

## Tax Appeal Tribunal Jurisdiction: Analytical Discuss on the Two Conflicting Decision of the Federal High Court

Mohammed Bashir Tanko

Messr Tanko & Co., No J1 Zaria Road, Kawo Kaduna, Tax Consultant, Llb, Mbcl, (Buk) B1  
tbaashiir2007@gmail.com

### Abstract

An effective mechanism for the tax dispute resolution is one of the features of a good tax system as rightly put it by the National Tax policy that the tax appeal process is an integral and important part of the tax administration process, it shall therefore be the responsibility of tax authorities to ensure that the tax appeal process is easily accessible to taxpayers and all its processes and procedures simplified. Tax Appeal Tribunal was established by section 59 of the Federal Inland Revenue Service (Establishment) Act in order to ensure fairness and transparency of the tax system, minimize delays in the adjudication of the tax matters in our traditional Courts. However, the jurisdictional conflict cause by the two different decisions of the Federal High Courts over TAT seem to bring a set back on the tax appeals processes in Nigeria and pending the determination of the appellate Court over the jurisdictional issue, the fate of TAT is at stake.

### INTRODUCTION

Tax Appeal Tribunal (TAT) is established in accordance with Section 59 (1) of the Federal Inland Revenue Service (Establishment) Act 2007. TAT formally took off pursuant to the Tax Appeal Tribunals Establishment order 2009 by the minister of finance, Federal Republic of Nigeria as published in the Federal Government Official Gazette No. 296, Vol. 96 of 2<sup>nd</sup> December, 2009. By this enactment, TAT replaces the former body of Appeal commissioners (BAC) and Value Added Tax (VAT) Tribunals.

Tax Appeal is an important component of the tax system and the new tax policy offers a step by step objection and appeal process which gives the complainant an opportunity to explore other dispute resolution mechanisms before gaining access to the regular Court System.

### JURISDICTION OF TAX APPEAL TRIBUNAL

Tax Appeal Tribunal is set up by the Federal Government to adjudicate on all tax disputes arising from operation of the various Tax Laws as spelt out in the fifth schedule to the FIRS (establishment) Act 2007<sup>(1)</sup>. Specifically, the fifth schedule, and in accordance with section 59(2) of the FIRS Act, states that TAT has jurisdiction over disputes arising from the under listed laws:

- Companies Income Tax Act
- Personal Income Tax Act
- Petroleum Profit Tax Act
- Capital Gains Tax Act
- Stamp Duties Tax Act
- Value Added Tax Act
- Taxes and levies (approved list for collection) Act, as well as other laws, regulations, proclamations, government notices or rules related to these Act<sup>(2)</sup>.

### STATUTORY PROVISIONS TAX APPEAL TRIBUNAL

The constitution of the Federal Republic of Nigeria, 1999 (as amended) confers on the National Assembly the authority to make laws on matters bordering on the taxation of income, profits and capital gains; amongst other matters<sup>(3)</sup>. The same constitution under section (6(4) provides for the establishment of other Courts or tribunals by the Federal or State legislature where the need arises<sup>(4)</sup>. The National Assembly is further empowered to legislate on any matter that are incidental or supplementary to the matters of taxation, etc; which matters are enumerated in the exclusive legislative list, second schedule, part 1 of the 1999 constitution.

In furtherance of the above ancillary legislative authority, the Federal Inland Revenue Service (Establishment) Act, 2007 established the Tax Appeal Tribunal to settle disputes arising from the collection of taxes accruing to the Government<sup>(5)</sup>. The tribunals is not meant to usurp the traditional role of the judiciary as the custodian of the judicial powers of Nigeria, but only to serves as a first point of call for any aggrieved party<sup>(6)</sup>. Any person dissatisfied with a decision of the Tax Appeal Tribunal is entitled to appeal against such decision, only on point of law, to the Federal High Court. Further appeals from such a decision are to be made to the Court of Appeal, then to the Supreme Court, which is the highest-Court in Nigeria<sup>(7)</sup>.

## THE TWO CONFLICTING DECISIONS OF THE FEDERAL HIGH COURT

1. CASE ONE-TSKJII CONSTRUCES INTERNACIONALS SOCIODADE LDA VS. FEDERAL INLAND REVENUE SERVICES 2014 T.L.R.N (VOL.13) PAGE 1.

TSKJ, a non-resident tax payer had obtained a contract for the construction of the NLNG, and used its subsidiary TSKJ Nigeria, to render logistic support services. TSKJ later filed self-assessment forms on deemed profits and made deductions of recharges being the cost-paid to its local subsidiary. The FIRS disallowed the said deductions as they were not allowed under the turnover basis assessment, and issued additional assessments. TSKJ objected and filed an appeal with TAT, asking that the additional assessment be set aside. The TAT dismissed TSKJ claims, following which an appeal was filed at the Federal High Court<sup>(8)</sup>.

### Court Decision

Upholding arguments of TSKJ counsel, the Abuja Division of the Federal High Court held that the jurisdiction of the Tax Appeal Tribunal usurped that of the FHC. Specifically, the FHC held that section 59 of and the fifth schedule to, the Federal Inland Revenue Service (Establishment) Act, 2007 which established the TAT conflicts with the provisions of section 251 of the 1999 constitution (as amended) which vests exclusive jurisdiction over matters of Federal taxation and Revenue on the FHC<sup>(9)</sup>. As a result of that conflict, the Court held the statute establishing the tax Appeal Tribunal, were null and void with the implication that the decision of the TAT was set aside. The TAT was further restrained from adjudicating on tax matters relating to the revenue of the Federal Government, with the Federal Minister for finance directed to disband all existing Tax Appeal Tribunals in Nigeria<sup>(10)</sup>.

2. CASE TWO-NIGERIA NATIONAL PETROLEUM COPORATION VS. TAX APPEAL TRIBUNAL & 3 ORS, 2014 T.L.R.N (VOL. 13) PAGE 39.

### Facts

The issue related to the NNPC being the agent of the Federal Government in collecting petroleum profits tax assessed against the contractors in OML 133, as well as the exact Education Tax liability for OML for the 2010 years.

### Court Decision

Federal High Court Lagos Division held that, the FIRSEA that established the Tax Appeal Tribunal was fundamentally different from VAT Tribunal Act that purportedly set-up the defunct VAT Tribunals. In defining the jurisdiction of the TAT and whether the FIRSEA violated the exclusive jurisdiction of the FHC under section 251 of the constitution, the Court started by examining section 251, which provides thus: “251 (1) Notwithstanding anything contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusive of any other Court in civil causes and matters.....” The Court then held that the tenor of the first portion of section 251 is to the effect that the National Assembly may make laws from time to time, such as to confer additional powers and jurisdiction on the FHC, and that intent of this provision is to enable legislature expand the jurisdiction of the FHC, and in no way can this provision be construed as empowering the National Assembly to ‘remove’, or ‘restrict’ the original jurisdiction of the FHC<sup>(11)</sup>. The Court compared the 2 statutes that setup the VAT Tribunal and TAT with such other, Para. 24 (1) of the 2<sup>nd</sup> Schedule of VAT Act Provided for an appeal from the VAT Tribunal to the Court of Appeal. In contrast, the TAT was created as an administrative framework by which the FBIR before resorting to the FHC by involving the FHC’s appellate jurisdiction. The Court therefore, held that the administrative framework did not derogate from the FHC’s original jurisdiction but rather “serves as a condition precedent to bringing an action before the Federal High Court”. Finally, the Court held that the legislature was right to have added an appellate jurisdiction to the FHC, in accordance with section 28 of the Federal High Court Act which provides thus:

The Court shall have appellate jurisdiction to hear and determine appeals from (a) the decisions of Appeal commissioners established under the companies Income Tax Act and the personal Income Tax Act in so far as applicable as Federal law.....<sup>(12)</sup>

In sum, since the TAT did not attempt to usurp the original jurisdiction of the FHC, its constitutionality was affirmed.

## ANALYSIS OF THE TWO DECISIONS

In TSKJ II’s case the basis for the judgment of the Court is that the Federal Inland Revenue Service (Establishment) Act No 13 2007 (FIRSEA) and the Tax Appeal Tribunals (Establishment) order of November 25<sup>th</sup>, 2009 (TAT order) under which the TAT was established conflicted with the exclusive jurisdiction of the Federal High Court conferred on it by section 251 of the 1999 constitution (as amended)<sup>(13)</sup>.

Per Ogunbiyi JCA held thus: the constitution is supreme, it is the organic or fundamental law and it is the grund norm of Nigeria. The Court has therefore the jurisdiction to declare any other law or Act inconsistent, invalid and therefore null and void. This is because the constitution has also been described as the fons et erigo..... Any Act which infrings or runs contrary to those organic principles or systems or provision must be declared to

be inconsistent<sup>(14)</sup>.

The Court in TSKJ II's case held that whilst not denying the desirability and efficacy of Tax Appeal Tribunals (TAT) in Nigeria's Tax Regime there is need for constitutional provisions to be enacted to give the legitimacy they lack.... In the absence of the constitutional provision empowering the Tax Appeal Tribunals, one cannot help but notice the conflict of its jurisdiction with that reserved for the Federal high Court by virtue of section 251 (1) (a) and (b) of the constitution of the Federal republic of Nigeria.

A lack of jurisdiction is a primary legal consideration that speaks to the heart of every matter before a Court. Without jurisdiction, a Court or an otherwise constituted body cannot hear a matter<sup>(15)</sup>. In *stabilini Visioni Ltd Vs. FBIR*,<sup>(16)</sup> the learned counsel to the appellant whose client dragged to the VAT tribunal for VAT arrears, argued that the tribunal lacked the jurisdiction to entertain the matter, it being an issue that has to do with the revenue of the Federal government, an exclusive preserve of the Federal High Court. The Court of Appeal relied on the Supremacy clause of the constitution as provided by section 1(1) and 1 (3) of the 1999 constitution and buttressed same with the case of *Orhiunu V. FRN* where it was held that where the constitution has given a jurisdiction, it cannot be lightly divested. Where it is intended to be divested it must be done by clear, express and unambiguous words and by a complete amendment of the constitution<sup>(17)</sup>.

**While in the NNPC VS TAT's case**, the basis of the judgment is that TAT is not Court within the meaning of section 6 of the 1999 constitution (as amended), but an administrative body set-up to determine preliminary matters before proceeding to the FHC. The Court while examining the jurisdiction of the TAT and whether the FIRSEA violated the exclusive jurisdiction of the FHC under section 251 of the constitution, the Court started by examining section 251(1) thus: notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other Court in civil causes and matters....<sup>(18)</sup>

As the Court noted the tenor of the first portion of section 251 is to the effect that the National Assembly may make laws from time to time, so as to confer additional powers and jurisdiction on the FHC, and that the intent of this provision is to enable the legislation expand the jurisdiction of the FHC, and in no way can this provision be construed as empowering the National Assembly to removes, or restrict the original jurisdiction of the FHC. This decision can be distinguish from VAT tribunal, while para 24 (1) of the 2<sup>nd</sup> schedule to the VAT Act provided for an Appeal from VAT Tribunal to the Court of Appeal, the TAT was created as an administrative framework by which taxpayers could resolve their tax disputes before resorting to the Federal High Court on appellate jurisdiction<sup>(19)</sup>. Relying on the case of *Orji V. DTM Nigeria ltd*<sup>(20)</sup>, where the appellate Court defined the issues, parties ought to exhaust that remedy before proceeding to the Federal High Court<sup>(22)</sup>.

word "deem" to mean treating a thing as being something it is not, or possessing certain qualities it does not possess, one can understandably agreed with the submission of Mr. Atake that the provisions of paragraph 20 (3) of the fifth schedule to the FIRSEA which deemed the tribunal to be a civil Court for all purposes as an acknowledgement that the Tax appeal Tribunal is not a Court. Here, one can say the legislature was right to have added an appellate jurisdiction to the FHC, in accordance with section 28 of the Federal High Court Act which provides that the Court shall have appellate jurisdiction to hear and determine appeals from (a) the decision of Appeal Commissioners established under the companies Income Tax Act and the Personal Income Tax Act in so far as applicable as federal law...<sup>(21)</sup> lastly, the Court stated that it preferred to follow the decision of the Supreme Court in *Eguamwense V. Amaghizemwen* and the persuasive decision of Federal High Court in *ocean & Oil Ltd. FBIR* that where a statute prescribes a legal line of action for determination of an issue be that an administrative matter, chieftaincy matter or a matter of taxation, the aggrieved party must exhaust all the remedies in that law before going to Court. Thus, the FIRS Act having provided an administrative channel through the Tax appeal Tribunal for determination of age-long disputes and collect the tax payments due to the Government without delay<sup>(24)</sup>.

## OBSERVATION

It is hereby observed as follows:-

1. That Tax Appeal Tribunal is purposely made in order to ensure fairness and transparency of the tax system, minimize the delays and bottlenecks in adjudication of tax matters in the traditional Court system and generally improve tax payers confidence in the tax system in Nigeria.
2. In the light of two conflicting decisions, it becomes inevitable to determine the fate of TAT, because the decisions of Courts of Coordinate jurisdiction are not binding on each other. Thus, until the appellate Court affirms one of the decisions the uncertainty in the forum to adjudicate a tax dispute by the tax payers continues which is not good for the country's tax system.<sup>(23)</sup>
3. That pending the resolution of the jurisdictional concerns around Tax Appeal Tribunal, it is imperative for the tax authorities- FIRS and state Board of Internal Revenue to consider alternative options to resolve these

## CONCLUSION

The objective of the Tax Appeal Tribunal may be hampered by the two conflicting decisions of the two judicial divisions of the Federal High Court. To remove the uncertainty over the constitutional authority of the Tax Appeal Tribunal to hear and determine tax Appeals in Nigeria by the Appellate Court has become a matter of urgency so as to determine the fate of the TAT and give taxpayers confidence in seeking redress on tax appeals.

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