

An Assessment of the Nigerian Tax Appeal Tribunal and the Need for a Speedier and More Efficient System

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Abstract

No doubt, the present tax appeal system in Nigeria is one that is saturated with unnecessary appeals on similar and identical issues of law and facts,¹ threat to its legitimacy,² perceived lack of fairness, loss of revenue to the government from incessant delays, and additional administrative costs.³

This author's position is that the Nigerian tax and duty appeal systems must aim at speeding up appeals and reducing costs, particularly through active case management and a streamlined process. Contemporary modern day simplified tax appeal system demands that the Nigerian system must involve more transparency over and above that which currently subsists, by ensuring public access to decisions and the reasons for them. Thus, this paper argues for a tax appeal system that is independent of the government, with simple procedural rules that are adaptable and flexible. It starts by analyzing contemporary Nigerian tax appeals procedure and system relating to the Value Added Tax ("VAT") as a specialized tax, within the context of the recently promulgated statutes: (a) Value Added Tax (Amendment) Act No 12 of 2007;⁴ (b) Federal Inland Revenue Service (Establishment) Act No. 13 of 2007 ("FIRSEA");⁵ (c) Tax Appeal Tribunals (Establishment) Order of November 25th, 2009 (TAT Order),⁶ and (d) Tax Appeal Tribunal (TAT) Procedure Rules (2010) ("TAT Rules")⁷—the tax appeal statutes.⁸ It examines the appeals process starting from the issuance of the Assessment Notice by the Relevant Tax Authority (RTA) in Nigeria, to the initiation of the appeal before the TAT, the exercise of the power of distraint by the RTA, and to the exhaustion of all appeals by the an aggrieved party. It compares the substantive and procedural rules that govern the old VAT Tribunal against the current tax appeals rules governing the TAT. In concluding, it makes recommendations towards bringing the Nigerian tax appeal system at par with similar jurisdictions at common law.⁹

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¹. Olumide K. Obayemi, *The Tax Appeal Tribunal As an Instrument of Promoting Nigerian National Tax Policy: Revisiting NAOC vs FIRS and Shell vs FIRS*, in *Thisday Lawyer* of Tuesday, February 25th, 2015 at Page 13 ("Obayemi I"), where the court in the latter case of *The Shell Petroleum Development Company of Nigeria Limited vs Federal Inland Revenue Service*, Consolidated Appeal Nos: TAT/LZ/003/2014 & TAT/LZ/006/2014, followed its earlier ruling in *Nigerian Agip Oil Company Limited vs Federal Inland Revenue Service*, (2014) 16 TLRN 25, and, by this, promoted the rules of certainty and consistency in the interpretation and application of the Nigerian tax statutes.

². See, e.g., *TSKJ Construction International Sociadade Unipessonal Lda v Federal Inland Revenue Service* (2014) 13 TLRN 1 and *NNPC v Tax Appeal Tribunal (TAT) & Ors*, (2014) 13 TLRN 39.

³. Olujimi Adedotun, *Tax Appeal Tribunals – Slow Pace of Justice*, in *THISDAY NEWSPAPER* of 8th August, 2013. Available at: <http://www.thisdaylive.com/articles/tax-appeal-tribunals-slow-pace-of-justice/155777/>. Last visited on 24th February 2015. ("Olujimi Adedotun").

⁴. Value Added Tax (Amendment) Act No 12 of 2007 ("VAT Act 2007").

⁵. Federal Inland Revenue (Establishment) Act No. 13 of 2007 ("FIRSEA").

⁶. Tax Appeal Tribunals (Establishment) Order of November 25th, 2009 (TAT Order).

⁷. Tax Appeal Tribunal (TAT) Procedure Rules (2010).

⁸. Under these statutes, the Nigerian Tax Appeal Tribunal (TAT) was established to replace the Value Added Tax (VAT) Tribunal that existed from 1993 to 2007 under Section 20 of the Second Schedule of the Value Added Tax Decree No. 102 of 1993 ("1993 VAT Act").

⁹. The apparent independence and transparency of most of the systems is also noteworthy. Apart from the Taxation Review Authority in New Zealand, public hearings and public access to evidence and records of hearings seem to be the norm. Submission to the Consultation on the Reform of the Appeal System for Tax Matters by the Office of the Revenue Commissioners prepared by Irish Tax and Customs, at Page 2. Available at: www.revenue.ie/en/about/submission-reform-appeal-system.pdf. Last visited on February 6, 2014. ("Irish Submission").

First, it argues for an efficient and effective appeal system that identifies the nature and characteristics of different kinds of tax appeals from the simple and informal appeals to the most complex and formal appeals that require formal hearings by legal minds, thereby separating them for ease of efficient adjudication.

Second, it argues for the introduction of the sanction and cost regime for instilling discipline and rule of law in the tax system, and, *ipso facto*, speedy resolution of all appeals.

Further, it argues for more transparency in the selection of the panel of judges and other aspects of administration of tax laws and statutes in Nigeria.

Finally, it proposes a new system for tax and duty appeals under a unified two-tier Tax Tribunal composing both the First-tier Tribunal and the Upper Tribunal of the UK model. It argues that such tribunal must be independent of FIRS and must be administered by the Federal Ministry of Justice, rather than the Ministry of Finance. In essence, to further abrogate the defunct VAT Tribunal and the Body of Tax Appeal Commissioners (BAC), which, hitherto, dealt with indirect and direct tax appeals, respectively, the TAT must be strengthened via constitutional amendments *viz-a-viz* the appellate role of the Federal High Court as the court to hear appeals against TAT's decisions.

Nigeria needs a refinement and reformation of the present tax appeal system. While the paper does *not* argue for jettisoning and/or abandoning the present TAT system, it argues for a fundamental review and radical overhaul of the existing system.

I. Introduction

To replace the old 1986 Sales Tax Act,¹ the Value Added Tax (VAT) was introduced in Nigeria in 1993 by the Federal Military Government,² to replace the defunct Sales Tax Act of 1986, and since then, the original Value Added Tax Decree,³ had been amended more than half a dozen times, including the substantive 2004 VAT Act⁴ with the latest being the Value Added Tax (Amendment) Act No 12 of 2007 which commenced on 27th May 2007 (VAT Act 2007).⁵ Some of the amendments have introduced significant changes⁶ which are yet to be reflected in the body of existing literature.⁷ In Nigeria, tax appeal is an important component of the tax system and the new Nigerian tax policy⁸ (encapsulated in the Appeal Process).⁹ The appeal system offers a step by step objection and appeal process which give the complainant an opportunity to explore other dispute resolution mechanisms before gaining access to the regular court system.¹⁰ The formal take-off of the new Tax Appeal Tribunal ("TAT") in Nigeria occurred with its inauguration on February 4th, 2010, after a two-week induction training of its staff.¹¹ As of present, all proceedings before the TAT are guided by the 2010 TAT Rules. Therefore, the goal of the present Nigerian appeal system is aimed at meeting the expectation of all tax stakeholders that the establishment of the TAT would reduce the incidence of tax evasion, ensure fairness and transparency of the tax system, minimize the delays and bottlenecks in adjudication of tax matters traditional court system, improve the tax payers' confidence in the Nigerian tax system, provide opportunity for expertise in

¹. Decree No.7 of 1986.

². See, Federal Inland Revenue Service Information Circular No. 9304 of 20th August, 1993; James Kayode Naiyeju, Value-Added Tax: The Facts of a Positive Tax in Nigeria (1996) p. 35; Chibuike Uche & Onuora Ugwoke, The Law and Practice of Value Added Tax in Nigeria, (Bulletin of International Law 2003) p. 265; Federal Ministry of Finance, Progress Report of the Modified Value Added Tax (MVAT) Committee, Vol. 1 (Abuja, Nigeria, 1992), Appendix 1; See Chartered Institute of Taxation of Nigeria, Tax Guide (Lagos: The Chartered Institute of Taxation of Nigeria, 2002) p 540; B. Buari and M.T. Abdulrazaq, Introduction to Value Added Tax in Nigeria (Ilorin, Nigeria: Maples & Temples Ltd, 1994); Report of the Study Group on Indirect Taxation in Nigeria p 17. See E. Ijewere, Towards Efficient VAT Operation in Nigeria (lecture organized by the MVAT Committee at Obafemi Awolowo University Ile-Ife, 20 May 1993), at 5-6. [Progress Report].

³. The Value Added Tax Act of 1993 (Decree No. 102 of 1993).

⁴. The Value Added Tax Act, Cap V-1, Laws of Federation, 2004.

⁵. See, Abiola Sanni, *Current Law and Practice of Value Added Tax in Nigeria*, British Journal of Arts and Social Sciences, Vol.5 No.2 (2012) at Page 186. ("Sanni I")

⁶. See Finance (Miscellaneous Taxation Provisions) Decree No. 21 of 1991; Finance (Miscellaneous Taxation Provisions) Decree No. 63 of 1991; Finance (Miscellaneous Taxation Provisions) Decree No.31 of 1993; Finance (Miscellaneous Taxation Provisions) Decree No. 30 of 1996; Finance (Miscellaneous Taxation Provisions) Decree No. 31 of 1996; Finance (Miscellaneous Taxation Provisions) Decree No. 32 of 1996; Finance (Miscellaneous Taxation Provisions) Decree No. 18 of 1998; Finance (Miscellaneous Taxation Provisions) Decree No. 19 of 1998; Finance (Miscellaneous Taxation Provisions) Decree No. 21 of 1998; Finance (Miscellaneous Taxation Provisions) Decree No. 40 of 1998; and Finance (Miscellaneous Taxation Provisions) Decree No.30 of 1999.

⁷. See, Sanni I, *supra* note 14, at 186.

⁸. See Federal Ministry of Finance, Nigerian National Tax Policy of April 2012, of April 2012. Available at: <http://www.firs.gov.ng/FTaxManagementFTaxLegislationsFNATIONALTAXPOLICY.pdf>.

⁹. See, Olujimi Adedotun, *supra* note 3.

¹⁰. See, *Executive Brief of the Nigerian Tax Appeal Tribunal*. Available at: <http://tat.gov.ng/node/6>. Last visited on: February 9, 2015 ("TAT Executive Brief").

¹¹. *Ibid*.

tax dispute resolution, provide avenue for effective involvement of parties, focus on facts rather than legal technicalities and promote early and speedy determination of matters without compromising the principle of fairness and equity.¹

No doubt, the administration and collection of direct and indirect taxes (including VAT) would be problematic in Nigeria, as has been succinctly stated by Honourable Mohammed Bello, JSC (as he then was) in *Aberuagba v A.G. Ogun State*² thus:

“In developed countries where retail trade is carried on in departmental stores, supermarkets, drug stores and shops where all sales are accounted for and the business addresses registered, it is convenient and safe for any government to appoint retailers as its agents for the collection of Sales Tax. Every penny collected will ordinarily reach the government. The position is entirely different in Nigeria. It is notorious fact that except in few departmental stores, shops and drug-stores, where accounts of sales are kept, the bulk of the retail trade is carried on by swam of amorphous trades in the market places and in their homes, on our streets and highways, under our bridges and trees. They do not keep record or account of their business dealings and they cannot be reached by any Government. It would be a bonanza to those retail traders to appoint them as agents for the collection of any sales tax. Except in the case of the few retailers that I have mentioned, not a kobo would reach the government. Consequently, for any meaningful sales tax to reach the government, it must be collected by agents, such as distributors, whose accountability to the government for the tax collected is assured.”³

Be that as it may, the structure of the present TAT system was established in accordance with Section 59(1) of the FIRSEA, and it formally took off pursuant to the TAT Order (2009),⁴ and is regulated by the TAT Rules (2010). Therefore, by the enactment of the TAT Order of December 2009, TAT replaced the former Body of Appeal Commissioners (“BAC”)⁵ and the VAT Tribunal.⁶ To reiterate, the background to the present TAT appeal system was that as part of the Ifueko Omogui-led reforms of the tax system in Nigeria, TAT was set up to adjudicate on all tax disputes arising from operations of the various tax laws as spelt out in the Fifth Schedule to the FIRSEA of 2007,⁷ which, in turn, confers, on TAT, jurisdiction over disputes arising from the administration of: Companies Income Tax Act (CITA);⁸ Petroleum Profit Tax Act (PPTA);⁹ Personal Income Tax Act (PITA);¹⁰ Capital Gains Tax Act;¹¹ Stamp Duties Act;¹² Value Added Tax Act (VAT Act);¹³ Taxes and Levies (Approved List for Collection) Act;¹⁴ as well as other laws, regulations, proclamations, government notices or rules related to these Acts.¹⁵

Prior to 1993 introduction of the VAT Act, there used to be the BAC,¹⁶ and so, the tax appeal system in Nigeria is not new.¹⁷ In addition, the legal framework for the erstwhile BAC was very simple.¹⁸ The BAC was thus the pioneer body that handled tax appeals in Nigeria. In this regard, Section 72 of CITA (now abrogated) provided that:

“Any company which, being aggrieved by an assessment made upon it, has failed to agree with the Board in the manner provided in subsection (5) of section 69 of this Act, may appeal against the assessment to the Appeal Commissioners”.

¹. *Ibid.*

². [1995] NWLR (Pt.3) 385.

³. *Ibid.* per Bello, J.S.C. (As he then was), [1995] NWLR (Pt.3) 385 at p.399.

⁴. See, the TAT Order (2009) issued by the Minister of Finance, Federal Republic of Nigeria as published in the Federal Government Official Gazette No 296, Vol. 96 of 2nd December, 2009.

⁵. That was set up under Section 72 of CITA.

⁶. See, *TAT Executive Brief*, *supra* note 19.

⁷. *Ibid.* *TAT Executive Brief*.

⁸. Companies Income Tax Act, Cap C21, Laws of the Federation of Nigeria (2004) (“*CITA*”).

⁹. Petroleum Profits Tax Act, Cap P13, Laws of the Federation of Nigeria (2004) (“*PPTA*”).

¹⁰. Personal Income Tax Act, Cap P8 Laws of the Federation of Nigeria 2004 and 2011 Amendment thereto (“*PITA*”).

¹¹. The Capital Gains Tax Act, Cap C1 Laws of the Federation of Nigeria 2004.

¹². The Stamp Duties Act, Cap S9 Laws of the Federation of Nigeria 2004.

¹³. The Value Added Tax Act, Cap V1 Laws of the Federation of Nigeria 2004 (“*VAT Act*”).

¹⁴. The Taxes and Levies (Approved List for Collection) Act, Cap T2 Laws of the Federation of Nigeria 2004.

¹⁵. See Section 59 and the 1st Schedule of the FIRSEA, respectively.

¹⁶. See, Section 72 of Companies Income Tax Act (“*CITA*”).

¹⁷. Abiola Sanni, *CITN Position on the Conflicting Decisions on the Federal High Courts on the Constitutionality or Otherwise of the Tax Appeal Tribunal*, Prepared by the Indirect Tax Faculty, 23rd April 2014, at Page 2 (“*Sanni CITN*”).

¹⁸. Under section 60 of the 1993 PITA, a taxable person who is aggrieved by an assessment as to income tax made against him, and after having failed to reach an agreement with the Relevant Tax Authority (RTA) as provided by Section 57(3) of 1993 PITA, may, within 30 days of receipt of a Notice of Refusal to Amend (“*NORA*”) from the RTA, and pursuant to Section 61 of PITA, file an appeal with the BAC.

Later, in 1993, the VAT Tribunal was introduced to handle tax appeals on VAT,¹ because there were several anomalies associated with the old appeal system. For instance, the BAC was an integral part of the Federal Board of Inland Revenue (“FBIR”) (now replaced by the Federal Inland Revenue--“FIRS”), and appeals before BAC were held *in camera*.² Further, only taxpayers could appeal to the BAC while the appeal must relate to the “assessment,” and, throughout the duration of the BAC, no taxpayer challenged its jurisdiction.³ In addition, a taxpayer who was dissatisfied with the decision of the BAC has a right to “appeal” to the High Court,⁴ and the payment of tax was not due until the appeal was determined by the Court although the Court may order the taxpayer to deposit a portion of the disputed tax in some circumstances.⁵

After 1993, the appeal procedure before the VAT Tribunal were slightly different from BAC, and so, problems started with the establishment of the VAT Tribunal under the VAT Act,⁶ which equated the VAT Tribunal with a Federal High Court (“FHC”) and made appeals from the defunct VAT Tribunal to lie directly to the Court of Appeal.⁷ In addition, most of the problems emanated from the fact that the legal framework under VAT Act could not be questioned during the military rule due to the superiority of Decrees and Edicts⁸ over the unsuspended part of the Constitution.⁹ However, with the return to democratic rule, the Court of Appeal Lagos Division in the case of *Stabilini Visinoni Limited v Federal Board of Inland Revenue*,¹⁰ declared the VAT Tribunal to be unconstitutional. Thus, the VAT Tribunal, that was set up under Sections 20 and 24(1) of the 2nd Schedule to the VAT Act of 1993, suffered premature extinction post the coming into force of the Federal Constitution of Nigeria (1999). In *Stabilini Visinoni v FBIR*,¹¹ the Court of Appeal held that the VAT Tribunal was not an administrative Tribunal since appeals from it did not lie to the FHC,¹² but directly to the Court of Appeal—by this, usurping the FHC’s constitutional jurisdiction. Further, the Court of Appeal also held that Section 20 of the 2nd Schedule to the VAT Act that had set up the VAT Tribunal was inconsistent with Section 251 of the Constitution of the Federal Republic of Nigeria (1999) which had solely conferred jurisdiction over the federal revenue exclusively on the FHC, making the VAT Tribunal an *ultra vires* Court.

Similarly, in *Cadbury (Nig.) Plc v. FBIR*,¹³ the FBIR had directed Cadbury to render VAT returns based on Cadbury’s payments to its Parent Company (Schweppes) in Britain. Upon Cadbury’s refusal, FBIR instituted tax recovery proceedings before the VAT Tribunal. With FBIR’s success, at the VAT Tribunal, Cadbury appealed to the Court of Appeal, which sustained Cadbury’s objection, holding that the VAT Tribunal had no jurisdiction to entertain VAT issues since such tax issues touched exclusive jurisdiction on federal revenue, conferred solely upon the FHC.

As seen above, the *Stabilini* and *Cadbury* decisions indicated that all was not well with the VAT Tribunal, and thus, while establishing the TAT system in 2007, attempt were made to correct the “mistakes” which led to the invalidation of VAT Tribunal.¹⁴ For instance, paragraph 17 of the Fifth Schedule to the FIRSEA provided that:

“any person dissatisfied with a decision of the Tribunal constituted under this Schedule may appeal against such a decision on a point of law to the Federal High Court ...”

As noted by Abiola Sanni, notwithstanding the FIRSEA, some taxpayers had challenged the jurisdiction of the TAT in several cases before it.¹⁵ In those cases,¹⁶

...taxpayers had raised preliminary objections that the TAT had no jurisdiction to hear and determine their cases on the basis that section 59 of the FIRSEA was inconsistent with the provisions of Section 251(a)&(b) of the 1999 Constitution. Yet, the TAT held in those cases that it had jurisdiction to determine them and that its jurisdiction was not inconsistent with that of the Federal High Court principally on the basis that it was not a court. Basically, the position of TAT was that there is no

¹. See Sections 20 and 24 of the Second (“2nd”) Schedule to the VAT Act.

². See, Sanni CITN, *supra* note 37, at Page 2.

³. *Ibid.* at Page 2.

⁴. Compare with Section 17 of the 5th Schedule of the Federal Inland Revenue Service Act of 2007 (FIRSEA).

⁵. Compare with Section 16 of the 5th Schedule of the Federal Inland Revenue Service Act of 2007 (FIRSEA).

⁶. See, Sections 20 and 24 of the 2nd Schedule of the Value Added Tax Act of 1993 (Decree No. 102 of 1993).

⁷. See, Sanni CITN, *supra* note 37, at Page 2.

⁸. The Constitution (Suspension and Modification) Decree No. 1 of 1984

⁹. See, Sanni CITN, *supra* note 37, at Page 2.

¹⁰. (2009) 13 NWLR (PT 1157) 200 (*Stabilini*).

¹¹. (2009) 13 NWLR (Pt 1157) 200.

¹². The Court of Appeal also held that the VAT Tribunal was not merely engaged in advisory role, but, that it engaged in deciding factual disputes between the parties.

¹³. (2010) 2 NWLR (Pt 1179) 561.

¹⁴. See Sanni CITN, *supra* note 37, at 3.

¹⁵. *Ibid.* at 3.

¹⁶. *FIRS v General Telecom Plc & Esso Exploration and Production Nigeria* (2013) 1 N.R.L.R. 44; (2012) 7 T.L.R.N 108; and *Esso Exploration and Production Nigeria (Deep Water) Ltd & Anor v FIRS & Anor*: (2012) 8 T.L.R.N 45;

inconsistency between section 59 of the FIRS Act and section 251(a) and (b) of the 1999 Constitution, the TAT not being part of the judiciary but an administrative tribunal established by the Minister of Finance.¹

Going on, Abiola Sanni stated that:

Being dissatisfied with the rulings of the TAT, aggrieved parties appealed to the Federal High Court. Two of such appeals which had been determined so far formed the focus of this position paper. As indicated in the introduction, while Justice Ademola of the Federal High Court, Federal Capital Territory Division, Abuja held in TSKJ Construction International Sociadade Unipessonal Lda v Federal Inland Revenue Service,² that the TAT is unconstitutional, Justice Buba of the Federal High Court, Lagos Judicial Division held in the case of NNPC v Tax Appeal Tribunal (TAT) & Ors,³ that the TAT is NOT unconstitutional.⁴

With the above constitutional problems in mind, using other commonwealth jurisdictions and the American tax system as comparative analysis, this paper traces the history of VAT in Nigeria, and focuses more on appeal relating to VAT being a specialised tax jurisprudence. It further examines notable judicial pronouncements on the Nigerian VAT Act,⁵ starting from the 1985 decision in *AG Ogun State v Aberuagba*,⁶ to *CNOOC Exploration vs AG Federation*,⁷ *AG Federation vs AG Lagos*,⁸ and finally to *AG Lagos vs AG Federation*.⁹ There shall be a review of judicial decisions based on VAT to show the nature of character of issues arising on appeal, by examining (a) the practice that existed before the defunct VAT Tribunal as created by the Second (2nd) Schedule to the 1993 VAT Act; (b) the procedure that was adopted from 1993 up till 2010;¹⁰ (c) the effect of the Court of Appeal's decisions in *Stabilini Visioni v FBIR*¹¹ and *Cadbury (Nig.) Plc v. FBIR*¹² on tax appeals regarding VAT; (d) the contemporary practice under the FIRSEA; and the necessary recommendations for the enhancement of tax appeals while borrowing from existing tax appeal practices at various similar common law jurisdictions.

This author's position is that the Nigerian tax and duty appeal systems must aim at speeding up appeals and reducing costs, particularly through active case management and a streamlined process. Contemporary modern day simplified tax appeal system demands that the Nigerian system must involve more transparency currently subsists, by ensuring public access to decisions and the reasons for them. Thus, this paper argues for a tax appeal system that is independent of the government, with simple procedural rules that are adaptable and flexible.

First, it argues for a system that identifies the nature and characteristics of different kinds of tax appeals from the simple and informal appeals to the most complex and formal appeals that require formal hearings by legal minds, thereby separating them for ease of efficient adjudication.

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Third, it argues more transparency in the selection of the panel of judges and other aspects of administration of tax laws and statutes in Nigeria.

Finally, it proposes a new system for tax and duty appeals under a unified two-tier Tax Tribunal composing both the First-tier Tribunal and the Upper Tribunal of the UK model. It argues that such tribunal must be independent of FIRS and must be administered by the Federal Ministry of Justice, rather than the Ministry of Finance. In essence, to further abrogate the defunct VAT Tribunal and the Body of Tax Appeal Commissioners (BAC), which, hitherto, dealt with indirect and direct tax appeals, respectively, the TAT must be strengthened via constitutional amendments viz-a-viz the appellate role of the Federal High Court as the court to hear appeals against TAT's decisions.

Nigeria needs a refinement and reformation of the present tax appeal system. While the paper does *not* argue for jettisoning and/or abandoning the present TAT system, it argues for a fundamental review and radical

¹. See Sanni CITN, *supra* note 37, at 3.

². (2014) 13 TLRN 1.

³. (2014) 13 TLRN 39.

⁴. See Sanni CITN, *supra* note 37, at 3.

⁵. *Ibid.* Cap V1 LFN 2004

⁶. [1985] 1 N.S.C.C. 487

⁷. (2011) TLRN 45.

⁸. (2013) 12 TLRN 55.

⁹. (2014) LPELR-22701(SC)

¹⁰. See, generally, Sanni CITN, *supra* note 37; Olumide K. Obayemi, *Tax Appeal Tribunals' Jurisdiction viz-a-viz The Federal High Court*, ThisDay Newspaper (Nigeria), May 13, 2014, ("Obayemi II"); Agbonika Josephine Aladi Achor, *Tax Dispute Resolution in Nigeria: A Storm in a Tea Cup*, 29 Journal of Law, Policy and Globalization 147 ("Agbonika").

¹¹. *Stabilini Visioni v FBIR*, (2009) 13 NWLR (Pt 1157) 200.

¹². *Cadbury (Nig.) Plc v. FBIR*, (2010) 2 NWLR (Pt 1179) 561.

overhaul of the existing system.

II. Theoretical Basis for Effective Value Added Tax Appeals Regime in Nigeria.

Generally, an effective appeals process is a necessary part of a good tax and duty¹ administration system.² In Nigeria, and at all common law countries, tax appeals process should be fair, easily accessible, expeditious and efficient.³ It is not only the taxpayers that have substantial interests in an efficient and fair tax appeal system, as a major stakeholder in the appeals process, the Revenue Authority⁴ has a particular interest in having a system that:

- is accepted as independent by all stakeholders,
- has procedures that are as simple as possible but are adaptable enough to deal efficiently with appeals of varying importance and complexity,
- minimises delays, and
- through transparency, ensures that identical issues are not appealed unnecessarily by different taxpayers.⁵

Achieving the above goals would clearly entail definitive and proactive rules. In the Nigerian context, it is clear that in the very near future, there will be a deluge/spike in tax litigation and appeals, most likely, to be centred around the applicable rates of VAT in Nigeria, especially, in view of Dr. Ngozi Okonjo-Iweala's statement⁶ that the federal government was planning to double VAT rates as oil prices continued to slide.⁷ In Nigeria, tax litigation and appeals emanate from increases in and/or unreasonable rates of taxes. Thus, it has been observed that, Nigeria does not operate a pure VAT system, and that what operates is a modified sales tax regime.⁸ Therefore, any rate increase on VAT, must be accompanied by the overhauling of the VAT system to ensure that VAT in Nigeria is at par with VAT in other countries with higher than 5% rate.⁹ Further, typically, countries increasing VAT rate usually reduce their direct income tax rate at the same time. Hence, the Nigerian corporate income tax rate cannot be at 30% +2% while VAT rate would be increased to 10%.¹⁰ Indeed, the hike in VAT rates as propounded in January 2015 will be inconsistent with the Nigerian national tax policy¹¹ as it is wrongly aimed at reducing direct income tax rate in tandem with increase in indirect taxes.

As was the situation in Nigeria *prior* to the enactment of the FIRSEA, TAT Order, and TAT Procedure Rules,¹² to the extent that the appeal system lacks the above stated efficient and fair tax appeal system and qualities, there can be adverse consequences for tax administration in Nigeria, such as:

- *a threat to the legitimacy of the tax system due to a perception that the appeals process is either biased in Revenue's favour or gives an unfair advantage to Revenue,*
- *a lack of fairness to taxpayers as a whole if the appeals process is capable of being used tactically by some taxpayers to delay or avoid payment,*
- *additional costs of administration in dealing with a cumbersome system, and*
- *loss of revenue, due to delays in resolving disputes, with the result that the resources that were available at an earlier stage to pay the tax, have been dissipated.*¹³

The present TAT appeal system under the FIRSEA is also fraught with problems. For instance, notwithstanding the fact that Order XV of the TAT (Procedure) Rules grants the TAT the power to conduct its proceedings in a manner it deems fit to ensure speedy dispensation of justice, thus providing the flexibility the TAT needs to dispense with cases in a fair and expeditious manner. Yet, the lack of clear mandatory sitting

¹. "Duty" refers to customs duties, excise duties and stamp duties.

². See, Irish Submission, *supra* note 9; See, also, the Law Reform Commission of the Republic of Ireland's twin Reports on "A Fiscal Prosecutor and a Revenue Court" and "Consolidation and Reform of the Courts Acts," contained in the Law Reform Commission of the Republic of Ireland's Reports Numbers 72-2004 and 97-2010, respectively.

³. *Ibid.*

⁴. In Nigeria, the Value Added Tax system is administered and implemented by the Federal Inland Revenue Service ("FIRS").

⁵. See, Irish Submission, *supra* note 9, at page 2.

⁶. Dr. Ngozi Okonjo-Iweala is the Nigerian the Coordinating Federal Minister for the Economy and Minister of Finance, respectively.

⁷. See, *Nigeria May Double VAT Due to Falling Oil Prices*, by Obinna Chima in ThisDay [Nigeria] Newspaper of 22nd January, 2015. Available at: <http://www.thisdaylive.com/articles/nigeria-may-double-vat-due-to-falling-oil-prices/199826/>. Last visited on February 6th, 2015.

⁸. See, Wole Obayomi, Partner & Head, Consumer & Industrial Markets Group, Tax, Regulatory & People Services Division at KPMG, in his comments (Hereinafter "Wole Obayomi") on Olumide K. Obayemi, *Policy Consideration in Raising Taxes in Nigeria*, in Thisday Lawyer of Tuesday, February 3rd, 2015 at Page 13 ("Obayemi III"), contained in an electronic mail of Wednesday, February 4th, 2015 at 16.11hours. Last visited on February 6, 2015.

⁹. *Ibid.* per Wole Obayomi.

¹⁰. *Ibid.* per Wole Obayomi.

¹¹. See, Nigerian National Tax Policy, *supra* note 17.

¹². Under which the Nigerian Tax Appeal Tribunal (TAT) was established.

¹³. See, Olujimi Adedotun, *supra* note 3.

schedule of the tax hearing panel creates uncertainty within the context of the fact that non-contentious and contentious cases are usually lumped together:

In Nigeria, there is no categorisation of appeal cases that speaks to manner of resolution. Consequently, all cases under appeal are heard in a similar manner. Furthermore, the Tax Appeal Tribunal (Procedure) Rules do not make any provisions for a fixed number of sittings or time within which judgment is to be delivered. In practice, some Tribunal panels sit for two (2) to three (3) days (depending on location) in a week, every month. It is on these days that scheduled cases are heard, in order of the listing in the case schedules for each particular day. As is typical of legal-related proceedings, Counsels for the parties seek adjournments as it deems expedient to their cause. The impact of the combination of the above factors is that cases drag on for months, and even years.¹

As also noted by Olujimi Adedotun, the incessant delay creates lack of certainty that is inimical to foreign direct investment needed in Nigeria.

One implication is that, while the appeal is being heard, the taxpayer is not certain whether it should discontinue/continue the practice that gave rise to the matter in contention. This is obviously because, while the taxpayer may think that its case has merit, it cannot be sure that judgment would be given in its favor. This concern is also magnified by the fact that any judgment given by the TAT is not final, as either party can subsequently appeal to the FHC. This lack of certainty could impact the tax payer's ability to make investment decisions. The point here is that, obviously, a speedy resolution of the appeal would be most desirable.²

Not only does the fluid and uncontrolled hearing rules create uncertainty, they also drive up the litigation costs:

Another concern for taxpayers is the nexus between the lengthy proceedings and costs. This is manifest in the area of representation before the Tribunal. Order V of the TAT (Procedure) Rules provides that a party may either represent itself or be represented by a legal practitioner, chartered accountant or an adviser. In most instances, companies engage the services of legal and/or tax practitioners to present their case before the TAT. The services of these professionals are obtained for a fee, and lengthy sittings translate to increased fees. In situations where the case is being heard in a different state, this also means increased expenses and travel risks. As judgment takes longer to obtain, fees increase; sometimes exponentially. Taxpayers then begin to evaluate the cost-benefit analysis of prosecuting the appeal. The point at which a taxpayer makes such an evaluation is closely related to the tax liability in contention and the availability of funds to settle professional fees. Where funds are limited, a taxpayer may decide to cut its losses and reach an out of court settlement with the revenue authority. In fact, there are instances where taxpayers have refused to appeal decisions they strongly disagree with, solely based on cost concerns. This decision implies that taxpayers are ultimately at the mercy of the RTAs' decisions, where significant costs of professional fees are anticipated to prosecute an appeal.³

Since the TAT appeal system is relatively young, there is a need to create dynamic body of laws and judicial precedents that would help guide tax practitioners having related or similar issues before TAT. The unwelcoming state of hearing of appeals operate against the creation of reliable precedents

Perhaps, the most important and far reaching implication of delays with the process is the impact on establishing precedents for tax cases. In developed economies, litigation is an integral part of resolving tax disputes. Judgments from litigation provide precedents for cases that are similar in material respects to a decided case. Litigation also serves as a check to ensure that taxpayers are not subject to the whims of the revenue authorities. In this way, taxpayers are able to challenge the authorities' interpretations of various provisions of the tax laws and obtain clarity from the courts regarding tax statutes. Therefore, in addition to making the tax system more robust, precedents reduce the incidence of disagreement and attendant cost of prosecuting appeal of similar cases. It is obvious that where taxpayers are dissuaded from challenging the position of the authorities, due to cost considerations, they will be constrained to abide by the decisions of the tax authorities. Practice has shown that the views of the authorities may not always be consistent from case to case, depending on the position that yields the most tax revenue. This is consistent with the attitude of the revenue authorities towards maximising tax revenue. This type of kink in the tax administration process does not provide the certainty that business owner's desire in making investment decisions. As tax costs comprise an increasing aspect of cash flow, current and potential investors

¹. *Ibid.*

². *Ibid.*

³. *Ibid.*

*are likely to view this lopsidedness of the tax system as a source of funds leakage.*¹

Finally, it must be noted that it is not only the private taxpayers that are on the losing end with present incongruous state tax appeal system in Nigeria, the tax authorities are also losing revenue from unnecessary collection costs and increased administrative expenses:

*The foregoing certainly suggests that taxpayers are on the receiving end of this procedural shortfall. However, the Government also stands to lose from a less-than-optimal tax appeal process. Based on current tax legislation, when an award or judgment of the TAT is registered with the Chief Registrar of the FHC, such judgment shall be enforced as if it were a judgment of the FHC. Any amount of tax payable per the judgment would be due within thirty days of the judgment being delivered. The amount would be payable whether or not an aggrieved party chooses to appeal the judgment at the FHC. If the decision is subsequently reversed, the taxpayer ordinarily should be repaid any excess tax based on the decision of the FHC. Prior to judgment being received at the TAT following an appeal, whatever tax is in contention will remain in abeyance. Therefore, the longer it takes to obtain a decision at the TAT, the more the tax authorities/Government loses by way of time value of money. However, this is not to say that hurried judgment should be made.*²

It is thus necessary, at this juncture, to make suggestions towards amending the present laws and rules towards meeting the goals and objectives stated above.

III. The Incidence Value Added Tax In Nigeria.

The current trend, in most countries, is to increase indirect taxes, including VAT.³ Thus, according to Olamide Akinla:

*Since its inception in 1954, over 140 countries around the world have adopted VAT. Indeed countries in all the continents have adopted it, Africa inclusive; all the ECOWAS States, without disregarding the other African countries, have a VAT system. The focus of this chapter is the VAT system in Nigeria - the history, principles and peculiarities of its operation within the Nigerian state.*⁴

Earlier on, Sales Tax Act⁵ was enacted by the defunct Federal Military Government which vested the administration of Sales Tax within each State on the State Government, and the revenue from the tax collected by each State then formed part of its Consolidated Revenue Fund and utilized for its independent purposes at its discretion.⁶ According to Akinla:

Prior to the introduction of VAT in Nigeria, the sales tax was in operation and its enabling law was Decree No.7 of 1986. Essentially, the Decree identified some types of goods and services which were subject to the sales tax. Taxable goods included, among others, beer, wine, liquor and spirits, soft drinks, cigarettes and tobacco, jewels and jewellery, perfumes and cosmetics (excluding toiletries), electrical and electronic equipment, carpets and rugs (excluding linoleum), and bottled natural water. Taxable services included sales and services in registered hotels, motels, catering establishments, restaurants and other personal service establishments (excluding those selling drinks). All these goods and services attracted sales tax at the rate of 5%, except wine, liquor and spirits, which were subject to tax at 10%. Section 7 of the Decree further stipulated that the Inland Revenue Service of each State of the federation should administer the tax, subject to directions from the Joint Tax Board. Sections 8 and 9 of the Decree deal with the collection and payment of the sales tax. Summarily, the sections provide:

*From a community reading of the provisions of Sections 7, 8 and 9, it is clear that each State of the federation was expressly vested with the powers to administer and collect the sales tax for its own use. Simply put, each State had fiscal autonomy over the sales tax collected within its borders.*⁷

Thereafter, Nigeria decided to replace its Sales Tax with VAT, with the idea of introducing VAT being recommended by the Study Group set up by the Federal Government in 1991 to review the tax system of the Federation as a replacement of Sales Tax.⁸

¹. *Ibid.*

². *Ibid.*

³. I.A. Ayua, "An Overview of the Tax Regime in Nigeria" (Unpublished) paper presented at the Workshop on "Current issues in the Nigerian Tax Laws", Organized by the Institute of Advanced Legal Studies (NIALS) Lagos on 21st-2nd April, 1998 p.11 ("Ayua"); See, also, Sanni I, *supra* note 8, at Page 187

⁴. See Olamide Akinla, THE COMPLEXITIES OF A VALUE ADDED TAX IN NIGERIA, ARE THERE ANY SOLUTIONS?, at Page 23. Available at: www.academia.edu. ("Akinla")

⁵. Sales Tax Act No. 7 of 1986.

⁶. See section 7 of the Sales Tax Act No. 7 of 1986; See, also, Sanni I, *supra* note 14, at 187.

⁷. See, Akinla, *supra* note 86, at 24-25.

⁸. See, Sanni I *supra* note 14, at 187.

VAT, a specie of indirect tax, was introduced into Nigeria on 24th August, 1993 in the aftermath of Nigeria being dissatisfied with the then existing income tax regime.¹ This dissatisfaction fell broadly into one or all, of four categories:

- (1) the existing sales taxes are unsatisfactory;
- (2) a customs union requires discriminatory border taxes to be abolished;
- (3) a reduction in other taxation is sought, or
- (4) the evolution of the system has not kept pace with the development of the country.²

Thus, according to Akinla:

*The federal government was dissatisfied with the non-oil revenue, hence decided to increase the base of the economy. The Minister of Finance at the time echoed this desire when he said that, Oil predominates in the government revenues. For some years now the thrust of economic policy has been to reverse this intolerable trend by diversifying revenue sources, strengthening the non-oil revenue base and making the economy more resistant to destabilizing shocks. It is in furtherance of this policy that Government has decided to undertake a reform of non-oil tax.*³

The *Federal Inland Revenue Service Information Circulation No. 9304, (1993)* also stated other factors necessitating a replacement of Sales Tax with VAT thus:

(i) The base of the Sales Tax in Nigeria as operated under the No. 7 of 1986 is narrow. It covers only nine categories of goods plus sales and services in registered hotels, motels and similar establishments. The narrow base of the tax negates the fundamental principle of consumption tax, which by nature is meant to cut across all consumable goods and services. VAT base is broader and include most professional services and banking transactions, which are high profit-generating sectors.

(ii) Only locally manufactured goods were targeted by the Sales Tax of 1986, although this might not have been the intention of the law. VAT is neutral in this regard. Under VAT, a considerable part of the tax to be realized is from imported goods. This means that under the new VAT, locally manufactured goods will not be placed at a disadvantage relative to imports.

*(iii) Since VAT is based on the general consumption behaviour of the people, the expected high yield from it will boost the fortunes of the state government with minimum resistance for the payers of the tax.*⁴

Tracing the background to the introduction of the VAT Act, Naiyeju had noted thus

The year 1991 was a major landmark in the tax administration of Nigeria. In that year, the Professor Edozien-led Study Group on the Review of the Nigerian Tax System first identified the need to transform the outmoded sales tax that was then administered by the state governments. Within the year (1991), a parallel study group on indirect taxation led by Dr Sylvester U. Ugoh was given the responsibility to study the feasibility of introducing VAT in Nigeria as an improvement on the existing sales tax.

*After making a series of empirical studies and research tours both within and outside the country, the Ugoh Study Group came up with a firm recommendation in November 1991 that VAT should be introduced in Nigeria after two years of preparatory work. As a follow up, by 1992 the Ijewere-led Modified Value Added Tax (MVAT) Committee was set up to undertake preliminary work for the introduction of the new tax. The Committee was later to work in close collaboration with the Federal Inland Revenue Service in 1993 for the latter to take over the administration of the new tax which was scheduled to come on stream as VAT by 1st September, 1993.*⁵

Thus, after extensive deliberation and consultation, VAT was introduced on 24th August 1993 as a federal tax by the VAT Decree, pursuant to both Prof. Edozien-led Study Group on the Review of the Nigerian Tax System and the Study Group led by Dr. Sylvester U. Ugoh (that was set up later in 1991 with the responsibility to study the feasibility of introducing VAT in Nigeria).⁶ After making series of empirical studies and research tours both within and outside the country, the Ugoh Study Group came up with a firm recommendation in November 1991 that VAT should be introduced in Nigeria after two years of preparatory

¹. *Ibid.* per Sanni I, at 187; See, *also*, Akinla, *supra* note 86, at 25.

². See A.A. Tait, Value Added Tax International Practice and Problems, (International Monetary Fund, 1988), p.9; *Ibid.* per Sanni I, at 187.

³. Federal Ministry of Finance, Progress Report of the Modified Value Added Tax (MVAT) Committee, Vol. 1 (Abuja, Nigeria, 1992), Appendix 1.

⁴. See, *Federal Inland Revenue Service Information Circulation No. 9304, (1993)* p. 2; See, *also*, Chartered Institute of Taxation of Nigeria, Tax Guide (Lagos: The Chartered Institute of Taxation of Nigeria, 2002) p 540.

⁵. See, Naiyeju, *supra* note 11, at 35.

⁶. See, Sanni I, *supra* note 14, at 187.

work.¹ Further, as a follow up, a third committee—the Ijewere-led Modified Value Added Tax (MVAT) Committee was set up in 1992 to undertake preliminary work for the introduction of the new tax, with the Committee handing over to the FIRS that eventually took over the administration of the VAT.²

Yet, most of the present constitutional problems started during the workshops and committees' reports in the early 1990s:

...[M]ost countries that have introduced VAT have unitary constitutions. In federal and confederal states, power sharing creates several tax jurisdiction and systems for revenue sharing between federation and the states and among the states that constitute the federation. Under the present system in Nigeria, sales tax is collected and retained by the states. If VAT is intended to replace it as in the existing constitutional arrangements, it would become a state revenue. But it is not so clear whether the Federal Government which now seeks to introduce VAT as a new source of revenue to lessen its dependence on oil revenue intends that VAT should be a state tax. This was the type of problem which faced the United States when it sought to introduce sales tax as a revenue source to supplement federal revenue and also when it debated the introduction of VAT as a new revenue source. In both cases, the move was vehemently opposed by the states. In other federations such as the Federal Republic of Germany, Argentina, Brazil and Mexico the proceeds from VAT are shared among the three tiers of Government. However, in all these countries, the tax that replaced the VAT was already a federal tax.³

Thus, Akinla had submitted that:

The committee expressed the uncertainty of the true nature of VAT. It realised the present constitutional arrangement which did not support a federal consumption tax. It was not clear whether VAT was strictly intended to be a federal tax; in which case, the States would ordinarily not be entitled to any of its proceeds (except there was a revenue sharing formula) or on the other hand, a direct replacement for the sales tax; in which case, the States would retain their powers to administer and retain the proceeds of the new tax as guaranteed under the Sales Tax Act 1986 (fiscal autonomy). Assuming it was a source of federal revenue, what would be the appropriate formula to be applied in order to ensure equitable apportionment of the proceeds of the new tax? These were some of the issues raised by the committee. The Committee also observed that VAT was best suited for countries with a unitary structure as opposed to countries with a federal structure. Nonetheless, the committee went ahead to endorse VAT as desirable. In its report, it was recommended that VAT should replace sales tax in its entirety and have a single tax rate. It was further recommended that the proposed VAT legislation pay special attention to the state-federal relationship since VAT would replace the sales tax.⁴ Finally, it was recommended that a Modified VAT be adopted and a MVAT Committee established to prepare the groundwork for the eventual introduction of VAT.⁴

Coming back to the current substantive VAT Act, Section 1 of the 2004 VAT Act⁵ imposes the VAT tax, and the FIRS is the body empowered by the Act to administer VAT in Nigeria.⁶ Under Section 2, VAT is imposed “on the supply of all goods and services other than those goods and services listed in the First Schedule to this Act.” To Abiola Sanni:

If the charging provisions were to be strictly construed, VAT will be chargeable on international, inter-State and intra-State supplies of goods and services. Apparently in recognition of the need for territorial limitation of the tax to goods and services supplied in Nigeria, the FIRS Information Circular 9304 provides that “supplies made outside Nigeria are outside the scope of Nigerian VAT.”⁷

This can be contrasted with section 1(1) of the Value Added Tax Act, 1994 of the United Kingdom which provides that:

“Value Added Tax shall be charged in accordance with the provisions of this Act – (a) on the supply of goods and services within the United Kingdom (including anything treated as such a supply, (b) on the acquisition in the United Kingdom from other member states of any goods; and (c) on the

¹. See, Sanni I, *supra* note 14, at 187.

². See, Naiyeju, *supra* note 11, at 35.

³. Report of the Study Group on Indirect Taxation in Nigeria p 17. See E. Ijewere, Towards Efficient VAT Operation in Nigeria (lecture organized by the MVAT Committee at Obafemi Awolowo University Ile-Ife, 20 May 1993), at 5-6. [Progress Report].

⁴. See, Akinla, *supra* note 86, at 28-29.

⁵. Now Value Added Tax Act, Cap V1, Laws of the Federation of Nigeria, 2004 (2004 VAT Act).

⁶. Federal Inland Revenue Establishment Act No. 13 of 2007 (“FIRSEA”).

⁷. See, Sanni I, *supra* note 14, at 189.

*importation of goods from places outside the member States.*¹

All businesses in Nigeria are VAT collectors, in accordance with Section 8 of the Act. They are required to collect tax pursuant to Section 14(1) of the Act, and also render returns to the FIRS under Section 15. Upon the Nigerian entity's failure, neglect, or refusal to remit tax as required under the VAT Act, the FIRS would exercise its powers of carrying out Best of Judgment ("BOJ") assessment under the Act.²

Generally, VAT is a percentage, and a person claiming a percentage of any amount of money must first show what the amount is. If no amount is alleged, no percentage can reasonably be claimed. Discretion, whether judicial or administrative, must be exercised reasonably and not arbitrarily. While Best of Judgment assessments are discretionary, their discretionary nature does not permit the FIRS to pluck a figure out of thin air and fasten it on the taxpayer. Section 18 of the Act empowers the FIRS to apply best of judgment assessment "where a taxable person fails to render or renders an incomplete or inaccurate tax returns." In carrying out this statutory duty, *however*, the FIRS ought to assess the amount of tax due on the taxable goods and services purchased or supplied by the taxable person. If the FIRS could not ascertain the actual volume of services rendered by the business entity, the FIRS should at least estimate that volume and assess its monetary value and base its judgment on that estimate and assessment.³

Hitherto, under both the 1960 and 1963 Constitutions of Federal Republic of Nigeria, respectively, Sales Tax was an item under the Exclusive Legislative List. However, under the 1979 Constitution, Sales Tax was omitted from the Exclusive List. Thus, most states enacted their Sales Tax laws in the 1980's, e.g., Ogun State and Lagos State Sales Tax Laws of 1982.⁴ However, with the second (2nd) military incursion into politics between 1984 and 1999, the Federal Constitution was suspended, and the Value Added Tax Decree No. 102 of 1993⁵ was promulgated. A later development was that upon the coming into force of the 1999 Constitution, some states resuscitated their near-extinct Sales Tax laws.⁶

It is this constitutional quagmire that has led to the abrogation of the VAT Tribunal and the introduction of the TAT into the Nigerian tax appeal jurisprudence. Yet, with conflicting decisions in *TSKJ Construction International Sociedade Unipessoal Lda v Federal Inland Revenue Service*,⁷ and *NNPC v Tax Appeal Tribunal (TAT) & Ors*,⁸ the solutions proposed by the FIRSEA to the tax appeal system seems to destined for a very long haul.

IV. The History of Tax Appeal system In Nigeria.

Much of the history of tax appeals in Nigeria is owed to the defunct Body of Tax Appeal Commissioners ("BAC"), which, just like the VAT Tribunal, has been abrogated by Section 59 and the 1st Schedule of the FIRSEA, respectively, coming into force in 2007. However, the substantive and procedural rules of appellate practice that developed at common law and before the Nigerian BAC have been much more comprehensive than those that developed from appellate practice before the VAT Tribunal. Therefore, in discussing tax appeal process in Nigeria, copious references shall be made to the substantive and procedural rules of appellate practice that developed before the BAC prior to FIRSEA.

Hitherto, i.e., *prior* to the enactment of the 2007 FIRSEA and 2009 TAT Order under which the present TAT was established, appeals against an assessment to corporate or personal tax may be made either to the Federal⁹ or State¹⁰ BAC whose decisions were not reported and whose decisions, on points of law, were appealable to Federal¹¹ and/or State¹² High Courts.¹³ Further appeals from the BAC went thereafter to the Nigerian Federal Court of Appeal¹⁴ and, then to the Supreme Court.¹

¹. On the bar to extra-territorial application of tax laws, see, *Boucher v Lawson*, Cas. t. Hardw. 84, 89, 191 and *Holman v. Johnson*, Cowp. 341

². Section 18 of the VAT Act.

³. *Federal Inland Revenue Service v General Telecom Plc*, Appeal No.: TAT/LZ/004/2010, before the Tax Appeal Tribunal, (Lagos Zone) delivered on 08 May 2014.

⁴. See, also, Sales Tax (Schedule Amendment) Order 2000 of Lagos State

⁵. Now revised and enacted as the *Value Added Tax Act*, Cap V1, Laws of the Federation of Nigeria, 2004 (2004 VAT ACT).

⁶. Chukwuka Ikwuazom, *What Manner of Sales Tax?*, in *ThisDay Lawyer* July 12, 2005.

⁷. (2014) 13 TLRN 1.

⁸. (2014) 13 TLRN 39.

⁹. See, Section 43(2) of Part X of the Old Companies Income Tax Act of 1990 ("1990 CITA"); See, also, Part VIII of the Old Petroleum Profits Tax Act of 1990 ("1990 PPTA")

¹⁰. See, Part VIII of the Old Personal Income Tax Act of 1993 ("1993 PITA"); See, also Section 43(2) of the Old Capital Gains Tax Act of 1990 ("1990 CGTA")

¹¹. See, Section 57(7) of the 1990 CITA.

¹². See, Section 63(12) of the 1990 PITA.

¹³. See M.T. Abdulrazaq, *Tax Appeals*, in *The Chartered Institute of Taxation of Nigeria Tax Practice Series*, No. 20, ISSN-1596-1397, (2003 ed.) at Page 1 ("Abdulrazaq I").

¹⁴. See, Section 63(12) of the 1993 PITA.

The BAC had jurisdictions over cases arising from the Companies Income Tax Act (CITA); Petroleum Profit Tax Act (PPTA); Personal Income Tax Act (PITA); Capital Gains Tax Act; and the Stamp Duties Act. For instance, statutorily, under Section 60 of the 1993 PITA, a taxable person who was aggrieved by an assessment as to income tax made against him, after having failed to reach an agreement with the Relevant Tax Authority (RTA)² as provided by Section 57(3) of 1993 PITA, may, within 30 days of receipt of a Notice of Refusal to Amend (“NORA”) from the RTA, and pursuant to Section 61 of PITA, file an appeal with the BAC,³ to commence the appeal process. Below are salient points about the old BAC tax appeal system.⁴

a. Composition of the BAC

Under Section 55 of the 1990 CITA, the BAC is authorized to meet as often as may be necessary provided the panel is composed of 3 or more commissioners with a Chairman presiding over the appeal.

b. Judgment/Decision of the BAC

Under section 56(1) of 1990 CITA, once the BAC had reached its decision, a notice of the amount chargeable under the assessment shall be served upon the company.⁵ If the tax chargeable is less than N400.00 (N200 under 1993 PITA), no further appeal shall lie to the FHC.⁶ Once the award is registered with the FHC, then it is as valid and effective as a judgment of the FHC.⁷ Yet, notwithstanding the fact that an appeal has been lodged and pending with the FHC, the tax shall be paid within one month of notification of the taxable amount.⁸ Further, under Section 63(3) of 1993 PITA, if such is not duly paid, the RTA may take all actions to recover the sum.

c. Appeals to the Federal High Court.

Under the 1993 PITA, Section 64(1)&(3) allows the aggrieved party—the taxpayer and the RTA to file an appeal with the FHC within 30 days of the service of the decision of the BAC upholding the assessment. The appeals were to be held *in camera* unless the Judge upon the application of the taxpayer directs otherwise.⁹ Under Section 64(11) of the 1993 PITA, an appeal against the High Court’s decision laid to the Court of Appeal, and, thereafter, to the Supreme Court, in a matter exceeding N400.00 chargeable tax.

Similarly, under the 1990 CITA, a company aggrieved by the BAC’s decision may, within 30 days and on point of law appeal to the FHC by giving a notice to the Secretary of BAC setting out the grounds of appeal.¹⁰ Upon receipt of the notice of appeal, the BAC Secretary will compile the records and forward the file to the Chief Registrar of the FHC.¹¹

Further, under Section 57(7) of the 1990 CITA, an appeal against the FHC decision would go to the Court of Appeal, at the instance of the Corporate taxpayer where chargeable tax is N1,000.00, while any appeal can be filed on any ground with the consent of the FBIR.

Under the 1990 PPTA, if a company fails to reach an agreement with the FBIR under Section 36(6) of the 1990 PPTA, it may, within 30 days after receiving a NORA appeal to the BAC for a revision of the final assessment.¹² **However, for the first time, the tax statutes actually permits a taxpayer to file a late appeal if he can prove that due to (a) sickness, absence from Nigeria, or (c) other reasonable cause that prevented him from filing an appeal within 30 days. The taxpayer was also mandated to prove that there had been no unreasonable delay on his part,** within a further period of 60 days—arguably providing a total 60 day-period for filing an appeal.¹³ This is similar to Section 33B (1),(2)&(3) of the Ugandan Value Added Tax Act (UVAT),¹⁴ under which a person dissatisfied with a tax assessment may, within forty-five (45) days after receipt lodge an objection with the Uganda Tax Commissioner, unless he was prevented from lodging an objection within 45 days due to absence from Uganda, sickness or other reasonable cause and there has not been any unreasonable delay by the person lodging the objection, the Commissioner General may accept the objection outside the 45 days limitation of lodging an objection.¹⁵ Further, PPTA appeals before the BAC used to be heard *in camera*.¹

¹. See the Valued Added Tax Act No. 102 of 1993 (1993 VAT ACT), at Second Schedule, Para. 9.

². This could be either the Federal or the State Board of Inland Revenue Service.

³. Similar provisions are contained under Sections 54(1) and 55 of 1990 CITA.

⁴. See Obayemi, *supra* note 64; See, also, Prof. C.J. Amasike, *Brief Notes on the Adjudication of Tax Disputes in Nigeria-The Tax Appeal Tribunal Perspective*.

⁵. See also, Section 63(1) of 1993 PITA, and Section 23(1) of 1990 VAT Act.

⁶. Section 56(2) of CITA. Under Section 63(2) of 1993 PITA, the threshold is N200.00.

⁷. Section 56(3) of CITA.

⁸. Section 56(4) of CITA. This is same under Section 63(3) of 1993 PITA and Section 23(2) of 1990 VAT Act.

⁹. Section 64(6) of the 1993 PITA.

¹⁰. Section 57(1) of the 1990 CITA; The RTA may also appeal on points of law within 30 days under Section 57(2) of the 1990 CITA.

¹¹. Section 57(3) of the 1990 CITA

¹². Section 38(1) of the 1990 PPTA.

¹³. Section 38(1) of the 1990 PPTA

¹⁴. Value Added Tax Act, CAP 349, Laws of Uganda (1996). This law came into effect on 1st July, 1996.

¹⁵. Section 33B (1),(2)&(3) of UVTA.

Appeals from the BAC to FHC, under PPTA, must be filed within 30 days save for temporary absence, sickness or other reasonable cases coupled with the taxpayer not being guilty of unreasonable delay.² Again, such appeals are heard *in camera* at the FHC, unless the court so directs at the appellant's application.³ The FHC's decision shall be final if no appeal is filed after 90 days.⁴ However, for an assessment of chargeable tax over N1,000.00, an appeal shall lie to the Court of Appeal, at the instance of the corporate taxpayer or the FBIR.⁵

V. Appeal Procedure Before The *Defunct* VAT Tribunal Under The VAT Act (1993), VAT Act (2004), and the VAT Tribunal Rules (2003).

The 2004 VAT Act consists of 47 sections with one Schedule which contains a list of goods and services exempt, and at inception of the 2004 VAT Act, the erstwhile Second Schedule and the VAT Tribunal Rules (2003) which, respectively, established and governed the operation of the defunct VAT Tribunal were recently deleted *vide* the VAT Amending Act of 2007.⁶ In addition, the FIRS had, over the years, published a number of Information Circulars on VAT which to some extent threw light on some of the provisions, while, it suffices to say that the FIRS Circulars and/or Information Notices⁷ are not legal documents and are merely issued for the guidance of taxpayers,⁸ since the Circulars are neither binding on nor create estoppel against the FIRS.⁹

Prior to the 2007 FIRSEA, regarding VAT assessments, any taxable person or entity that was aggrieved by an assessment or demand notice in respect of VAT was allowed to appeal against the assessment, by giving notice to the Zonal VAT Tribunal where the taxable person was resident.¹⁰ An award or judgment of the Tribunal shall be enforced as if it were a judgment of the FHC.¹¹ Appeals from the VAT Tribunal on point of law lied directly to the Court of Appeal.¹²

The Federal Minister of Finance ("Minister") was empowered to make rules regulating the practice and procedure of the VAT Tribunal, and, until such rules had been made, the practice and procedure of the FHC was to apply with modifications as the circumstances may require.¹³ Thus, the situation was that the VAT Tribunal operated as if it was a High Court while using the FHC Rules, although the Minister was allowed to make rules regulating the VAT Tribunal practice and procedure, in a manner radically different from those of the FHC.¹⁴ Further, these statutory provisions did not limit the VAT Tribunal to civil matters only.¹⁵

Appeals against an assessment to tax from VAT Tribunal to either the Federal or the State High Courts were limited to points of law alone except in the case of personal income tax where there is no such statutory limitation.¹⁶ There were notable parts of the VAT Act that previously regulated appeals:

a. Establishment of the VAT Tribunal

Sections 1 and 2 of the 2nd Schedule to the 1993 VAT Act, provided for the establishment of the erstwhile VAT Tribunal thus:

1. *The Minister may by notice in the Federal Gazette, establish a Value Added Tax Tribunal in each Zone of the Federal Inland Revenue Service.*
2. *Each of the Zonal VAT Tribunal shall consist of not more than eight persons, none of whom shall be a serving public officer and one of whom shall be designated as Chairman by the Minister.*

b. Composition of the VAT Tribunal

The composition of the Tribunal was as stated under Sections 3 and 4 of the 2nd Schedule to the 1993 VAT Act, thus:

¹. Section 38(6) of the 1990 PPTA.

². Section 39(1)&(2) of the 1990 PPTA

³. Section 39(11) of the 1990 PPTA

⁴. Section 40 of the 1990 PPTA

⁵. Section 39(14)(a)&(b) of the 1990 PPTA

⁶. See, Sanni I, *supra* note 14 at Page 189.

⁷. See FIRS Information Circular No.93/03 of 25th March 1993 on Collection Procedure, FIRS Information Circular No.9304 of 20th August, 1993 providing basic information on VAT, FIRS Information Circular No.9305 of 5th November, 1993 on VAT on Import to supplement Information Circular No.9304 and FIRS Information Circular No.9401 of 1st March, 1994 providing 'Detailed List of Items Exempted from Value Added Tax (VAT).

⁸. See, *Saipem Contracting Nigeria Ltd vs FIRS*, (2014) 15 TLRN 76; See, also, *Halliburton West Africa Ltd v. Federal Board of Inland Revenue (FHC)* (2006) 7 CLRN, 138, at p.156 at lines 29-45.

⁹. See Sanni I, *supra* note 14, at 189.

¹⁰. See, 1993 VAT ACT, at Second Schedule, Para. 12.

¹¹. See, 1993 VAT ACT, at Second Schedule, Para. 24.

¹². See, 1993 VAT ACT, at Second Schedule, Para. 21.

¹³. See Abdulrazaq I, *supra* note 116, at 1.

¹⁴. *Ibid.* per Abdulrazaq I, at 1.

¹⁵. *Ibid.* per Abdulrazaq I, at 1.

¹⁶. *Ibid.* per Abdulrazaq I, at 1.

3. **The Chairman of each of the Zonal VAT Tribunal;**
 - (a) shall be a legal practitioner of not less than 15 years experience.
 - (b) shall preside over the proceedings of the Tribunal.

4. **Members of each of the Zonal VAT Tribunal –**
 - (a) shall be appointed by notice in the Federal Gazette by the Ministry from among persons appearing to him to have wide and adequate practical experience, professional knowledge, skills and integrity in the profession of law, accountancy or taxation in Nigeria, as well as persons that have shown capacity in the management of trade, business and retired senior public servant in tax administration;
 - (b) shall hold office for a period of three years from the date of appointment and may resign at any time by a notice in writing addressed to the Minister;
 - (c) shall cease to be a member upon the Minister determining that his office be vacate upon notice of such determination.

c. The Power of the Minister of Finance To Make Rules for the VAT Tribunal

Further, Sections 21 and 22 of the 2nd Schedule to the 1993 VAT Act, stated thus

21. *The Minister shall make rules regulating the practice and procedure of the VAT Tribunal and, until such rules are made, the practice and procedure of the Federal High Court shall apply with such modifications (whether by way of addition, alteration or omission) as the circumstances may require.*

22. *Any case or proceeding relating to a matter for which the VAT Tribunal has jurisdiction pending before the Federal High Court on the commencement of this paragraph shall be continued and completed as if this Act had not been made.*

d. The Power of the President of the Court of Appeal To Make Rules for the VAT Tribunal

Also, the President of the Court of Appeal was allowed to make procedural rules for VAT Tribunal under Section 25 of the 2nd Schedule to the 1993 VAT Act

25. *The President of the Court of Appeal may make rules providing for the procedure in respect of appeals made under this Act and until such rules are made, the Court of Appeal Rules relating to the hearing of appeals shall apply to the hearing and determination of an appeal under this Act.¹*

e. Commencing Proceedings Before the VAT Tribunal

Proceedings under the old 1993 VAT Act commenced with a notice of assessment. To proceed before the VAT Tribunal, a taxpayer (individual or corporate) that is aggrieved by an assessment from the FBIR may file an **objection** to the assessment with the FBIR. The FBIR will either amend or refuse to amend the assessment. Where the FBIR refuses to amend the assessment, the FBIR will then issue a Notice or Refusal to Amend (“NORA”). Upon receiving the NORA, and within **30 days**, the taxpayer may file an appeal with the VAT Tribunal. Section 13 of the 2nd Schedule to the 1993 VAT Act, stated thus:

13. *Notice of appeal against assessment shall contain:*
- (a) *the name and address of the taxable person;*
 - (b) *the total amount of goods and services chargeable to tax in respect of each month;*
 - (c) *any input tax;*
 - (d) *net amount of tax payable;*
 - (e) *the copy of assessment notice;*
 - (f) *the precise grounds of appeal against the assessment; and*
 - (g) *an address for service of any notice, process or other document to be given to the appellant and the Secretary to the Zonal Tribunal.*

f. Hearing Procedure Before the VAT Tribunal

Once the appeal has been filed, the procedure for the hearing of the appeal is provided for under Sections 15, 16, 17 and 18 of the 2nd Schedule to the 1993 VAT Act, stated thus:

15. *The Zonal Tribunal shall meet as often as may be necessary to hear appeal in any town and place in which the office of the Tribunal is situated.*

16. *At least five members may hear and determine an appeal.*

¹. Section 25 of 1993 VAT ACT, at Second Schedule

17. *The Secretary to the Zonal Tribunal shall give seven days notice to the parties to an appeal of the date and place fixed for the hearing of the appeal.*

18. *All notices and documents, other than the decisions of the Tribunal may be signed under the hand of the Secretary. All appeals before the Tribunal shall be held in camera. Every taxable person so appealing shall be entitled to be represented at the hearing of the appeal by a legal practitioner, a qualified chartered accountant, or tax consultant.*

g. Burden of Proof Before the VAT Tribunal

The burden of proof is on the party filing the appeal was as stated under Section 19 of the 2nd Schedule to the 1993 VAT Act:

19. *The onus of proving the basis of grievance against an assessment or non-compliance with the provisions of the law shall be on the appellant.¹*

h. Filing Notices of Discontinuance Before the VAT Tribunal

Both the FBIR and the appellant had individual right/power to discontinue the appeal at anytime under Section 14 of the 2nd Schedule to the 1993 VAT Act

14. *The Board or a taxable person may discontinue an appeal at any time before the hearing of the appeal by giving notice in writing through the Secretary to the Zonal Tribunal.²*

i. Decisions of the VAT Tribunal's Decisions

If the taxpayer neglected to appeal, the assessment became final. Thus, under Section 11 of the 2nd Schedule to the 1993 VAT Act:

11. *Where a notice of appeal is not given within the period specified, the assessment or demand notices shall become final and conclusive and the Board may recover tax, interest and penalty, which remain unpaid from any taxable person through the proceeding at the Zonal Tribunal.*

Under Section 12 of the 2nd Schedule to the 1993 VAT Act, the award or judgment of the VAT Tribunal was enforced as an FHC's judgment:

12. *An award or judgment of the VAT Tribunal shall be enforced as if it were judgment of the Federal High Court on registration of a copy of the award of judgment in the Registry of the Federal High Court by the party seeking to enforce the award or judgment.*

The nature of the judgment to be delivered by the VAT Tribunal was enumerated under Section 20 of the 2nd Schedule to the 1993 VAT Act thus:

20. *The Zonal Tribunal may upon hearing the appeal, confirm, reduce, increase or amend the assessment or make such orders thereon as it deems fit.³*

The decision of the VAT Tribunal after being served on the taxpayer was enforceable against the taxpayer after 30 days, even if an appeal were filed before the FHC, under Section 23 of the 2nd Schedule to the 1993 VAT Act

23. *(1) Following the decision of the VAT Tribunal, notice of the amount of the Tax chargeable under the assessment as determined by the VAT Tribunal shall be served by the Board on the company or person in whose name the tax is chargeable.*

(2) Notwithstanding that an appeal is pending, tax shall be paid in accordance with the decision of the VAT Tribunal within one month of notification of the amount of the tax payable in pursuance of sub-paragraph 1 of this paragraph.

j. Right of Appeal From the VAT Tribunal

A right of appeal to the FHC was provided for under Section 24 of the 2nd Schedule to the 1993 VAT Act, stating thus:

24. *– (1) Any party aggrieved by the decision of the VAT Tribunal may appeal against the decision on point of law to the Court of Appeal on giving notice in writing to the Secretary to the VAT Tribunal within thirty days after the date on which the decision was given setting out the grounds on which the decision is being challenged.*

¹. Section 19 of 1993 VAT ACT, at Second Schedule.

². Section 13 of 1993 VAT ACT, at Second Schedule.

³. Section 20 of 1993 VAT ACT, at Second Schedule.

(2) On receipt of a notice of appeal under subparagraph (1) of this paragraph, the Secretary to the VAT Tribunal shall compile the record of proceedings and judgment before the VAT Tribunal and shall cause them to be transmitted to the Chief Registrar of the Court of Appeal together with all the exhibits tendered at the hearing before the VAT Tribunal within thirty days after the date on which the decision was made.

VI. Issues of Facts, Law and Burden of Proof in VAT Appeals Prior to 2007

As stated earlier, the 1993 VAT Act was amended in 2004,¹ however, prior to this, the tax appeal rules of procedure and the common law rules that governed “primary facts,” “conclusions,” and “inferences” that existed at common law, similarly governed the conduct of proceedings and appeals before both the BAC and the VAT Tribunal. Since the BAC preceded the VAT Tribunal and since the BAC was fashioned after the defunct English Board of Tax Appeal Commissioners, the tax appeal jurisprudence before the BAC was much developed and richer in cases from common law than before the VAT Tribunal. Thus, much of the case law to be discussed emanated before the BAC.

a. The Distinction Between Conclusions of Facts and Conclusions of Law.

Generally, a decision of the BAC to be appealed usually sets out the primary facts as found, which are followed by the conclusions arrived at from those facts. The question for the Appellate Court would then be whether, given the primary facts stated, the BAC was justified in law in reaching the conclusions so reached.² In this regard, primary facts are facts which are observed by witnesses and proved by oral testimony or facts proved by the production of a thing itself, such as the original documents.³ Their determination is essentially a question of fact for the tribunal of fact, and the only question of law that can arise on them is whether there was any evidence to support the finding.⁴ Since the BAC was fashioned after similar contemporary BAC Tribunals in the United Kingdom, the tax appeal jurisprudence under BAC was much more developed than those of the VAT Tribunal.

i. Inferences That Do Not Require The Skills of a Lawyer

Conclusions from primary facts that can be drawn by a layman (properly instructed on the law as by a lawyer), are conclusions of fact for the tribunal of fact, and the only questions of law which can arise on them are

- whether there was a proper direction in point of law; and
- whether the conclusion is one which could reasonably be drawn from the primary facts.⁵

ii. Inferences Requiring The Skills of a lawyer.⁶

Whenever the correct conclusion to be drawn from primary facts requires for its correctness a determination by a trained lawyer, the conclusion is one of law.⁷ In *British Launderers' Research Association v. Borough of Hendon Rating Authority*, a finding had been made that the British Launderers' Research Association was not an institution established "for the purpose of science, literature or the fine arts exclusively" and hence was not entitled to an exemption from rating under the *Scientific Societies Act, 1843*. This finding was reversed by the Divisional Court and before the Court of Appeal it was argued that this was a finding of fact with which the Divisional Court should not have interfered. Of this argument, Denning L.J. commented:

If, and in so far, however, as the correct conclusion to be drawn from primary facts requires, for its correctness, determination by a trained lawyer - as, for instance, because it involves the interpretation of documents or because the law and facts cannot be separated, or because the law on the point cannot properly be understood or applied except by a trained lawyer - the conclusion is a conclusion of law in which an appellate tribunal is as competent to form an opinion as the tribunal of first instance.⁸

Applying those principles to the facts of the case before him, Denning L.J. concluded that the finding was one of law because it involved an examination of the memorandum and articles of association of the Research Association and involved questions of interpretation to those documents and the Act.

Subsequent cases where this need for the skills of a lawyer has served as sufficient reason to label a finding as one of law include the proper status of an employee where that status depended entirely on the

¹. Value Added Tax Act, Cap V1, Laws of the Federation of Nigeria, 2004 (“2004 VAT ACT”).

². See Abdulrazaq I, *supra* note 116, at 2.

³. *British Launderers' Research Association v Borough of Hendon Rating Authority*, CA [1949] 1 K.B. 462; [1949] 1 All E.R. 21.

⁴. *Ibid.*, [1949] 1 K.B. 462, at 471-72 per Denning L.J.

⁵. *Bracegirdle v. Oxley*, [1962] 1 All E.R. 909.

⁶. See, generally, Geoffrey A. Flick, *Error of Law Or Error of Fact?* 15 U.W. Austl. L. Rev. 193 (1983, at 209-210).

⁷. *British Launderers' Research Association v. Borough of Hendon Rating Authority*, [1949] 1 K.B. 462, at 471-72 per Denning L.J.

⁸. *Ibid.*, at 472.

construction of a written agreement¹ and again where the finding depended upon what was said to be "the reasonable inferences based on the legal interpretation of the contract."² A question of law is also involved in determining an issue of causation of injury for the purposes of compensation.³ The distinction between questions of fact and of law is vital to appeals in tax disputes,⁴ because, on appeal, the decisions as to the facts by the BAC are conclusive.⁵ This was noted by Lord Denning, MR, in *Griffiths v J.P. Harrison (Watford) Ltd.*⁶ thus:

*"Now the powers of the High Court on an appeal are very limited. The judge cannot reverse the commissioners on their findings of fact. He can only reverse their decision if it is 'erroneous on point of law.' Now here the primary facts were all found by the Commissioners. They were stated in the case. They cannot be disputed. What is disputed is their conclusions from them. And it is now settled, as well as anything can be, that their conclusion cannot be challenged unless it was unreasonable, so unreasonable that that it can be dismissed as one which could not reasonably be entertained by them. It is not sufficient that the judge would himself have come to a different conclusion..."*⁷

To this end, a distinction is often made between findings of fact, findings of law, or "mixed" findings of fact and law.⁸

d. Findings of Facts in Tax Appeals Are Final

Generally, an appellate court reviewing a BAC decision is restricted to considering whether, on the facts found as set out in the case stated, the BAC has erred in law, but, however, the facts themselves are not open to challenge.⁹ Thus, in *Levene v Inland Commissioners*,¹⁰ Viscount Sumner held that:

*In substance, persons are chargeable or exempt, as the case may be according as they are deemed by this Body of Commissioners or that to be resident or the reverse, whatever resident may mean in the particular circumstances of each case. The tribunal thus provided is neither bound by the findings of other similar tribunals in other cases nor is it open to review, so long as it commits no palpable error of law, and the Legislature practically transfers to it the function of imposing taxes on individuals, since it empowers them in terms of so general, that no one can be certainly advised in advance, whether he must pay or can escape payment. The way of taxpayers is hard, and the Legislature does not go out of its way to make it any easier. If it had possible in the case to apply the principle that a taxing statute must impose a charge in clear terms or fail, since it is to be construed contra proferentem, our duty would have been plain and it is only their application that is haphazard and beyond all forecast, Mr. Levene has no remedy in your Lordships' house.*¹¹

In view of the decisions in *TSKJ v FIRS*,¹² and *NNPC v TAT*,¹³ without an amendment to the Federal Constitution, it would appear to be a difficult task to make an argument that a finding of fact by the TAT is conclusive.

e. Appeals from BAC's Conclusions

It is well settled that when the BAC has ascertained the facts of the case and the Commissioners have found the conclusion of fact which the facts prove, their decision is not open to review, provided (a) that they had before them evidence, from which such conclusion could properly be drawn, and (b) that they did not misdirect themselves in law in any of the forms of legal error which would have amounted to misdirection.¹⁴

f. Where the Conclusions Reached by the BAC Are Not Erroneous in Law, and Can Be Supported by the Facts, the Appellate Court May Not Substitute Its Own Conclusions.

The law is that the decision of the BAC that is supported by facts and is not erroneous in law must be accepted and cannot be overruled unless it is plain from the primary facts found that 'no person acting judicially and properly instructed as to relevant law could have come to the determination under appeal,' or unless one comes to the conclusion that no reasonable person could have arrived at the same conclusion as the BAC.¹⁵ According to Lord Salmon, LJ:

¹ *Gould v. Minister of National Insurances*, [1951] 1 All E.R. 368.

² *Morren v. Swinton and Pendlebury Borough Council*, [1965] 1 W.L.R. 576, at 583 per Lord Parker C.J.

³ *Hoveringham Gravels Ltd v. Secretary of State for the Environment*, [1975] 1 Q.B. 754. 126.

⁴ See, Salter & Ker (1990) *Eason: Cases and materials on Revenue Law* (Sweet & Maxwell) at pages 30-35.

⁵ See Abdulrazaq I, *supra* note 116, at 2; This is also the situation under the 2007 FIRSEA.

⁶ [1963] A.C. 1; [1962] 40 TC 281.

⁷ See, Lord Denning, MR, in *Griffiths v J.P. Harrison (Watford) Ltd* [1963] A.C. 1 at 16-17.

⁸ See Abdulrazaq I, *supra* note 116, at 2.

⁹ *Ibid.* per Abdulrazaq I, at 3.

¹⁰ [1928] A.C. 217.

¹¹ [1928] A.C. 217, at Page 227.

¹² (2014) 13 TLRN 1.

¹³ (2014) 13 TLRN 39.

¹⁴ *IRC v Lysaght* [1928] A.C. 234 at Page 243.

¹⁵ *Pilkington v Randall* [1966] 42 TC 662

*I agree that this case is very close to the borderline, and I am by no means certain that if I had been sitting as a Commissioner and had had to draw inferences of fact, I should have come to the same conclusion as the Commissioners. But it is important to guard oneself against the temptation, to which I suppose we are all prone, and which is happily put by Cross, J., in *Lucy & Sunderland Ltd. v Hunt*.¹ When we think a conclusion of fact is one at which we would not have arrived ourselves, we are tempted to say that it follows that no reasonable person could have come to that conclusion. I think the facts here were evenly balanced. On the whole I think I would have come down the other way, but I cannot say that the view at which the Commissioners arrived at is not a possible view for a reasonable man to take...²*

g. The Burden of Proof

In *John Ihekwoaba v Commissioner of Internal Revenue*,³ the appellant, a member of the Eastern State House of Assembly had realized a small and ascertainable income.⁴ However, he also had business income from his self-employment as a produce dealer which he failed to substantiate with the Commissioner. Upon his being found subject to tax by the BAC, he appealed up to the Supreme Court, respectively. The Supreme Court, rejecting his claim that the assessment was excessive, held that the onus was on the taxpayer to prove that an assessment was excessive, and that in the instant case, the appellant failed.⁵

h. Tax Deposit As A Condition Precedent for Filing Appeal Before the BAC

To curb abuse and the use of frivolous appeals to delay and/or stall legitimate and undisputed assessments, deposits have been demanded prior to filing appeals. In *The Queen v. Port Harcourt Tax Collection Authority*,⁶ the High Court of Eastern Nigeria held that the tax to be paid as condition precedent for filing an appeal is the tax chargeable that was in dispute and, therefore, such would be the difference between the tax assessed and the chargeable tax on the taxpayer's income that ought to have been deposited.⁷ Further, in *The Queen v. Urhobo Rating Authority*,⁸ it was also held that granting a stay of action on tax collection pending appeal was discretionary and that if it were found that excess tax had been paid, the excess amount ought to be refunded back to the taxpayer, together with interest.⁹

It is this author's opinion that in view of incessant delays in litigation, endemic use of technicalities and pervading sharp practices common in Nigeria, tax deposits should be used as a means of filtering unmeritorious suits.

i. Appeals Filed Outside the Period Allowed

Equity aids the vigilant and not the indolent. A person who sleeps on his right to the detriment of other party, must forever abandon his right. In *Aboud v. Regional Tax Board*,¹⁰ the Supreme Court held that where no appeal had been lodged against an assessment within the statutory time permitted by law, the assessment shall become final and conclusive for all purposes of the law as regards the amount of the chargeable income.¹¹ Further, in *Anosike v. Tax Assessment Authority (Abakaliki)*,¹² it was held that where a notice of appeal was filed within time, but with a wrong tribunal contrary to law, the effect is the same as if no notice had been filed *ab initio*.¹³

VII. Nature of Legal Challenges Available During Tax Appeals

A. Judicial Review

This is a remedy¹⁴ that used to be applicable to the decisions of the BAC at both Federal and State levels.¹⁵ This was noted by Lord Meggry, J. in *IRC v Sneath*¹⁶ thus

“the commissioners discharge functions which are essentially judicial in nature. They hear evidence and argument, and decide questions of facts and law impartially and without regard to so-called

¹. (1961) 40 T.C. 132, at Page 138.

². *Pilkington v Randall* [1966] 42 TC 662 at 665.

³. (1958) 3 FSC 67; 1 N.T.C. 60

⁴. See Abdulrazaq I, *supra* note 116, at 6.

⁵. *Ibid.* per Abdulrazaq, at 6.

⁶. *The Queen v. Port Harcourt Tax Collection Authority*, (1958) 1 NTC 45.

⁷. See Abdulrazaq I, *supra* note 116, at 6.

⁸. (1958) 1 NTC 76.

⁹. See Abdulrazaq I, *supra* note 116, at 6.

¹⁰. *Aboud v. Regional Tax Board* (1960) N.M.L.R. 100

¹¹. See Abdulrazaq I, *supra* note 116, at 7.

¹². 1 NTC 71.

¹³. See Abdulrazaq I, *supra* note 116, at 7.

¹⁴. Such specie of remedies include: Declaratory Actions, Mandamus, Certiorari, Prohibition and *Quo Warranto*.

¹⁵. See Abdulrazaq I, *supra* note 116, at 42.

¹⁶. (1932) 17 TC 149.

considerations of policy.¹

Based on the above, the BAC's decisions are subject to review provided the challenging party can prove sufficient interest or *locus standi*.² As has been noted by Abdulrazaq,³ there has been a long line of cases that have established the remedy of judicial review in Nigeria such as *Aboud v R.T.B.*,⁴ *Williams v Adelaja*,⁵ *Rev. Shodipo v F.B.I.R.*,⁶ and *Offshore International v. F.B.I.R.*⁷ where the taxpayer's claim for judicial review is for Declaratory Relief/Order that he is not liable for the assessed taxes.⁸ Further, in Nigeria, another remedy available by way of judicial review are claims for orders of *certiorari* and prohibition to quash assessment and prohibit payment of taxes have been canvassed in *Alitalia Airlines Ltd. v F.B.I.R.*⁹ and *Okupe v F.B.I.R.*¹⁰ respectively.¹¹ Finally, an order of mandamus was sought to compel the RTA to stay action on tax collection was sought by the taxpayer in *The Queen v. Urhobo Rating Authority*.¹²

B. Public Law Defence

Other than judicial review, Abdulrazaq¹³ has shown that a taxpayer may also assert a public law defence to a revenue enforcement action,¹⁴ by arguing that the original assessment was *ultra vires* and therefore invalid and void.¹⁵ In discussing this remedy and its application viz-a-viz the decision in *IRC v Aken*,¹⁶ Abdulrazaq posited thus:

In IRC v Aken, this line of argument was used-unsuccessfully- to argue that the profits of prostitution could not be taxable since, as a matter of law, the profits of an illegal activity cannot be subject to tax. The English Court of Appeal rejected this argument. Judges will no doubt keep the use of the ultra vires doctrine under tight control to prevent it from becoming another avenue of tax appeal. Inspectors do not act ultra vires merely by making a mistake of law. Since IRC v Aken was decided, the courts have developed the law on collateral challenge. The English House of Lords has held that it is open to citizens charged with a criminal offence to argue that the law under which they are charged is invalid.¹⁷

Thus, in *Boddington v British Transport Police*,¹⁸ which concerned a prosecution for breach of a bye-law against smoking, the House of Lords distinguished it from *R v Wicks*,¹⁹ in which a taxpayer was not allowed to challenge the validity of an enforcement notice in the planning notice enforcement proceedings, and did so treating the matter as one of the statutory construction.²⁰ In planning law, the English parliament had provided a complex system of appeal and the decision was addressed to the defendant; the exercise of the right of appeal and judicial review was enough.²¹ These might have had weight in matters but were swept aside by the Court of Appeal in *Pawłowski v Dunnington*.²²

C. Damages

Another remedy available to the taxpayer is the ingenious claim for damages against the RTA.²³ This claim is founded on exemplary damages based on the unlawful collection of or demand for tax.²⁴ However, in *O'Rourke*

¹. See Abdulrazaq I, *supra* note 116, at 42.

². *Ibid.* per Abdulrazaq I.

³. M.T. Abdulrazaq, *Judicial Review in Nigerian Taxation* (Maples & temples Associates) at Page 16. ("Abdulrazaq II").

⁴. 1 N.T.C. 124.

⁵. 1 N.T.C. 141.

⁶. 1 N.T.C. 273.

⁷. 1 N.T.C. 384.

⁸. See Abdulrazaq I, *supra* note 116, at 42.

⁹. 1 N.T.C. 222.

¹⁰. 1 N.T.C. 321.

¹¹. See Abdulrazaq I, *supra* note 116, at 42.

¹². 1 N.T.C. 76.

¹³. See Abdulrazaq I, *supra* note 116, at 42.

¹⁴. See, *Pawłowski v Dunnington*, [1999] STC 550, where a taxpayer was allowed to argue the legality of the condition for Revenue action under the PAYE regulations that sought to allow action against an employee for recovery of tax following of the suit.

¹⁵. See Abdulrazaq I, *supra* note 116, at 42.

¹⁶. [1990] STC 497 (CA).

¹⁷. See, *Boddington v British Transport Police* [1999] 2 AC 143; See, also, *Elliot 3 Judicial Review 144, Forsyth (1998) Public Law 364 and Hare [1998] CLJ 429*.

¹⁸. *Boddington v British Transport Police* [1999] 2 AC 143;

¹⁹. [1998] AC 92.

²⁰. See Abdulrazaq I, *supra* note 116, at 43.

²¹. *Ibid* per Abdulrazaq I.

²². *Pawłowski v Dunnington*, [1999] STC 550.

²³. See Abdulrazaq I, *supra* note 116, at 43.

²⁴. *Wilde* [1995] BTR 137.

v Camden B.C.,¹ the House of Lords disagreed with such a claim for damages.² Yet, it has been submitted that the damages claim may gain credibility based on the incorporation of the African Charter of Human Rights³ into the Nigerian legal jurisprudence.⁴ Yet, Abdulrazaq has noted that a credible argument does not usually translate into a successful one.⁵

D. Constitutional Argument

The fundamental rights of a person (including a corporate body) are enshrined in Chapter 4 of the Constitution. Section 1(3) of the Constitution provides that if any other law is inconsistent with the provisions of the Constitution, the Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.⁶ Thus, Section 36(1) of the Constitution of the Federal Republic of Nigeria (1999) stipulates that:

“In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law.”

It is fundamental to fair hearing procedure that both sides should be heard: *audi alteram partem*, “hear the other side.” A plethora of English and Nigerian authorities have long established this principle and the principle that administrative powers which affect the rights of any person must be exercised in accordance with natural justice. This point was emphasised in the case of *Leaders and Company Ltd v Major General Musa Bamaiyi*⁷ per Rhodes-Vivour JSC where he stated that

“audi alteram partem denotes basic fairness and a generally accepted standard of natural justice. In practice it means that the judge should allow both parties to be heard and ensure he listens to the point of view or case of each side.”

In the case of *R v Commission for Racial Equality ex.p Hillingdon LBC*⁸ Lord Diplock put it succinctly:

“Where an Act of Parliament confers upon an administrative body functions which involve it’s making decisions which affect to their detriment the rights of other persons or curtail their liberty to do as they please, there is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decisions.”

Similarly, in the text, *Wade & Forsyth’s Administrative Law*⁹ reference was made to Lord Reid’s postulation in *Ridge v Badwin* (that the mere fact that the power affects rights or interests is what makes it “judicial”, and so subject to the procedures required by natural justice. In other words, a power which affects rights must be exercised “judicially” and “fairly, and the fact that the power is administrative does not make it any the less “judicial” for this purpose. Any act which infringes or purports to infringe on a person’s fundamental rights would be declared null and void. The courts have consistently upheld this position as illustrated in the case of *A.G. Federation v A.G Lagos State*.¹⁰

Under the defunct Section 55(5) of the 1990 CITA, and Section 62(6) of the old 1993 PPTA, respectively, there are the requirements that all appeals before the BAC shall be held in camera.¹¹ Clearly, the constitutionality of this provision is in question,¹² especially in view of Section 33(3) of the 1999 Constitution of the Federal Republic of Nigeria. As Abdulrazaq had noted, the fact that publicity of a tax charge would be embarrassing and/or economically damaging is not a sufficient ground to hear tax appeals in camera.¹³ Support for this was explained in *In re-*,¹⁴ where it was also held thus:

It is of course, a fundamental and extremely important requirement of our administration of justice that it should take place in public, he said..... ‘I have not the slightest doubt in this case, as the only consideration in favour of preserving the respondent’s anonymity is his own convenience, including possible loss of repute in his own neighbourhood and of income from his profession, there is by no means strong enough reason to override the extremely important and fundamental requirement of

¹. [1998] AC 188.

². See, also *Carnwarth* [1998] Public Law 407.

³. African Charter on Human and Peoples Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3Rev5 (entered into force 21 October 1986), reprinted in (1982) 21 International Legal Materials 59.

⁴. See Abdulrazaq I, *supra* note 116, at 43.

⁵. *Ibid.*

⁶. See *A.G. Federation v A.G Lagos State* 16 NWLR 2013 (pt.1380) at page 249 and *The Nigerian Army v Warrant Officer Banni Yakubu* (2013) 8 NWLR (pt.1355) 1.

⁷. (2010) 18 NWLR (pt.1225) pg. 329 at 345 para D

⁸. (1982) AC 779

⁹. (7th Edition) pg. 512

¹⁰. 16 NWLR 2013 (pt.1380) at page 249

¹¹. *Ibid.*

¹². See of *Menakaya vs Menakaya* (2001) 16 NWLR (Pt. 738) 203

¹³. See Abdulrazaq I, *supra* note 116, at 43.

¹⁴. (1964) 42 TC 14.

publicity in our administration of justice.¹

Tax commentators, including Basil Sabine,² have cynically suggested that the courts can always unearth a question of law whenever they are of the opinion that a case ought to be reviewed and equally they can always take refuge in the proposition that they have been called upon to pronounce on a question of pure fact if they do not wish to interfere with the lower court's decision.³ To Abdulrazaq:

Certainly, it is very difficult to discern any consistent pattern in the long line of judicial decisions wherein it has been thought necessary to draw a distinction between questions of fact, which cannot be appealed against, and questions of law which can.⁴

Further, Abdulrazaq rested on Lord Scott, LJ's ruling in *Bean v Doncaster Amalgamated Collieries Ltd.*⁵ That:

Between pure white on the one side and jet black on the other side is a penumbra of grey, shading off into black and white respectively. Within this penumbra there must, of course, often lie cases where the decision is one of fact for the commissioners: but in others it will depend on the correct appreciation of the true character in law of some or more of the facts. Where it is clear to the court that commissioners have misread that character, the decision in law rests with the courts.⁶

In *Bean v. Doncaster Amalgamated Collieries Ltd.*, a colliery company was required by a local Drainage Act to execute or pay for works necessary to obviate or remedy any loss of efficiency in a drainage system due to subsidence caused by the company's workings. At a certain stage the company prepared a scheme for remedial work which involved considerable expenditure for its implementation. Before this could be worked out in detail, the Drainage Board had put forward a general drainage improvement scheme for the district, the effect of which was to eliminate the necessity for the remedial works contemplated by the company, and proposed that the company should bear a proportion of the cost approximately equivalent to the cost of the works it would have carried out independently. After negotiation the company agreed, by an agreement dated the 28th September, 1939, to pay the Drainage Board a certain sum towards the cost of the general scheme by sixty half-yearly installments. It was contended by the company before the General Commissioners that the payments made were in respect of its statutory obligations, that no capital asset had been acquired and that the payments were admissible deductions in computing its profits for income tax purposes. The Crown contended, on the contrary, that the payments were not made in discharge of the company's statutory obligations but were contributions towards a general scheme of drainage improvement and resulted in the acquisition of a capital asset. The General Commissioners decided in favour of the company and held that the payments may be deducted. It was, however, held by the House of Lords that the payments to the Drainage Board were capital payments and, accordingly, not admissible deductions in computing the company's profits for income tax purposes. According to Viscount Simon:

"The same conclusion may be reached if the payments made are not regarded as substituted for the discharge of obligations under the Act of 1929, but rather as sums paid to secure an enduring advantage within the proper application of Lord Caves phrase in Atherton v. British Insulated and Helsby Cables Ltd. The result of the transaction said Uthwatt, J., in the Court of Appeal, clearly was that the value of the particular coal measures—a capital asset remaining unchanged in character—was increased both for use and exchange. There was, therefore, as the result of the transaction, brought into existence, not indeed an asset, but an advantage for the enduring benefit of the trade of the company."⁷

It would therefore seem that the courts have deliberately, perhaps wisely, refrained from laying down general principles.⁸

The constitutional right of a person to access to the courts, as provided under section 6(6) (b) of the Constitution may be invoked where the civil rights and obligations of the *aggrieved party has been infringed. Fawehinmi v IGP and Ors.*⁹ Any inordinate delay on the part of the FIRS in responding to a request or an objection which results in irreparable damage to an aggrieved party may give rise to a cause of action.

In the case of *AYIDA V TOWN PLANNING AUTHORITY*,¹⁰ the Supreme Court held that the pre-condition to approaching the court

“cannot be taken to mean that a party's access to the court ably provided for by the Constitution

¹. (1964) 42 TC 14.

². Basil E.V. Sabine, Tax Appeals Handbook (Butterworths, London 1983) at 135-136.

³. See Abdulrazaq I, *supra* note 116, at 44.

⁴. *Ibid.*

⁵. (1944) 27 TC 296.

⁶. (1944), 27 T.C. 296 at 305, 175 L.T. 10.

⁷. (1944), 27 T.C. 296 at 312.

⁸. See Abdulrazaq I, *supra* note 116, at 44.

⁹. (2002) 7 NWLR pt. 767 pg. 606 at 689, paras D - E.

¹⁰. (2013) 10 NWLR PT. 1362 PG. 226

has been removed or restricted.”

The Court further stated that

“while it is accepted that the right of a party to approach the court is inviolate, it must be noted that where regulations as to how that access is to be made it cannot be ignored, as it is a condition precedent that is duly recognised and must be fulfilled before the commencement of the process can be said to be competent. Flouting section 6(6)(a)(b) of the constitution without due regard to the appropriate rules of court or the legal condition precedent, would be no more than an act in futility.”

Similarly in the case of *ADESOLA v ABIDOYE*,¹ the Apex court held that

“since the determination of the Commissioner for Chieftaincy Affairs is clearly not excluded from the determination of the court, the issue of access to the courts is not foreclosed as to make the provision a violation of the fundamental right of access to the court”.

VIII. Brief Review of Notable Decisions on VAT

In *ATTORNEY GENERAL OF OGUN STATE V ABERUAGBA*,² the court considered the extent of the power of the Federal Government to make tax laws on trade and commerce; whether Sales Tax Law of Ogun State is in conflict with the Constitution; and whether Sales Tax Law of Ogun State is in conflict with the Public Order Act. This is considered the *fons et origos* of case law on sales tax, consumption tax and, implicitly, VAT in Nigeria.³ The relevance of this case is three-fold, to wit, it is the earliest Nigerian case bordering on fiscal federalism, secondly, it throws light on the origin of Sales Tax and thirdly, it is precedent that States have power to legislate on Sales Tax, and this is because the 1960 and 1963 Constitutions provided, in item 38, that both the Federal and State Governments shall have power to legislate over sales tax, however, this item was omitted from the 1979 Constitution and all other subsequent Constitutions, and so, the House of Assembly of Ogun State, relying on the 1979 Constitution, enacted the Sales Tax Law 1982 which imposed tax on the sale of specific goods and services.⁴

The taxpayers, who were wholesale purchasers of beer in the State, commenced a representative action against the State and sought a declaration that the Sales Tax Law was inconsistent with Section 4 (particularly Section 4 (2) and (3)) of the Constitution and accordingly void. The thrust of their case was that since the National House of Assembly was vested with exclusive power, by virtue of the Exclusive Legislative List, to legislate on customs and excise (item 15) and Trade and Commerce (item 61) the State House of Assembly had no competence to legislate on same.⁵ This argument is based on the doctrine of covering the field, meaning that where, in a Federal set up, both the Federal and State legislatures are vested with power to legislate on the same subject and the former, in pursuance of such power, enacts a law, any State legislature on that same subject is deemed to be inconsistent and invalid because the Federal legislation has covered the field.⁶

As to the issue whether the omission to include item 38 of the 1960 and 1963 Exclusive Legislative List in the 1979 Constitution showed an intention to regard the Sales Tax Law as a residual subject or whether the power to legislate on all fiscal subjects had been vested in the Federal Government, the Supreme Court laid down the rules that the Federal Government has the power to legislate on international trade and inter-state trades, while the states had power to legislate on *intra-state* trade.⁷ According to Honourable Justice Mohammed Bello, JSC (as he then was) in *AG Ogun State vs. Aberuagba*:⁸

...it is very tempting to accept the view that since the 1960 and 1963 constitutions specifically shared the power to make sales tax law between the Federation and the Regions and that power is omitted in the Exclusive and Concurrent Lists of the present Constitution, then there is a presumption that sales tax is left as a residuary matter to the States. It is also equally appealing to agree with the contrary

¹. (1999) 14 NWLR PT. 637 28 at 58 paras. E-J SC.

². (2009) 1TLRN 82

³. See, Akinla, *supra* note 86, at 39.

⁴. *Ibid.* per Akinla at 39.

⁵. *Ibid.* per Akinla at 40.

⁶. *Ibid.* per Akinla at 40. See also, Section 4(5) of the 1999 Constitution providing that: “If any law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other law shall to the extent of the inconsistency be void.”

⁷. Olumide K. Obayemi, What Manner of Sales Tax?: *UAC of Nigeria PLC, & Ors. Vs. FBIR, & Ors: THE NATURE AND INCIDENTS OF SALES TAX LAW REVISITED*. Olumide K. Obayemi revisits the case of *UAC Plc & Ors v FBIR & Ors* as he examines Nigeria’s Sales Tax regime and its legality or otherwise, published in ThisDay Newspaper of July 18, 2005. Available at: <http://www.thisdayonline.com/nview.php?id=22935> (“Obayemi IV”); Olumide K. Obayemi, *SHOULD LAGOS STATE CONTINUE TO IMPOSE SALES TAX WITHIN ITS BOUNDARIES IN THE AFTERMATH OF Lagos Board of Internal Revenue v. Nigerian Bottling Company Plc and Anor, Suit No. ID/45/2002*, published by proshareng.com, Monday September 19, 2011 (“Obayemi V”); See, also Chukwuka Ikwuazom, *supra* note 109.

⁸. (1985) 1 NWLR (PT. 3) 395 (SC)

view that since trade and commerce...are exclusively reserved for the Federation and... sales tax is an incident of trade and commerce, then it follows that sales tax is...within the exclusive specifically reserved for the Federation. While trade and commerce within a State is left as a residuary matter to the States...Accordingly, I would not invalidate the Sales Tax Law of Ogun State by reason of the proposition that...a State has no power at all over trade and commerce. I reject the proposition because it has no constitutional basis.¹

Further, as to whether Ogun State Sales Tax Law was valid and constitutional in so far as it imposed tax on purchasers of taxable goods, Honourable Justice Mohammed Bello, JSC (as he then was) went on to hold thus:

My answer...is also No...to the extent that the law imposes the sales tax on inter-State trade and commerce and also in respect of taxable goods the prices of which have been controlled by the Federal Government.²

In Akinla's opinion:

In essence what the Supreme Court held was that the Sales Tax Law of Ogun State was invalid only to the extent that it applied to sales tax in respect of international trade or interstate trade over which the Federal Government has exclusive competence to legislate. Impliedly, the said Law is valid insofar as it applied only to intra-state trade.³

In **LAGOS STATE BOARD OF INTERNAL REVENUE vs NIGERIAN BOTTLING CO. LTD**,⁴ the court considered the effect of Section 7(2) of the Sales Tax Law of Lagos State. There, Lagos State Government, acting through LSBIR, on December 1, 2000, sent a letter to NBC, informing NBC of the reintroduction of sales tax in Lagos State while adding that "the tax rate shall be 5% flat on Goods/Services produced in or brought into the State." Further, LSBIR advised NBC to obtain sales tax forms for registration as "a collector of sales tax" on behalf of LSBIR. NBC failed and/or refused to collect the requested sales tax, and did not obtain the tax forms.

Therefore, acting under section 6 of the Lagos State Sales Tax Law, 1982 No. 9, (Sales Tax Law), LSBIR made an estimate of the sum due from NBC as sales tax sum of N231,500,000.00 plus a 5% penalty of N11,575,000 (assessed on the estimated sum), respectively, for the period between and including December 2000 and January - May 2001. Thus, in another July 12, 2001 Notice of Assessment issued by LSBIR, NBC was further assessed the sum of N243,075,000 being the estimated sales tax and interest. This Notice of Assessment was served on NBC on December 31, 2001. After receiving the Notice of Assessment, although NBC did not pay the assessed sum of N243,075,000, NBC filed a Notice of Objection dated July 30, 2001 on the ground that the legality of the Sale Tax Law was the subject of litigation.

In reply, on September 12, 2001, LSBIR served a demand notice for the assessed sum of N243,075,000 on NBC. As a result, the law suit commenced, wherein LSBIR instituted an action at the Lagos High Court claiming the sum of N210,000,000 as sales tax arrears and penalty as well as interest on the said sum at the rate of 21% from June 2001 until judgment and thereafter at the rate of 6% per annum until liquidation.

At the trial, before Hon. Oshodi, lawyers from ÆLEX, the law firm representing NBC raised the following defenses to LSBIR's claims:

(i) LSBIR was not entitled to impose sales tax on LSBIR in view of the provisions of the Value Added Tax Act. Reliance was placed on the judgment of the Court of Appeal in **Attorney General of Lagos v. Eko Hotels Limited** [2008] All FWLR (Pt. 398) 235 where the court held that both taxes are the same and that the imposition of both taxes amounted to double taxation.

(ii) The imposition of sales tax on goods brought into Lagos State and sold outside Lagos State is unconstitutional as it amounts to a tax on inter-state trade and commerce which is outside the jurisdiction of Lagos State.

(iii) The mode of assessment adopted by LSBIR was arbitrary and capricious and not in accordance with the Sales Tax Law

(iv) LSBIR had failed to comply with the provisions of the Sales Tax Law particularly with respect to the service of requisite notices

In its judgment, the Court agreed with NBC's arguments on points 1 and 4 above and dismissed LSBIR's action.

In **ATTORNEY GENERAL OF LAGOS STATE vs EKO HOTELS LIMITED**,⁵ the court considered whether the Lagos State House of Assembly can validly make law on consumption of goods and services, the National Assembly having enacted the Value Added Tax Act. According to Hon. Dongban-Mensem, JCA:

"VAT and Sales Tax are the same. VAT, as earlier noted, is ordinary termed national tax on sales of goods and services. The actual beast of burden of the VAT/Sales Tax is the consumer and the tax is

¹. (1985) 1 NWLR (PT. 3) 395, at 412-416 (SC).

². (1985) 1 NWLR (PT. 3) 395, at 429 (SC).

³. See, Akinla, *supra* note 86, at 42.

⁴. (2009) 1TLRN 294

⁵. (2009)1TLRN 198.

charged on consumable items (refer to the schedules of both the VAT and Lagos State Sales Law). The imposition of both VAT and sales tax will therefore create double taxation....

“What this appeal decides is that:- It is the 2nd respondent, as the Federal Government agency alone to which the 1st respondent is obliged to collect and remit VAT. It is accordingly under no obligation to collect additional tax on the sales of its services to its customers. VAT, in this situation has covered the field of tax on consumption of the services provided by the 1st respondent.”¹

In *ATTORNEY GENERAL OF LAGOS STATE vs. EKO HOTELS LIMITED*,² the court considered whether the State House of Assembly can validly make law on consumption of goods and services, the National Assembly having enacted the Value Added Tax Act.

In *MAS EVEREST HOTELS LTD & ANOR vs AG, LAGOS STATE*³ and *MAMA CASS & 2 ORS vs FEDERAL BOARD OF INLAND REVENUE*⁴ the court considered where the VAT Act covered the field on taxation of consumption of goods and services and the issue regarding the power of the State House of Assembly- to impose taxes on consumption of goods and services. Honourable Justice Oshodi examined Section 4(7) of Constitution of Federal Republic of Nigeria (1999) providing thus:

4 (7) The House of Assembly of a State shall have power to make laws...with respect to the following matters,...

(a) any matter not included in the Exclusive Legislative List...

(b) any matter included in the Concurrent Legislative List...

Therefore, she held that Section 4(7) empowered Lagos State to make laws for the peace, order and good government on all matters not included in the Exclusive List and since collection of taxes was on the 1st Column of the Concurrent List, the following laws were valid

The Hotel Licensing Law, Cap H.6., Laws of Lagos State of 2003

The Hotel Occupancy and Restaurant Consumption Law, No. 30, Vol. 42, Lagos State of Nigeria Official Gazette

In *FEDERAL BOARD OF INLAND REVENUE vs IBILE HOLDINGS*⁵ the court considered whether commercial rent with building, selling and renting of properties, would be subject to VAT tax under the Value Added Tax Act. In upholding the application VAT to commercial rents collected by the taxpayer, the court held that Sections 2 and 42 of VAT Act that prescribes that goods and services were subject to VAT, i.e., goods and services not expressly exempted under Parts 1 and 2 of the First Schedule of VAT Act, must be taxed.

In *CNOOC EXPLORATION AND PRODUCTION NIGERIA LIMITED vs AG FEDERATION & 2 ORS*,⁶ the court considered whether an assignment of contractor’s right in respect of Oil Mining Lease would qualify as supply of goods and services for the purposes of the provision of the Value Added Tax Act, Cap V1, Laws of the Federation of Nigeria, 2004. There, the issue was whether incorporeal rights (i.e., “choses in action”) should be subject to VAT tax. In an era where people obtain blocs of Oil Mining Leases and then “sell” such to third parties, such assignment must be taxable. For instance, Sections 2 and 46 of the VAT Act must be amended to follow Section 5(2) of the United Kingdom Value Added Tax Act.

Section 2 of the Nigerian 2004 VAT Act presently provides that

“The tax (VAT) shall be charged and payable on the supply of all goods and services (in this Act referred to as “taxable goods and services”) other than those goods and services listed in the First Schedule to this Act.”

Further, Section 46 (Interpretation) of the VAT Act defines “supply of goods” to mean:

“any transaction where the whole property in the goods is transferred or where the agreement expressly contemplates that this will happen, and in particular includes the sale and delivery of taxable goods or services used outside the business, the letting out of taxable goods on hire or leasing and any disposal of taxable goods . In a similar vein, supply of services is simply defined as “any service provided for a consideration.”

The combined effect of these two sections have led to the decision that interest in an oil concession agreement does not constitute a “good” or a “service,” and that the transfer in *CNOOC Exploration vs AG Federation*⁷ did not fall within the purview of the VAT Act on which the tax would fall due. In fact, the FHC in *CNOOC* advised the Nigerian lawmakers to use Section 5(2) of the UK VAT Act⁸ as guide towards

¹. See Hon. Dongban-Mensem, JCA in *Attorney General of Lagos v. Eko Hotels Limited* [2008] All FWLR (Pt. 398) 235, at pages 259-260

². (2009)1TLRN 198.

³. (2010) 2TLRN 1

⁴. (2010) 2TLRN.99

⁵. (2010) 2TLRN 152

⁶. (2011) 4TLRN 183

⁷. (2011) TLRN 45.

⁸. Value Added Tax Act 1994, c. 23.

amending the Nigerian VAT Act. In this regard, Section 5(2) of the UK VAT Act defining services subject to VAT, provides that:

“Anything which is not a supply of goods but is done for consideration (including, if so done, the granting, assignment or surrender of any right is a supply of services.”

Another topical tax issue relates to the procedural rule that govern the adjudication of an aggrieved person’s claim before the RTA and the TAT, especially where the RTA refuses to take action on the taxpayer’s objection within a reasonable time. In Nigeria, there is no express provision for the time within which an aggrieved taxpayer may consider the RTA’s inaction to his Objection to an assessment. Except for case law, the aggrieved taxpayer may continue to wait for the RTA’s decision for substantial length of time.

In fact, there is no provision of the FIRSEA which requires a Notice of Refusal to Amend (NORA) as a condition precedent for filing an appeal with the TAT within a literary interpretation of Paragraph 13(1) of the Fifth (5th) Schedule to the FIRSEA. In this regard, Paragraph 13(1) provides thus:

“a person aggrieved by an assessment or demand notice made upon it by the Service or aggrieved by any action or decision of the Service under the provisions of the tax laws referred to in paragraph 11, may appeal against such decision or assessment or demand notice within the period stipulated under this Schedule to the Tribunal”

Thus, under Paragraph 13(1) of the Fifth (5th) Schedule to the FIRSEA, a taxpayer is allowed to appeal directly to the TAT against an RTA's assessment within the 30 days time limit without waiting for the RTA’s Notice of refusal to amend. This position has support in *MAS Everest Hotels vs AG, Lagos State*¹ and *Shell v FBIR*² However, Section 69(1) of the CITA provides thus:

“if any company disputes the assessment, it may apply to the Board by notice of objection in writing, to review and to revise the assessment made upon it.”

Further, the proviso to Section 69 of CITA also provides that:

“provided that if an applicant for revision under the provisions of subsection 1 of this section fails to agree with the board the amount at which the company is liable to be assessed, the Board shall give Notice of refusal to amend the assessment as desired by such company, and may revise the assessment to such amount as the Board may according to the best of its judgment determine, and give notice of the revised assessment and of the tax payable together with notice of refusal to amend the revised assessment.....”

From the above, a contrary view, i.e., that the issuance of a NORA by the RTA may constitute the point of finality where a dispute arises out of an assessment, and that until a NORA is issued, an aggrieved taxpayer may not approach the TAT, is evident. Support for this may likewise be found in the old case of *FBIR vs Manila Industrial Security Services*³ where the erstwhile Federal Revenue Court non-suited the taxpayer for an unripe suit absent a NORA. Complicating the issue is the fact that Section 69 of CITA may not be the actual provision that makes the filing of a notice of objection and the issuance of a NORA a condition precedent to an appeal, in view of the provisions of Section 72 of CITA. Further, it appears that Section 72 of CITA has been repealed by Section 18 of Companies Income Tax (Amendment) Act 2007 (CITAA). Therefore, it now appears that Section 18 of CITAA actually states that the FIRSEA is the governing code for appeals. In detail, Section 18 of CITAA (2007) provides that: ***“Appeals shall be as provided under Federal Inland Revenue Service Act”*** It follows necessarily that a repealed statutory clause cannot override a subsisting statute. Since the FIRSEA, a subsisting law, does not require prior compliance with the tax authorities’ in-house review process before activating the TAT’s jurisdiction, the remaining value of Section 69 of CITA 2004 is that the aggrieved taxpayer may choose to exhaust his option at the tax authorities’ in-house review mechanism, or decide to appeal directly to the Tax appeal Tribunal. A combined reading of Paragraph 13 of the Fifth Schedule and Section 68 of the FIRSEA makes the NORA no more mandatory. In this regard, Section 68(1) of FIRSEA provides that:

“Notwithstanding the provisions of this Act, the relevant provisions of all existing enactments including, but not limited to, the laws in the first schedule shall be read with such modifications as to bring them into conformity with the provisions of this Act”.

Further, Section 68(2) of FIRSEA also provides that:

“if any provisions of any other law including the enactments in the first schedule are inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the provisions of that other law shall to the extent of the inconsistency be void”.

Oando Supply & Trading Ltd v FIRS (Oando I)⁴ decision gives an aggrieved taxpayer four options when faced

¹ (1996) 8 NWLR (Pt 466) 256

² 2 TLRN 1 at 12

³ (1976) 2 FRCR 116

⁴ (2011) 4 TLRN 113 (*Oando I*)

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 Board within 30 days of the receipt of such assessment¹.
- c) Appeal against such assessment to the Tax appeal tribunal².
- d) Pursue option b and c above.³

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.⁴ Prior to the ruling of the Tribunal in *Oando I*, a taxpayer under Section 69(1)&(2) of CITA has within 30 days to make an objection to the assessment by sending a notice of objection in writing to the FIRS, but there are no stipulated time limit for the FIRS to respond to such objection. This lacuna on part of the law creates a situation where an aggrieved and expectant taxpayer's notice of objection can spend several months with the Tax authorities without any review or NORA from them. Consequentially, the ruling in *Oando I* has a serious effect on this especially as it alters this position.⁵

Paragraph 13(2) of the Fifth Schedule to FIRSEA provides that:

"an appeal under this schedule shall be filed within a period of 30 days from the date on which a copy of the order or decision which is being appealed against is made, or deemed to have been made by the service....."

The effect of this is that a decision or order of the FIRS can be deemed, because by using the words "*or deemed to have been made by the service.*" the lawmakers contemplate something other than a published decision. An order or decision deemed to have been made is one which was not in fact made, but which some other authority treats as having been made. Some other authority must do the deeming, and the other authority in this case is the TAT. With this express power expressly stated in Paragraph 13(2), the TAT in *Oando Court* ruled on this issue by saying

"Where a taxpayer sends a notice of objection to the FIRS, the latter, if they do not agree with the taxpayer's objection in any material particular, must issue their Notice of Refusal to amend (NORA) within a reasonable time-we suggest 90 days. This Tribunal can treat FIRS' failure to issue NORA within a reasonable time or at all as a deemed decision' (within the meaning of paragraph 13(2) of the fifth schedule to the FIRS Act) refusing amendment in terms of the taxpayer's objection or at all".

Justifying the decision, the *Oando Court* reasoned that where no time limit is stipulated for the taking of a step required by law, the law does not lie prostrate but has always imposed a reasonable time. What a reasonable time is in each particular case depends on the circumstances of the case. In the present case, the Tribunal drew inspiration from the time allowed the taxpayer to send his notice of objection which is 30 days⁶, and thus expected the tax authorities to respond in due form of law(i.e. issuance of NORA) within a reasonable time - which they feel is 90 days considering their busy schedule. Failure by them to serve the NORA within 90 days of receipt of the taxpayer's objection would be deemed to mean their refusal to amend. In the words of the Tribunal, "*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*".

It is therefore submitted that in Nigeria, on the practice side, where a taxpayer has filed an objection, the FIRSEA and the TAT Procedure Rules must make provisions for **Positive Deeming provisions** where the RTA delays in ruling on an objection. We may take cue from the Ugandan Income Tax Act (UITA).⁷ Under Section 98 of the Ugandan Income Tax Act, the Commissioner shall prepare an assessment list stating the taxpayer's name, address amount chargeable, the income upon which the assessment has been made and the amount of tax payable. For personal income taxes, a taxpayer who is dissatisfied with an assessment may lodge an objection with the Commissioner within forty-five (45) days after service of the notice of assessment.⁸ If, during the 45 day window for appealing, the taxpayer were outside Uganda, sick or has other reasonable excuse, the 45-day limit may be extended.⁹ Thereafter, Commissioner, after considering the objection, may allow the objection made by a taxpayer either in whole or in part and amend the assessment accordingly, or disallow the objection.¹⁰ Where an objection decision has not been made by the commissioner within ninety (90) days after the taxpayer

¹ Section 69(2)(a) of Paragraph 13 of the Fifth Schedule, FIRS Act.

² Paragraph 13 of the Fifth Schedule, FIRS Act.

³ Ayoleke Owolabi, *Oando v FIRS: Implications for Tax Policy, Law and Administration in Nigeria*, LLM Thesis, University of Lagos.

⁴ *Ibid.* per Ayoleke Owolabi.

⁵ *Ibid.* per Ayoleke Owolabi.

⁶ Section 69(2) CITA

⁷ Income Tax Act, CAP 340 Laws of Uganda of 1997, (UITA).

⁸ Section 99(1) UITA.

⁹ Section 99(3) UITA.

¹⁰ This is called the "Objection Decision" under Section 99(5) UITA.

has lodged his objection, the taxpayer, by notice in writing, may *deem*/elect to treat the commissioner's delay as a decision to *allow* the objection.¹ Further, where the taxpayer makes such an election, he is treated as having been served with a position notice of objection decision on the date that election was served on the commissioner.²

According to Kasimbazi

This [delay] may be prejudicial to a taxpayer especially where the objection is due to excessive taxation. The power of the [Commissioner] has to be cautiously exercised, taking into account other rights.³

It is also necessary to re-examine section 38 VAT Act.⁴ Although the point made previously by Wole Obayomi⁵ on shifting emphasis from income to consumption taxes as espoused in the National Tax Policy was succinctly made, this will require better coordination that the Federal Government of Nigeria and the Coordinating Minister seem to appreciate.⁶ In this regard, para 4.3 of the National Tax Policy – Final DRAFT provides thus:

“It is proposed to have a shift from direct to indirect taxation within the non-oil sector in order to stimulate economic growth in the sectors, whilst still meeting revenue requirements. This is particularly necessary, given that oil revenues are no longer viewed as a sustainable source of revenue and there is the urgent necessity to diversify tax revenue. In this regard, it is proposed that there should be lower rates of direct taxes such as Companies’ Income and Personal Income tax to reduce the cost of doing business in Nigeria by increasing cash flow and disposable income for corporate entities and individuals alike.”⁷

However, Wole Obayomi seems to have support with Sanni with the view that the Nigerian Minister of Finance was not making a case for the increment of VAT rate on the basis of user charges, but rather, basically underscoring the need for government to raise revenue through alternative means other than oil which appears inevitable if Nigeria were to survive the sliding oil revenue.⁸ VAT increment will however not significantly improve the revenue profile of the Federal Government since bulk of the revenue goes to the Federal, State and Local Governments based on the following ratio 20:50:30.⁹

Yet, Sanni went on to disagree with Wole Obayomi concerning the latter's interpretation of Section 38 VAT Act, a section which relates to the "power of the Minister to vary the Schedule". In Sanni's view, the VAT rate is now *presently* contained in section 4 of the VAT Act, and no longer in the Schedule when VAT Decree was first promulgated, and, therefore it is clear that section 38 VAT Act can no longer be used as the legal springboard to increase VAT rate on the principle that taxing statute are construed strictly.¹⁰

Sanni also agreed with the present author that effecting the proposed increment would require the amendment of VAT Act notwithstanding section 38, since section 38 is part of the relics of military rule, and so stands the risk of being declared unconstitutional, null and void on the basis that the determination of tax rate is legislative in nature under sections 58 & 59 of the under the 1999 Constitution and not delegable.¹¹

While section 38 has not been declared to be null and void, it has practically otiose following the futile attempt by the former Minister Nnenadi Usman to leverage on section to increase the VAT rate in the twilight of erstwhile President Obasanjo's administration, and so it is surprising that the section survived the 2007 Amendment.¹² According to Sanni

I am optimistic that the provisions would be given a decent burial when an opportunity presents itself

¹. This is the deeming provisions, which in this case positive default rule in favour of the taxpayer. See, Section 99(7) UITA.

². Section 99(8) UITA.

³. See, Emmanuel Kasimbazi, TAXPAYERS' RIGHTS AND OBLIGATIONS: ANALYSIS OF IMPLEMENTATION AND ENFORCEMENT MECHANISMS IN UGANDA, DIIS Working Paper no 2004/12, at page 34 (ed. DANISH INSTITUTE FOR INTERNATIONAL STUDIES). Available at: http://www.diis.dk/files/Publications/WP2004/emk_taxpayers_obligations_uganda.pdf. (Last visited on 23rd October 2014) at 41. (Hereinafter "Kasimbazi").

⁴. See, Abiola Sanni, in his comments (Hereinafter "Sanni II") on Olumide K. Obayemi, *Policy Consideration in Raising Taxes in Nigeria*, in *Thisday Lawyer* of Tuesday, February 3rd, 2015 at Page 13 ("Obayemi III"), contained in an electronic mail of Wednesday, February 11th, 2015 at 05.37hours. Last visited on February 11th, 2015.

⁵. See, Wole Obayomi, *supra* note 74.

⁶. See Sanni II, *supra* note 278.

⁷. See para 4.3 of the National Tax Policy, *supra* note 17.

⁸. See Sanni II, *supra* note 278.

⁹. *Ibid.*

¹⁰. *Ibid.*

¹¹. *Ibid.*

¹². See, Taofeeq Abdulrazaq, Legal implication of the notice on increase in VAT, in *Guardian (Nigeria) Newspaper* of June 26, 2007. Available at: <http://www.guardiannewsngr.com/law/article01/260607>. Last visited on February 11, 2015. ("Abdulrazaq III").

to amend the VATA.

A genuine effort to increase VAT rate will focus on engagement of the beneficiaries (the States and taxpayers) and sponsoring a VAT Amendment Bill as an executive bill. Until that happens, whatever any government functionary, no matter how exalted is saying is nothing but a declaration of future intention which is yet to crystallise to a definite proposal.¹

IX. Comparative Analysis of Tax Appeal Procedure Existing in Similar Jurisdictions

a. United States of America

To expedite appeals, Nigeria may borrow the use of small claims courts that allow the expedited hearings of little tax disputes subject to waiver of appellate rights.

In the United States, tax litigation usually involves disputes over federal income tax and penalties—known as “deficiency”—i.e., the excess of the amount the IRS contends is the correct tax over the amount the taxpayer showed on the return—in both cases, without regard to how much has actually been paid.² Tax disputes commence after an examination of a taxpayer’s return by the Internal Revenue Service (IRS). If the IRS does not agree with the taxpayer, the IRS will issue notices to the taxpayer. If, after issuance of a series of preliminary written notices and a lack of agreement between the taxpayer and the IRS, there is no resolution, the IRS will formally “determine” the amount of the “deficiency” and will then issues a formal notice called a “statutory notice of deficiency,” aka “ninety day letter”.³

Clearly, once the IRS determines the tax amount, but before the formal IRS assessment of the tax, a statutory notice of deficiency will be issued. What follows is that upon issuance of the statutory notice of deficiency, the taxpayer generally has 90 days to file a Tax Court petition for “redetermination of the deficiency”. Where the taxpayer waives his right to appear before the US Tax Court with a petition for redetermination of the deficiency issued by IRS—i.e., where no petition is timely filed, the IRS may then statutorily “assess” the tax, by administratively and formally recording the tax on the books of the United States Department of the Treasury.

This formal statutory assessment is a critical act, as the statutory tax lien that later arises is effective retroactively to the date of the assessment, and encumbers all property and rights to property of the taxpayer.

Appeals against decisions of the Internal Revenue Service (IRS) are made to a variety of independent courts, depending on the issue being disputed. For example, appeals against a tax liability are made to the United States Tax Court (TC). Where the disputed liability is less than about €37,000 (\$50,000) for any one tax year, the taxpayer has the option of choosing a small claims procedure. This procedure involves less formality, a relaxation of the rules of evidence and a greater choice of venues. However, it also means that there is no further right of appeal against decisions of the TC to the United States Court of Appeals.⁴

The United States Tax Court provides a judicial forum in which affected persons can dispute tax deficiencies determined by the Commissioner of Internal Revenue prior to payment of the disputed amounts. The jurisdiction of the Tax Court includes, but is not limited to the authority to hear: tax disputes concerning notices of deficiency, notices of transferee liability, certain types of declaratory judgment, readjustment and adjustment of partnership items, review of the failure to abate interest, administrative costs, worker classification, relief from joint and several liability on a joint return, and review of certain collection actions.

The US Congress later amended the Internal Revenue Code, by inserting a new Section 7482, now providing that decisions of the Tax Court may be reviewed by the applicable geographical United States Court of Appeals other than the Court of Appeals for the Federal Circuit.⁵

As stated above, “Small Tax Cases” are conducted under Internal Revenue Code section 7463, and generally involve only amounts in controversy of \$50,000 or less for any one tax year. The “Small Tax Case” procedure is available “at the option of the taxpayer.” These cases are neither appealable nor precedential.⁶

Payment of the disputed liability can be deferred pending the finalisation of the appeal process. Hearings in the TC are held in public. The documents used as evidence and the transcript of the proceedings are available for public viewing.⁷

b. Tiered Tax Tribunal system in the United Kingdom (“UK”)

The Tax Tribunal system in the United Kingdom is administered by the Ministry of Justice. It is a tiered court process, and, as such, cases are allocated to each tier based on their complexity. Specifically, cases are

¹. See Sanni II, *supra* note 278.

². See, Olumide K Obayemi, *A brief examination tax practice and procedure in Nigeria*, Friday, February 07, 2014. Available at: <http://www.proshareng.com/news/22200.html>. Last visited on 22 February, 2015 (“Obayemi VI”).

³. See 26 USC, Section 6212

⁴. See, Irish Submission, *supra* note 9, at 20.

⁵. See 26 USC, Section 7482.

⁶. See 26 USC, Section 7463.

⁷. See, Irish Submission, *supra* note 9, at 20.

categorized into Default Paper, Basic, Standard and Complex.¹ First-tier Tribunal (Tax) hears appeals against decisions relating to tax made by Her Majesty's Revenue and Customs (HMRC). Appeals can be made by individuals or organizations, single tax payers or large multi-national companies. Appeals against HMRC decisions in relation to tax heard in the Tax Chamber include: Income Tax, Corporation Tax, Capital Gains Tax, Inheritance Tax, Stamp Duty Land Tax, PAYE coding notices, National Insurance Contributions, Statutory Payments, VAT or duties such as custom duties, excise duties or landfill tax, aggregates or climate change levies, or, the amounts of tax or duty to be paid, against penalties imposed upon them and against certain other decisions.

According to Olujimi Adedotun, the tax appeal process in the UK, is similar to that of the United States and Nigeria. Her Majesty Revenue and Customs (HMRC) will notify the taxpayer of the HMRC's assessment of additional tax against the taxpayer or a decision to disallow an expense or deduction as claimed by the taxpayer.² The taxpayer may then petition the HMRC to amend the tax assessment or decision. If the HMRC refuses to amend, the taxpayer has the right to appeal to the Tax Tribunal. Thus, where any decision made by HMRC can be appealed, a taxpayer would be informed of his right to appeal.

There are two (2) options available to the taxpayer, which are either to request an independent review or to appeal directly to the Tax Tribunal.

Where the taxpayer chooses an independent review, such review would be conducted by an officer of HMRC who did not previously handle the case and a decision would be communicated to the taxpayer within 45 days. Adedotun also stated that cases in the Default Paper category are usually decided without a hearing once the parties have submitted documents relevant to their case. The Tribunal will base its decision on the documents submitted and inform the parties of its decision as soon as it completes its review. The procedure for cases in the Basic category is similar.³ However, in addition to the documents that may have been submitted to the Tax Tribunal, the case is decided at an informal hearing where the parties present their case. It is typical that judgment is given at the end of the hearing. For cases in the Standard and Complex categories, there is also a frontloading of evidence to the Tax Tribunal. The Tax Tribunal reviews the evidence prior to the hearing date. On the chosen date, after both parties have made their case, the Tribunal judge would either give judgment on the same day or may decide to deliberate further on the matter. In the latter case, the Tribunal would communicate its decision within 28 days.

X. Recommendations

Section 59 of the Federal Inland Revenue Establishment Act (FIRSEA or the Act) in 2007 established the Tax Appeal Tribunal (TAT), and the TAT is charged with the power to settle disputes arising from the operation of relevant tax legislation in Nigeria.⁴ The FIRSEA covers all taxes mentioned in the First schedule to the Act.

As stated earlier, in setting up the TAT, the government's objectives included a desire to engender public confidence in and to assist the administration of the tax system in Nigeria, and under the present structure, the TAT is a pseudo tax court that bridges the gap to full litigation between taxpayers and revenue authorities—an attempt by the government to circumvent the delays associated with hearing of cases at the Federal High Court (FHC) and ensure that tax matters are adjudicated on by a focused group of knowledgeable professionals.⁵

The TAT is presently bedevilled by slow pace of resolution of matters before it. This is due to legislative provisions and the use of adjournments to scuttle the easy movement of cases. According to Olujimi Adedotun

*Paragraph 4 of the Order establishing the TAT provides that the TAT shall have a minimum of 1 sitting per quarter. However, Order XV of the TAT (Procedure) Rules grants the TAT the power to conduct its proceedings in a manner it deems fit to ensure speedy dispensation of justice. This provision provides the flexibility the TAT needs to dispense with cases in a fair and expeditious manner. This is in keeping with an efficiently-administered tax system and one of the primary reasons for setting up the TAT in the first place. However, the reality on ground is a bit different. The pace of proceedings from the filing of notices of appeal to receiving actual judgment is a protracted one. This article focuses on the attendant implications of the slow pace of proceedings at the TAT. To put the issue in perspective, this article first summarises the comparable process in the United Kingdom (UK) and then contrasts it with the system in Nigeria. Thereafter, it addresses some of the observed and potential implications of the protracted appeal process for tax administration in Nigeria.*⁶

It is recommended that the name of TAT be changed to the Tax and Duty Appeal Tribunal. Internationally, bodies adjudicating indirect and direct taxes usually refer such in their nomenclatures towards

¹. See, Obayemi VI, *supra* note 288.

². See, Olujimi Adedotun, *supra* note 3.

³. *Ibid.*

⁴. *Ibid.*

⁵. *Ibid.*

⁶. *Ibid.*

validating their jurisdictional scope. Since the Fifth Schedule to the FIRSEA of 2007,¹ confers on TAT jurisdiction over disputes arising from, *inter alia*, Stamp Duties Act,² we submit that the Tax Appeal Tribunal be renamed as Tax and Duty Appeal Tribunal to effectively announce that disputes on custom, excise and duties are also adjudicated before the Tribunal

Second, the TAT must be given full control of its procedure, processes and administration. The TAT must be divested from the Federal Ministry of Finance and transferred to the Office of the Federal Ministry of Justice. Since the Finance Ministry is charged with government's fiscal policies, it is advised, for semblance of neutrality and independence of TAT, that TAT's members be chosen by the Minister of Justice. As to the listing of cases, transferring control of the listing process from Revenue to the Appeal Commissioners could help to minimise delays in the listing of appeals for hearing once an appeal has been lodged – provided the new arrangements do not lead to a significant number of additional cases seeking a hearing.

Third, we recommend that the TAT must balance independence with accountability, as the need for the Appeal Commissioners to be independent should be balanced with the appropriate degree of accountability. The Appeal Commissioners should be accountable to the Minister for Justice for their own performance and that of their Office and be required to submit an Annual Report to the Minister which should be laid before the Houses of Senate and Representatives. This Annual Report should contain the information required to effectively assess the performance of the appeal process. The effective assessment of the performance of the appeals process would be improved by the publication of reliable statistics. While Revenue publishes some data in its own Annual Report, it is desirable that there be a statutory basis for relevant information to be included in the proposed Annual Report of the Appeal Commissioners. This would include, for example,

- *the number of appeals lodged, settled and awaiting hearing,*
- *the particular tax or duty involved,*
- *the number of appeals determined and whether they were determined in favour of Revenue or the taxpayer,*
- *whether the taxpayer or Revenue had legal representation at the hearing,*
- *the number of written determinations issued and pending,*
- *the number of determinations appealed to the courts,*
- *the number of determinations published,*
- *the number of days between the lodgement and hearing of an appeal,*
- *the length of hearings,*
- *the number of days for which written determinations are pending following the completion of a hearing, and*
- *the number of days between the determination of appeals and the completion of a case stated for the High Court.*³

There must be little delay to hearing and disposition of all tax appeals. We agree with Olujimi Adedotun that the TAT Rules be amended:

Changes to the TAT Rules

*As already mentioned, a much needed provision would be one that directly or indirectly addresses the duration of proceedings. The current procedure of front-loading evidence could be better leveraged by ensuring that the panels would have already considered the evidence submitted by both parties. This would then restrict the sittings to adoption of statements under oath and cross examinations of witnesses. Where the parties have sufficiently documented and referenced their case in the processes submitted, the panels could form a view early in the process, and use the sittings as opportunities to glean corroboratory information. Incessant adjournments should also be dealt away with. A specific provision in the TAT Rules limiting the time within which judgment is to be given would have the effect of ensuring that the process is reworked accordingly.*⁴

Thus, we propose for the development of processes to minimise delays and the development of customer service standards relating to the timing and location of appeal hearings.

Further, we propose that the efficiency and effectiveness of the appeal process can be improved by formalising a case management procedure and imposing certain disciplines on all of the parties to the process, including the Appeal Commissioners.

As to the delays in the provision of determinations and the lack of written determinations, we propose the imposition of a statutory time limit on an appeal by way of a case stated, underpinned by sanctions for not

¹. See, *TAT Executive Brief*, *supra* note 19.

². The Stamp Duties Act, Cap S9 Laws of the Federation of Nigeria 2004.

³. See, Irish Submission, *supra* note 9, at 10.

⁴. See, Olujimi Adedotun, *supra* note 3.

meeting this time limit. The Federal High Court rules could be adapted for this purpose. The new rules should provide that where the party requesting the case stated does not prepare it within three months, the other party may prepare it, and, if the case stated has still not been prepared after a further three months, the Federal High Court Judge may do so or may decide to grant more time or treat the request for a case stated as withdrawn. Another possibility is to allow either of the parties to the appeal to make an application to the High Court to dismiss the appeal where the case stated has not been completed within a specified timeframe.

Further, based on historical and contextual affinity with England, perhaps Nigeria could borrow from the United Kingdom's tax appeal model. The appeal system in the United Kingdom (UK) is a good example of a system that has the features that are desirable, i.e., demonstrably independent, with procedures that are as simple as possible but also adaptable to the requirements of the case, speedy and transparent.¹ This is in line with the observations of Olujimi Adedotun:

Review of Existing Appeals

It may also be expedient for the revenue authorities to consider cases where there is scope to settle differences outside of the appeal cases. There are instances where cases have been appealed because the parties shared different views which could not be harmonised due to personality clashes or facts surrounding such cases. It is possible that due to the passage of time, emotions would have sufficiently cooled for parties to revisit the issues in contention and find a common ground based on provisions of the tax legislation. For instance, cases where a taxpayer is not contesting its liability to additional tax but is instead aggrieved with the manner in which the RTA has arrived at the alleged additional tax liability, can be revisited. Speedy resolution again, would ensure that Government makes recoveries sooner rather than later.²

Clearly, Nigeria can benefit from the UK model which is a flexible and adaptable tax and duty appeal system under which cases are dealt with in the most efficient way for each particular type of case.³ In the UK, this is particularly evident in the requirement to allocate cases to one of four categories that range from *simple* cases that do *not* require a hearing down the spectrum to the *complex* cases requiring a lengthy formal hearing.⁴ The UK tax appeal system also allows for a considerable degree of informality in cases where (a) the point at issue is straightforward or (b) the circumstances of the taxpayer are such that a formal approach would not be warranted.⁵

It therefore follows that the categorisation of a case as 'complex', may mean that the case bypasses the First-Tier Tribunal and proceeds straight to the Upper Tribunal (essentially High Court level) where it may be heard by a panel with legal and other relevant expertise.⁶

This author hereby makes a bold request for amendment of the TAT Rules to allow this kind of flexibility of fast-tracking complex cases to the Federal High Court (FHC) rather than the present system whereby complex and technical tax appeals currently proceed through successive levels of the appellate system, which may involve restating the facts of a case, either before the FIRS, the TAT, or in a case stated for the FHC.⁷

Therefore, we propose the following **First-Tier Tribunal** and **Upper Tribunal** systems to be adopted into the Nigerian tax appeal jurisprudence.

a. First-Tier Tribunal

When the Tribunal receives a notice of appeal, it must give a direction allocating the case to one of four categories as part of its case management process. These categories are:

- ***Default paper: this category is used for simple appeals that are generally decided by way of written submission although the parties can request a hearing if they wish.***
- ***Basic: cases in this category are generally decided after a hearing with minimal exchange of documents before the hearing.***
- ***Standard: this category is used for cases that require more detailed case management that are decided after a hearing.***

- ***Complex: this category is used for the more complicated cases that require detailed case management. The Tribunal can only categorise a case as 'complex' if it considers that the case:***
 - ***will require lengthy or complex evidence or a lengthy hearing;***
 - ***involves a complex or important principle or issue; or***
 - ***involves a large financial sum.***

¹. See, Irish Submission, *supra* note 9, at 3.

². See, Olujimi Adedotun, *supra* note 3.

³. See, Irish Submission, *supra* note 9, at 3.

⁴. *Ibid.*

⁵. *Ibid.*

⁶. *Ibid.*

⁷. *Ibid.*

A taxpayer who is aggrieved by a decision of the First-Tier Tribunal may appeal the decision to the Upper Tribunal. However, such an appeal is not an absolute right and he or she must first get permission from the First-Tier tribunal. If the right to appeal is refused, the taxpayer may seek permission from the Upper Tribunal. Appeals must be on a point of law.

b. Upper Tribunal

The Upper Tribunal is intended, in broad terms, to be of equivalent status to the High Court. The judges of the Tax and Chancery Chamber of the Upper Tribunal are High Court judges who have particular experience in tax, charity and finance. The Upper Tribunal is a court of record, creating binding precedents that must be followed by the First-Tier Tribunal. It is mainly involved in hearing appeals from the First-Tier Tribunal. It also hears as a court of first instance certain cases that have been categorised as complex (thus bypassing the First-Tier Tribunal hearing). These tend to be cases in which the disputed issue is a complex point of law rather than the facts of the case.

Appeals from the Upper Tribunal to the Court of Appeal must be on a point of law. Such appeals require permission from the Upper Tribunal. If the Upper Tribunal refuses permission to appeal, permission may be sought from the Court of Appeal.

The supervisory roles of the Judges must be enhanced to speed up the hearing of all appeals. Thus, the author also argues for the introduction of the sanction and cost regime to instil discipline and rule of law in the tax system, and, *ipso facto*, speedy resolution of all appeals. Generally, the tax and duty appeal system operates within the parameters of established rules and procedures and has sanctions for failure to comply with these.¹ This facilitates the active management of cases towards the quickest possible resolution, as a Tribunal can strike out a case for failure to comply with its directions and deter unreasonable behaviour in relation to the legal process by awarding costs against a party for such behaviour.² However, as it has been noted, there are other mechanisms in place that ensure that the appeal process is not unnecessarily prolonged, such as:

- *there is no absolute right to appeal a Tribunal decision to the next level of the appellate system,*
- *cases can be struck out for failure to comply with a Tribunal's rules and procedures,*
- *costs can be awarded against a party who abuses the appeal process, and*
- *payment/repayment of disputed liabilities is not automatically deferred pending the final outcome of the appeal process.*³

The above-mentioned features are an important safeguard in ensuring that the appeals process is only used for the purpose for which it was intended, i.e., the resolution of genuine disputes and is not used tactically by some appellants as a means of delaying or avoiding payment.⁴

It is also submitted that public hearings and publication of decisions would certainly enhance public confidence that the tax system is being administered and the law, including the imposition of penalties, is being applied in an even-handed way.⁵

The composition of the panel of appeal commissioners must be streamlined and enhanced to attract the best brains from the academia and intelligentsia.

Composition of the tribunal members

*It would be better to start from the beginning. A beginning could be the need to ensure that the reconstituted panels are composed of independent and knowledgeable tax lawyers/experts. This would ensure that issues are handled with the dispatch that they merit. The reconstituted panels may also consider a means of streamlining cases heard or the manner of hearing to ensure speedy resolutions of appeals. Knowledgeable panels are also more likely to appreciate the commercial context of the TAT process both from the taxpayers' and government's perspectives.*⁶

¹. *Ibid.*

². *Ibid.*

³. *Ibid.* at 3-4.

⁴. *Ibid.* at 4.

⁵. *Ibid.*

⁶. See, Olujimi Adedotun, *supra* note 3.

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