

## THE COURT OF APPEAL'S PRONOUNCEMENT IN CNOOC & ANOR V NNPC & ANOR: A JURISDICTIONAL LANDMINE?

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### ABSTRACT

*The present article examined the various contradictory decisions which have been delivered by two separate trial courts in the Lagos division of the Federal High Court (FHC), on the constitutionality or otherwise of the jurisdiction of the Tax Appeal Tribunal (TAT) in Nigeria. Thus, whereas one court of the Lagos division of the FHC had held in NNPC v TAT & 3 Ors, validating the jurisdiction of the TAT, that TAT was not a court, but an administrative tribunal established by statute to resolve taxation disputes between taxpayers and the Federal Inland Revenue Service (FIRS), surprisingly, another court of the same Lagos division of the FHC, on the other hand, held otherwise, in the case of CNOOC & Anor v NNPC & Anor. Hence, since both Courts are of co-ordinate Jurisdiction, thus the two contradictory pronouncements created some doubts, uncertainty and confusion in the minds of stakeholders. Accordingly, it became imperative for the Court of Appeal, which is next in the hierarchy of courts in Nigeria, to make a pronouncement on the way forward, on the subject. The present article therefore x-rays arguments, laced with authorities, in support of the creation of the TAT as a necessary facilitator for resolution of tax disputes and conflicts, with the decision of the Court of Appeal Lagos Division, in CNOOC & Anor v NNPC & Anor, in perspective. However, the article concluded with a call that, even with the pronouncement of the Appellate Court, that it is not yet uhuru, for there is still need, and an urgent one, too, for legislative interventions, to review the extant statute creating the TAT, to embrace current agitations, demands and realities.*

**Keywords:** *tribunal, jurisdiction, co-ordinate, court, pronouncement.*

### 1.0. INTRODUCTION

#### 1.1. The case of NNPC v TAT & 3 Ors<sup>1</sup>

In the present case, the applicant, Nigeria National Petroleum Corporation (NNPC) was joined as a party in this tax matter before the Tax Appeal Tribunal (TAT), Lagos zone. (NNPC) challenged the jurisdiction of the TAT to determine the tax appeal. Alternatively, it sought an order striking it out as a party to the tax appeal before the TAT. The TAT dismissed the objection to its jurisdiction and granted the alternative prayer thereby striking out NNPC as a party to the tax appeal. Dissatisfied, NNPC applied to the Federal High Court (FHC), Lagos Division, for an order of *certiorari* to quash the decision of the 1<sup>st</sup> respondent (TAT) and an order of prohibition to prevent the respondents from continuing the proceedings. One of the issues formulated by the respondents for the determination of the Federal High Court, Lagos Division,

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<sup>1</sup>(2014) 4 CLRN 311

was whether the Tax Appeal Tribunal (TAT) has jurisdiction to determine the tax appeal brought before it.

In arguing this issue, the NNPC through its counsel, contended that by virtue of the provisions of Section 251(I) (a), (b), (a) and (b) of the 1999 Constitution, matters on disputes relating to taxation are within the exclusive jurisdiction of the Federal High Court (FHC), They further argued that any other body exercising adjudicatory powers over such lacked the jurisdictional competence to entertain any suit on such matters. It went further to submit, through its counsel, that the provisions of paragraph 11(I) and (2) of the Fifth Schedule to the Federal Inland Revenue Service (Establishment) Act, which confers adjudicatory powers on the 1<sup>st</sup> respondent (TAT) over matters and disputes in respect of taxation violated the express provisions of section 251(1) of the 1999 Constitution and are therefore void.

They further based their argument on decided authorities of *Stabilini Visinoni Ltd v FBIR*<sup>2</sup> and *Cadbury (Nig) PLC v FBIR*<sup>3</sup>. However, the 2nd and 3rd respondents, through their counsel, countered that the decisions sought to be relied upon by the NNPC to wit, *Stabilni Visinoni v. FBIR*<sup>4</sup> and *Cadbury Nig PLC v FBIR*<sup>5</sup> are distinguishable as they are based on the provisions of paragraph 24 (I), second schedule and section 20(2) &(3) of the Value Added Tax (VAT) Act<sup>6</sup> which had placed the VAT Tribunal and the Federal High Court (FHC) on equal footing as courts of co-ordinate jurisdiction by allowing appeals from VAT Tribunal to go directly to the Court of Appeal. They argued that, that was usurpation of the powers of the FHC as granted in Section 251(1) Act of the 1999 Constitution and was therefore void. They distinguished that from the provision of the FIRS (E) Act which established the TAT as an administrative tribunal through which taxpayers (and FIRS as well) could attempt to resolve their disputes with FIRS (or FIRS against the taxpayer) before appealing to the FHC. They therefore submitted that the establishment of the TAT and the subsequent powers conferred on it do not derogate from the jurisdiction of the FHC but rather serves as a condition precedent to bringing an action before the FHC

The FHC held validating the jurisdiction of TAT, that TAT was not a court of law, but an administrative tribunal established by statute to resolve taxation disputes between taxpayers and FIRS. The FHC stated as follows:

Even if the Tax Appeal Tribunal is manned by legal minds, it does not enjoy the status of court. It is like a retired justice of Supreme Court leading an arbitration. It does not elevate him to any status more than an arbitral tribunal. Therefore, the court is unable to agree with the applicant that the 1st respondent is acting in excess of jurisdiction and that only the Federal High Court has exclusive jurisdiction. Apart from the fact that Tax Appeal Tribunal is not a court, it is subject to appeal to the Federal High Court and is indeed supervised by the Federal High Court through judicial review as in the instant case. It is not like the Value Added Tax Tribunal that had triple jumped its decision to the Court of Appeal. Let me also say that this court prefers to follow the

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<sup>2</sup>(2009) 2 CLRN 269; (2009) 13 NWLR (pt 1157) 200; 1 TRNL 1

<sup>3</sup>(2010) 1 CLRN 215; (2010) 2 NWLR (pt 1179) 561.

<sup>4</sup>Supra

<sup>5</sup> Supra

<sup>6</sup>Chap V1, *Law of the Federation of Nigeria* (LFN), 2014

binding decision of belgore JSC (as he then was) in *Eguamvense v Amaghiizenwen*<sup>7</sup>. and the equally persuasive decision of Auta C.Jin *Queen & Oil Ltd v FBIR*<sup>8</sup>.This court so follow the line of decision.

### 1.2. The Case of *CNOOC & Anor v NNPC & Anor*<sup>9</sup>

CNOOC Exploration and Production Nigeria Limited and South Atlantic Petroleum Limited (the Contractors)and the Nigerian National Petroleum Corporation (“The Corporation or NNPC”) are partners to OMI, 130 Production Sharing Contract (PSC) aimed at conducting petroleum operations in the contract area. Under the PSC, the Contractors bear the full cost of operations, prepare the petroleum profits tax returns on behalf of the PSC parties and determine the lifting allocation of available crude oil between the parties. The Corporation is required to file the petroleum profits tax (PPT) returns prepared by the contractors with the FIRS, and lift the amount of available crude oil in accordance with the lifting allocation prepared by the Contractors. NNPC however failed to file the returns prepared by the operator for the 2010 accounting period and rather unilaterally prepared and filed a different one.

On assessing the content Area for Tertiary Education Tax (EDT) and PPT, the FIRS served Notice of Assessment on the operators<sup>10</sup>. The operator objected to the FIRS assessments and in response the FIRS informed the operator that it has received the objection which had been noted for memorandum purposes only. Consequently, the Appellants filed an Appeal against the FIRS<sup>11</sup>on the ground that FIRS computation in its Notices of Assessment were wrong to law. In its reply, the FIRS challenged the appeal on the ground amongst others, that the Appellants lacked the locus stand to appeal before the TAT, and as the returns were not filed by the appellants but by NNPC, that the Appellants objection was incompetent for non-jointer of NNPC as a proper/necessary party to the appeal at the TAT. FIRS further urged the TAT to find that the tax assessments had become final and conclusive and could not be reviewed.

The TAT on 8 June 2012 dismissed FIRS objection which challenged the appeal and made an order joining NNPC as a desirable and necessary party to the appeal. Upon being joined, the NNPC filed Notices of Preliminary Objection dated 27 August 2012 and challenged the jurisdiction of the TAT to hear claims connected with or pertaining to the taxation of companies carrying on business in the Federal Republic of Nigeria. It argued that jurisdiction lies exclusively with the Federal High Court and that the TAT was devoid of jurisdiction over the NNPC in respect of the tax appeals. In its ruling on 8 February 2013, the TAT confirmed that it had jurisdiction to hear and determine the Appellants tax appeals, and made an order striking out the NNPC as a party to the appeal.

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<sup>7</sup>(1993) 9 NWLR (pt 315); where the Supreme Court held that where a Statute prescribes a line of action for determining issues, be it administrative or matters of taxation, the aggrieved party must exhaust all the remedies in law before going to Court.

<sup>8</sup> (2011) 4 TLRN 135; where the case was struck out because the plaintiff jumped the hurdle by failing to seek remedy from the Body of Appeal Commissioners (BAC) before approaching the Court.

<sup>9</sup>*CA/L/1144/2015*; & *EA/L/1145/2015* (Unreported)

<sup>10</sup>Nos PPTBA/Ed34; PPTBA/EO37 dated 2 August 2011, respectively.

<sup>11</sup>*TAT/LZ/003/2012*; *TAT/LZ/004/2012* (Unreported)

Aggrieved by the decisions of the TAT, the NNPC appealed to the Federal High Court, Lagos Division. In addition to the question on the TAT's jurisdiction, the Contractors (Appellants) added that the NNPC had no *locus standi* to file the appeal at the Federal High Court. But the Federal High Court decided<sup>12</sup> that the NNPC had the *locus standi* to initiate the appeal, particularly as the TAT itself recognized that the NNPC was a desirable and necessary party to the tax appeal, and that TAT by exercising jurisdiction in matters that relate to the revenue of the Federal Government of Nigeria had encroached upon the exclusive jurisdiction of the Federal High Court.

## **2.0 The Court of Appeal, Lagos Division's Decision in *CNOOC & Anor v NNPC*<sup>13</sup>**

The Appellants appealed the decision of the Federal High Court in *CNOOC & Anor v NNPC*<sup>14</sup> at the Court of Appeal, Lagos division, whereupon the appellate court was invited to determine the following issues;

1. Whether it was a prerequisite for NNPC to be a party in the appeal filed by the Appellants at the Tax Appeal Tribunal for the Tax Appeal Tribunal to exercise jurisdiction over the dispute.
2. Whether the NNPC had the *locus standi* to initiate the appeal at the Federal High Court having elected not to be a party to the Tax Appeal Tribunal appeals and
3. Whether the jurisdiction of the Tax Appeal Tribunal to entertain that Appellants appeals as provided under Paragraph 20(3) of the Faith Schedule to the FIRS Act infringes on the exclusive jurisdiction of the Federal High Court to hear as disputes as stipulated under section 251 of the Constitution of the Federal Republic of Nigeria 1999.

On the first issue, counsel to the NNPC and the Appellants recognised that the parties aggrieved by the tax assessments issued by the FIRS are the Appellants. This is irrespective of the fact that the NNPC filed the tax returns that is subject of the tax appeal. Irrespective of the NNPC's further arguments that it would be impossible to resolve the dispute without joining the NNPC because the Appellants are assessed over tax assessments made by the NNPC based on returns submitted by NNPC and TAT's recognition of NNPC as a necessary party, the Court of Appeal held that a necessary party is one whose presence is necessary for the effectual and complete determination of the issue in a suit, who is not only interest in the subject matter, but who in the absence, the proceedings cannot be fairly dealt with. According to the Court of Appeal, the central area of dispute between the Appellants and the FIRS revolved around the notices of assessments which made the Appellants liable to pay the assessed tax. Thus the disputes went about who was aggrieved by the assessment and not on any rights or obligations of the NNPC. Consequently, the NNPC was declared not to be a necessary party.

On the second issue, the Court of Appeal noted that the NNPC had indeed exhibited a lack of interest in the action at the Tax Appeal Tribunal. The NNPC's participation was akin to a busy-body particularly since it was unable to show *prima facie* that the action of the defendant had adverse effect on its rights or interest. The Appellate court noted further that the NNPC had by

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<sup>12</sup>Per Justice Idris on 22 May, 2015.

<sup>13</sup>*Supra*

<sup>14</sup>In pursuance of Paragraph 23 of the Fifth Schedule to the FIRS Act 2007.

its application of 27 August 2012 informed the Tax Appeal Tribunal that the Tribunal had no jurisdiction over it but only on the FIRS and a person aggrieved by the tax assessments, the NNPC had no locus standi to initiate the appeal at all.

**i. Appellants' Submission on Jurisdiction**

On the third issue relating to the jurisdiction of the TAT *vis-à-vis* that of the Federal High Court, the Appellants argued that the TAT's jurisdiction as set out in the FIRS does not encroach upon the exclusive jurisdiction of the Federal High Court as stipulated in the section 251(1) of 1999 Constitution of Federal Republic of Nigeria. They added that the TAT is only an administrative appellate body and the proceedings before it are condition precedent to the assumption of jurisdiction by the Federal High Court. That the FIRS Act does not intend that the TAT be a court. Rather, it is only deemed a civil court and the processes before it are also only deemed judicial proceedings, not indeed a court or judicial proceedings respectively. It was further argued that unlike that of the extinct VAT Tribunal, appeal from the TAT goes to the Federal High Court, thus giving the Federal High Court the power to exercise its exclusive jurisdiction in *Esso Exploration and Production Nig. Ltd & SNEPCO v. NNPC*<sup>15</sup> and *SNEPCO & 3 Others v. NNPC*<sup>16</sup>, which acknowledged the tax assessment appeal procedure that commences with the appeal of the taxpayer to the FIRS, and the TAT, then to the Federal High Court through to the Court of Appeal and then finally the Supreme Court.

**ii. Corporation's Submission on Jurisdiction**

The corporation submitted that by virtue of section 251 of the 1999 Constitution (as amended), the Federal High Court is to exercise original jurisdiction over the matters to the exclusion of other courts. That by deeming the Tax Appeal Tribunal to be a civil court for all purposes, the National Assembly had introduced a fiction and all adjudicatory bodies are enjoined to proceed on the presumption that such a state of affairs exists from the date of the legislation took effect. Consequently, the FIRS Act cannot override the provisions of the Constitution which donates exclusive jurisdiction to the Federal High Court. Therefore section 59 of the FIRS Act is inconsistent with section 251 of the Constitution and is void to the extent of its inconsistency.

**iii. The Court of Appeal's Decision on TAT's Jurisdiction**

The court of Appeal observed that it had, in two earlier appeals, set out the procedure for an aggrieved taxpayer to appeal assessments issued by the FIRS under FIRS Act. These are the *Esso Exploration and Production Nig. Ltd & SNEPCO*<sup>17</sup> v. *NNPC* and *SNEPCO v. NNPC*<sup>18</sup> cases. In respect of *SNEPCO v. FIRS*, the Court of Appeal restated the procedure where it held:

The procedure for resolving claims and objection such as in the instant matter, are spelt out. When an assessment is made and the party is not satisfied, it can serve a Notice of Objection with the FIRS. It can also file a Notice of Refusal to Amend the assessment as desired where it disagrees with FIRS.

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<sup>15</sup> . *CA/A/307/2012* delivered on 22 July, 2016 (Unreported)

<sup>16</sup> *CA/A/208/2012* delivered on 31 August, 2016 (Unreported)

<sup>17</sup> *Supra*

<sup>18</sup> . *Supra*

The party may also then appeal the assessment to the Tax Appeal Tribunal. If the party is still dissatisfied with the decision of the Appeal Tribunal then it can approach the Federal High Court, the Court of Appeal and finally the Supreme Court<sup>19</sup>

The Court of Appeal noted that its earlier recognition of the Tax Appeal Tribunal as a vital step to the resolution of the tax related disputes shows that the TAT has jurisdiction over such matters. It reiterated the position with reference to its earlier decision in *Esso Exploration and Production Nig. Ltd & SNEPCO v. NNPC*<sup>20</sup>, which facts are in *pari materia* with the facts in the present case by stating that:

It must also be stated that Section 251 (I) (b) of the Constitution of Nigeria 1999 (as amended) gives exclusive jurisdiction to the Federal High Court in civil causes and matters connected with or pertaining to the taxation of companies and other bodies establishment or carrying on business in Nigeria and all other persons subject to Federal taxation. It may be added that in respect of the Petroleum Profits Tax Act, it is after the exhaustion of remedies or the process set out in (ii) and (iii) above that a person may approach the Federal High Court.

Thus, in the *Esso Exploration and Production Nig. Ltd & SNEPC v. NNPC* case<sup>21</sup>, the Court of Appeal, in setting out the procedure for the appeal, said:

The Petroleum Profits Tax Act provides for the procedure for the resolving of any claim, objection, appeal, representation or the like made by any person under the provisions of the Act or of any subsidiary legislation thereunder.

The procedure, as set out in the above case, is outlined as follows;

- i. Notice of objection to review and revise assessment made of the objector applicant (section 38(2));
- ii. Notice of refusal to amend the assessment as desired by applicant where the applicant fails to agree with the Federal board of Inland Revenue (Section 38(2));

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<sup>19</sup>The author asserts that the FIRS (E) Act 2007 does not state that appeals from the court of Appeal shall lie straight to the Supreme Court. In particular, Paragraph 23 of the Fifth Schedule to the Act provides that “an appeal against the decision of the FHC at the instance of either party shall lie to the Court of Appeal”. In spite of this provision, the paragraph does not state that the Court of Appeal shall be the last appellate court on tax disputes. Consequently, the provisions of Section 233 of the 1999 Constitution (as amended) will come in to show that a party that is aggrieved with the decision(s) of the Court of Appeal may further appeal to the Supreme Court.

<sup>20</sup>*Supra*

<sup>21</sup>*Supra*



- iii. Appeal against the assessment to the appropriate Appeal Commissioners (now the Tax Appeal Tribunal) established pursuant to section 59 (I) of the Federal Inland Revenue Service (Establishment) Act 2007, (Section 41);
- iv. Appeal to the Federal High Court where the party is aggrieved by the decision of the Appeal Commissioners or the Tax Appeal Tribunal 42(i) and (ii), and
- v. An appeal to the Court of Appeal (Section 42(14)).

The Court of Appeal found that the appeals were meritorious, and concluded that “the combined effect of the aforementioned decisions is that the Tax Appeal Tribunal has jurisdiction to entertain tax matters such as in the instant case”.

The author reviews some of the opinions being shared to advance and promote the view that the jurisdiction of the TAT is unconstitutional and void, by ventilating the position of the Appellate Court in the instant case, and thereby submits and strongly too, that the existence of the TAT is therefore lawful, in very legal case

### 3.0. **Commentary**

#### 3.1. **The TAT As A Child of Circumstance?**

In spite of the Federal High Court exclusive jurisdiction over tax disputes, several tax statutes earlier provided for administrative tribunals to deal with tax disputes. For example, the Companies Income Tax Act<sup>22</sup> and the Personal Income Tax Act in 1961 established the Federal Board of Inland Revenue (FBIR), as well as established the Body of Appeal Commissioners, (BAC). The Federal Military Government promulgated the Value Added Tax Decree<sup>23</sup> and subsequently established the Value Added Tax Tribunal, (VATT).

Dispute relating to the jurisdiction of the VAT Tribunal and the Body of Appeal Commissioners came to the fore where it was contended that the jurisdiction vested in the Body of Appeal Commissioners as well as the VAT Tribunal conflicted with the exclusive jurisdiction of the Federal High Court over tax matters. That was the much celebrated case of *Stabilini Visinoni v FBIR*<sup>24</sup>. In its judgment, the Court of Appeal held that section 20 of the VAT Act is inconsistent with the Constitution and cannot therefore stand. The Court of Appeal which heard an appeal directly from the VAT Tribunal in *Cadbury Nig. Plc v FBIR*<sup>25</sup> also affirmed this position on the jurisdiction of the VAT Tribunal under the VAT Act vs- a-vis that of the Federal High Court, and held that section 20(1) of the VAT Act is invalid, and a nullity in view of its inconsistency with section 251 of the Constitution, 1999.

In 2007, the National Assembly enacted the Federal Inland Revenue (Establishment) Act 2007. Thus section 59 of the Act established the Tax Appeal Tribunal with powers to settle disputes arising from the operations of the Act and other legislations<sup>26</sup> administered by the Federal Inland Revenue Service (FIRS) as set out in the First Schedule to the Act.

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<sup>22</sup>No 22 of 1961

<sup>23</sup>VAT Decree No 102 of 24 August, 1993

<sup>24</sup>*Supra*

<sup>25</sup>*Supra*

<sup>26</sup>First Schedule to the FIRS Act as well as Sections 1 & 11 of the Fifth Schedule to the FIRS Act.

In exercise of the powers vested in the Minister of Finance, the then Minister of Finance in 2009 set up the Tax Appeal Tribunal in various six geopolitical zones. The Tax Appeal Tribunal under the Act<sup>27</sup> is empowered to make rules regulating its procedures, and “any proceeding before (it) shall be deemed to be a judicial proceedings and the Tax Appeal Tribunal “shall be deemed to be a civil court for all purposes”. Unlike the Value Added Tax Tribunal’s decisions which could be subject of appeal to the Court of Appeal, appeals from the Tax Appeal Tribunal now lie to the Federal High Court, albeit on points of law<sup>28</sup>.

Thus above facts were what led to the inauguration of the TAT, with the philosophy that the challenges that had confronted the pre-existing adjudicating bodies for the resolution of tax disputes and conflicts, would now become a thing of the past. The author shall now examine if those challenges have been surmounted more so even with the subsisting appellate court’s decision<sup>29</sup>, under the next subhead in the current discourse.

### **3.2 Has the Subsisting Court of Appeal’s Decision in CNOOC & NNPC & ANOR Doused the Tension Generated by Inauguration of the TAT?**

The author now attempts to examine the impact of the Appellate court’s decision in *CNOOC & Anor v NNPC*<sup>30</sup> by asking if that pronouncement has been able to quell the anxiety, tension and agitations in the minds of the generality on the constitutionality of the jurisdiction of the TAT or otherwise?.

Above poser became imperative since the issues that greeted the inauguration of the TAT in 2010 seem to be still rearing their ugly heads as far as the opinions of some text writers, tax practitioners, commentators, and tax lawyers are concerned.

The author now answers the poser with an emphatic No in view of the following legal issues which are still embroiled in the TAT’s enabling statute, as they are set out *seriatim*:

#### **3.2.1. Conflict in the Composition of the TAT in the Light of Section 36(1) of the 1999 Constitution (as amended)**

The constitutionality of the composition of the TAT whose members are entirely appointed and removable by serving minister of finance, an agent of the federal government, in the light of Section 36(1) of the Constitution<sup>31</sup>, which guarantees fair hearing, by requiring every tribunal to be constituted in such way as to secure its independence and impartiality, is the bane of contention here. This is in relation to the constitutionality of the tribunal in the composition of its membership. The FIRS Act<sup>32</sup> provides for the appointment and removal of all the members of the tribunal by the Minister of Finance. This provision undermines the principle of fair hearing under Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The section provides thus:

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<sup>27</sup>Section 20 (1) & (2) of the Fifth Schedule to the FIRS Act 2007.

<sup>28</sup>Section 17 of the Fifth Schedule to the FIRS Act 2007.

<sup>29</sup>*Supra*

<sup>30</sup>*Supra*

<sup>31</sup>*CFRN 1999* as (amended)

<sup>32</sup>Paragraph 2 of the Fifth Schedule to the FIRS Act 2007.



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 and constituted in such a way as to secure its independence and impartiality.

Impliedly, the tribunal's composition under the Act, is inconsistent with the above provision. The minister is an agent of the Federal Government, and the FIRS, which is an agency of the Federal Government, is either going to be plaintiff or appellant and or the defendant/respondent, as the case may be, yet the members of the tribunal are exclusively appointed and removable by the Minister, who is an agent of the Federal Government<sup>33</sup>.

### **3.2.2. The Provision of the Ouster Clause seeking to prevent any Legal Action against the Propriety or otherwise of the Appointment of a Member of the TAT.**

Thus, the Act provides hereunder;

The question as to the validity of the appointment of any person as a Tax Appeal Commissioner shall not be the cause of any litigation in any court or tribunal and no act or proceeding before the tribunal shall be called into question in any manner on the ground merely of any defect in the constitution of the tribunal<sup>34</sup>.

The above issue stems from the provision of the Act which purports to oust the court of law from entertaining any issue or question that may arise due to any defect in the constitution of the tribunal<sup>35</sup>. This in itself is an ouster clause which ousts the inherent jurisdiction of the court of law to exact its power according. In accordance with the provisions of the constitution<sup>36</sup>

The above constitutional provision presupposes that it is the constitutional right, function and duty of the court to exercise its judicial powers in adjudicating and settling disputes between individuals, corporate persons and government in accordance with the Constitution. Thus the ouster clause in this provision which seeks to prevent any legal action against the validity of the appointment of persons as Tax Appeal Commissioner and the constitution of the tribunal is therefore unconstitutional in the light of the above constitutional provision.

### **3.2.3 Apparent Defect in Appeal Procedure from the Tax Appeal Tribunal to the Federal High Court.**

The author queries the validity of the restriction under the Act on an appeal to the Federal High Court from the decision of TAT only on the point of law. This is set hereunder;

Any person dissatisfied with a decision of the tribunal constituted under this schedule may appeal against such decision on point of law

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<sup>33</sup>The is in breach of the Twin Pillars of Natural which hinges on the doctrine of impartiality and independence, as enunciated by the supreme Court in the case *Madukolom v Nkendilim* (1962) 2 SCNLR 341

<sup>34</sup>Paragraph 8 of the Fifth Schedule to the FIRS Act.

<sup>35</sup>*Ibid*

<sup>36</sup>*CFRN* 1999, section 6 (6) (a) (b)

to the Federal High Court upon giving notice in writing to the secretary to the tribunal within 30 days after the date on which such decision was given<sup>37</sup>.

The aforementioned provision bars the right of appeal from decision of the TAT to the Federal High Court on point of fact and is therefore questionable in the light of the constitutional powers of the Federal High Court to entertain matters relating to taxation and revenue of the Federal Government<sup>38</sup>. It should be noted that the BAC had similar limitation under the repealed sections of the Companies Income Tax Act<sup>39</sup>. The court had also interpreted this provision to mean that it is *ultra vires* Appeal Commissioner to go into issues of law as the restriction is to only determine assessments on point of facts<sup>40</sup>.

Taking a look at the Federal High Court entertaining appeals from the TAT, the proceedings are deemed to be judicial since it is to look into actions and decisions of FIRS in cases of non-compliance. Thus, the author is of the opinion that, to enquire into any action of the FIRS, whether it is valid or not is a point of law, hence the issue of validity of assessment remains within the jurisdiction of the Court<sup>41</sup>.

#### 4.0. Conclusion

There is no gain saying the fact that, in any given polity, that consistency, certainty and uniformity are the envisaged hallmarks of an ideal legislation, with such tasks becoming more demanding if the piece of legislation concerned is a tax statute. The demands are particularly so if the given polity, such as the current scenario in Nigeria, where the nation's fiscal policy is dependent on tax to drive the economy. Hence, the present author salutes the Appellate Court in its verdict in *CNOOC & Anor v NNPC & Anor*, which has given credence to the jurisdiction of the TAT. Otherwise, any contrary pronouncement would have opened up a floodgate of litigation on tax appeals which had hitherto determined and settled by the Tribunal.

#### 5.0. Recommendation

Even with the roadmap which has been signaled by the Appellate Court in *CNOOC & Anor v NNPC & Anor*, the author still agrees with the raging view, and a popular one too, that it is not *yetuhuru* on the puzzle concerning the constitutionality or otherwise of the jurisdiction of the TAT. The author, therefore, invites the legislature to amend the subsisting provisions of paragraph 17 (1) (2) (3) & (4) of the Fifth Schedule to the Act which limit appeals from the TAT to the FHC only on points of law, and to now insert the suggested provision on factual evidence.

This is more so, as the TAT is not indeed a judicial body, but serves only as the first point of call for an aggrieved person to ventilate his tax assessment issues. What is more, the TAT is composed of human beings, thus they could be prone to human errors in respect of factual

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<sup>37</sup>Paragraph 17 (2) (3) & (4) of the Fifth Schedule to the FIRS Act.

<sup>38</sup>CFRN, 1999, Section 251(1)

<sup>39</sup>*Ibid*

<sup>40</sup>*FBIR v Joseph Rezcallah & Sons Ltd.* (1962) 1 ANLR 1

<sup>41</sup> The author opinion is in commerce with the view expressed by an eminent tax scholar M.T in his book, *Revenue law & Practice in Nigeria*, Malthinese Press Ltd, Lagos, Nigeria, 2010.

evidence. Thus, the author hereby recommends that the FHC should be given the mandate to ascertain factual errors, just as it has got over points of law.

Again, there is still the need for legislative intervention in the appointment, composition and tenure of Tax Appeal Commissioners. The author is of the view that the present appointment shall ceased to be by the fiat of the executive arm of the government. The author thereby suggests that, the National Judicial Council, which has the statutory powers of appointment of judicial officers, shall also assume the responsibility of the appointment, composition and tenure of Tax Appeal /Commissioners. Such a development, in the opinion of the present author, shall enthrone and sustain the envisaged independence and impartiality of such tribunal.