

EXPLORING THE POTENTIALS OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS IN TAX DISPUTE RESOLUTION*

Abstract

Alternative Dispute Resolution (ADR) is a nascent adjudicative mechanism. Its preference to litigation is premised on lots of advantages which includes saving time, cost effectiveness and mutual relationship of the disputants. Notwithstanding the seeming advantages of ADR as projected by the protagonists, ADR has not been fully explored in the resolution of tax dispute. The challenge lies in the legal framework regulating the practice of ADR and the dynamic nature of tax dispute being a matter of public concern. Tax dispute is not always a controversial dispute where facts are so much in issue. The Tax authority knows its right to collect tax while tax payers know their obligation to pay tax. What is usually in issue is assessment which does not necessarily require full blown litigation; what is usually required is mutual understanding of tax parties positions and differences; and the genuineness of parties to shift ground. This can be achieved through ADR process. It is on this ground that this paper evaluated the legal and theoretical potentials of the ADR process in the resolution of tax disputes other than the conventional litigation. The paper adopted a doctrinal approach. Accordingly, text books, journal articles, statutes, case laws were reviewed to propagate a profound and persuasive social-legal theory that justifies the potentials of ADR applicability to tax disputes. However, the paper does not apply to the resolution of every type of tax dispute. Jurisdictional tax disputes are beyond the scope of ADR while administrative tax disputes are suitable for the ADR process. ADR in tax is most suitable as an in-house administrative mechanism. The paper found that the applicability of ADR to tax dispute will reduce the cost and delay associated with litigation. The ADR process would require the involvement of tax experts as mediators, negotiators or conciliators who would look into the matter and advice the parties accordingly.

Keywords: Alternative Dispute Resolution, Taxation, Tax Dispute, Potentials, Nigeria

1. Introduction

The term ‘Alternative Dispute Resolution’ (ADR), is used generally to describe the methods and procedures used in resolving disputes either as alternatives to the conventional dispute resolution mechanism of the court or in some cases supplementary to such mechanisms.¹ The Black’s Law Dictionary defined alternative dispute resolution as ‘procedure for settling a dispute by means other than litigation.’² According to Ware, ADR can be defined as encompassing all legally permitted processes of dispute resolution other than litigation.³ ADR seems nascent to the conventional court system hence the name ‘alternative’. But it was an ancient set of dispute resolution mechanism. It was a friendly process where parties were made to shake hand or hug each other when a dispute is resolved. It was also very quick as there was no conventional procedure for admissibility of evidence. The process was not technical. Many of the techniques that are regarded as ADR today have roots in different respective localities.⁴ Time came when the society became more industrialised and the wave of revolution did not spare the judiciary system. A more rigid dispute resolution system was introduced: the court system, fundamentally different from the traditional ADR, possessing rigid rules and procedure. But litigation has failed to serve the justice of the society. The common complaint now is that litigation is too confrontational, too expensive, too time consuming and sometimes too complex.⁵ The increased complexity of litigation and the concomitant dissatisfaction with the legal outcomes amongst disputants has led to the rediscovery of ADR as an alternative to litigation.

ADR is really making waves in other areas of law. Commercial law is the most affected. Business partners desire quick resolution of their disputes; the delay associated with litigation hampers the growth of every

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¹N.Adulenkor, ‘Alternative Method of Dispute Resolution’ available at <https://nigerianlawclass.wordpress.com/author/adulenkor/> (accessed on 8th December, 2017).

² B.A. Garner (ed) (2009) *Black’s Law Dictionary*, (St. Paul, MN : West),P. 91.

³ S.J Ware, *Alternative Dispute Resolution*, (Harlow: Pearson,2008) P. 5 – 6.

⁴The traditional societies across the globe have featured varieties of ADR process like Negotiation, Mediation and Arbitration. ADR therefore is not an imported concept to African Jurisprudence. It has existed in our indigenous societies and rudimentary to our customary jurisprudence.⁴ Anyone used to village setting knows of the role played by the village head or the council of elders when a dispute arises or complaint is made. Many families have also made efforts to have their disputes resolved through mediation of the head of the family, the village priests and close family friends.

⁵See N. Adulenkor, *Alternative Methods of Dispute Resolution* available at <https://nigerianlawclass.wordpress.com/2014/12/08/alternative-methods-of-dispute-resolution/> (accessed on 8 December, 2019).

business. The court system has also embraced ADR. Most States judiciary have established Multi-door Court Houses, which is an in-house ADR out-fit where the courts refers litigants to the option of all available ADR methods that will enable them resolve their matters pending court. It is only when the reference fails that the court goes on with the matters. The trend of quick resolution of dispute is cutting across every area of law; but, the place of Tax law in this ADR revolution is unexploited.

This paper explores the potentials of ADR in resolving tax dispute. It is a theoretical investigation that is anchored on law and practice; and seeks to advocate and promote the use of ADR in tax dispute.⁶ Tax is the life line of every society. Where tax administration is marred with incessant litigation, tax administration will be inefficient and revenue generation will be poor. A good tax resolution mechanism must be timorous and cost effective. There is need to explore ADR in the resolution of tax disputes; the advantages are enormous.⁷ ADR is a suitable process for the resolution of tax dispute; it saves time, it saves cost and it's very most convenient.

2. Litigation and Alternative Dispute Resolution

Litigation is the current method of resolving dispute through an established court system where a judge, an arbiter, is legally empowered to adjudicate over certain matters. The Court system is usually rigid as both the relationship between the judge and the litigants is governed by a defined set of rules and principles. There are various courts in Nigeria. In hierarchy, it ranges from Supreme Court to Magistrate Court. Cases can start from Magistrate court and terminate at the Supreme court spanning through a lengthy period of time. Most times, litigants become frustrated by the delay in the litigation of cases in various courts. The reason for the delay is numerous. Technicalities account for some while floodgate of cases has its own share. An issue of jurisdiction can be contested up to Supreme Court, while the substantive issues is stayed, after which the jurisdiction maybe upheld and trial ordered at the lower court. This can take 3- 5 years. Judges are also saddled with so many cases which account for lengthy litigation since everyone has to join the queue while the judge writes in long hand. In the tax system, the process seems more technical than the other areas of law. Tax requires special expertise and skills. The expertise required in tax practice is huge that when compounded with the technicality of court system, it will certainly affect tax dispute resolution. Most tax payers would like to leverage on the technicalities to evade or delay tax payment. For instance, where tax assessment is contested, status quo will be maintained pending the determination of the suit. If every tax payer challenges his/ her assessment in court, revenue generation will be grounded.

ADR could provide a quicker and better platform for the resolution of tax dispute. The law has recognised the importance of ADR. Sections 19(d) of the 1999 Constitution of the Federal Republic of Nigeria⁸ provides for the settlement of disputes by Arbitration, Mediation, Conciliation, Negotiation and Adjudication. This is in recognition of the crucial role arbitration and other forms of ADR now play in the resolution of various types of disputes. The constitutional status accorded arbitration and other forms of ADR for the settlement of disputes is a complementary role to the judicial powers conferred on the Courts by the Constitution. The practice of ADR has gained tremendous awareness. It has become a developed profession with the induction of practitioners by different institutions like Chartered Institute of Arbitrators, and Institute of Chartered Mediators and Conciliators to practice ADR as a full profession.⁹ Multi-Door Court Houses have also been established in other jurisdictions in Nigeria.¹⁰ The idea is to provide a system where court users would have another option to dispute resolution other than the conventional litigation process. A Multi- Door Court usually has its own set of rules to guide whichever ADR process that is selected. There are various ways a matter can come before Multi Door Court. It could be via a judge who refers an existing case he or she considers suitable for ADR. A party or both parties can apply directly to the Multi Door Court for the resolution of their dispute, with or without having first commenced court action.

Litigation which has been the principal method of resolving commercial disputes is now being complemented by other methods of dispute resolution owing to the exigencies of commercial transactions. Many countries in

⁶ This paper does not apply to the resolution of every type of tax dispute. Jurisdictional tax dispute is beyond the scope of ADR while administrative tax dispute is suitable for ADR process. ADR in tax is most suitable as an in-house administrative mechanism. See NB Amadi: 'Distilling the Contour of ADR Applicability to Tax Dispute in Nigeria' *Journal of Taxation and Economic Development of Chartered Institute of Taxation (CITN)*, Vol. 18, Issue 2, Sept., 2019.

⁷ Odinkonigbo and Ezeuko, advocate for the need for Nigeria to make a paradigm shift from its current adversarial approach to the global trend of adopting ADR in the resolution of tax dispute. See JJ Odinkonigbo and JJ Ezeuko 'Does Nigeria Follow the Contemporary Global Trend In Tax Dispute Resolution Strategy?', *Nigerian Juridical Review*, Vol 12, 2014.

⁸ The provision is made under the foreign policy objective which is unenforceable; it has however recognised the importance of ADR in resolving dispute.

⁹ See <http://www.ciarb.org/> and <http://icmcng.org/>.

¹⁰ Lagos, Kano, Abuja, Akwa Ibom, Enugu Judiciary have established Multi Door Court House.

the world now apply alternative methods of dispute resolution. In the United States for example, Frank Sander, developed the concept of multi-door courthouses- a bundle of alternative systems of dispute resolution options which parties can resort to.¹¹ This has been replicated in Nigeria by the establishment of the Lagos Multi-door court House and other Multi-door Courthouses.¹²

3. The Legal Framework for the Practice of ADR in Nigeria

The practice of Alternative Dispute Resolution in Nigeria has been recognised by the Nigerian Constitution. Section 19(d) of the 1999 Constitution states: ‘...Respect for international law and treaty obligation as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication’. Section 254C (3)¹³ also states that: ‘The National Industrial court may establish an Alternative Dispute Resolution Centre within the court premises on matters which jurisdiction is conferred on the court by this Constitution or any Act or Law’ ADR also has the blessings of The Arbitration and Conciliation Act.¹⁴

The Act provides that:

Every arbitration agreement shall be in writing contained (a) in a document signed by the parties; or (b) in an exchange of letters, telex, telegrams or other means of communication which provide a record of the arbitration agreement; or (c) in an exchange of points of claim and of defence in which the existence of an arbitration agreement is alleged by one party and denied by another.¹⁵

The Act also provides for Conciliation. It states that: ‘Notwithstanding the other provisions of this Act, the parties to any agreement may seek amicable settlement of any dispute in relation to the agreement by conciliation under the provisions of this part of this Act’. Order 19 of Federal High Court (civil procedure) Rules of Nigeria is also supportive of ADR interventions in arbitral proceedings.¹⁶ The Government of Nigeria has also entered into some international agreements and treaties in respect of ADR. These include the New York Convention (Recognition and Enforcement of Foreign Arbitral Award) 1958, and International Centre for Settlement of Investment Dispute (ICSID) (Washington Convention) 1966 There have also been court decisions as regard arbitration awards. In the case of *Kano State Urban Development Board V. Fanz Construction Co.*¹⁷ the Court held that the respondent is bound to pay the award made by an arbitration panel. Similar decision was made in *LSDPC v. Adold/Stan Ltd.*¹⁸ Furthermore, Supreme Court, in the case of *Ohaeri vs. Akabueze*,¹⁹ held

¹¹ F. E. Sander first articulated the multi-door courthouse concept in April 1976 at a conference convened by Chief Justice Warren Burger to address the problems faced by judges in the administration of justice. See Address by F. E. Sander at the National Conference on the Causes of Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), reprinted in Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976). Judges and attorneys from around the country attended the Pound Conference and discussed many issues previously discussed by Dean Roscoe Pound of Harvard Law School in his 1906 address, *The Causes of Popular Dissatisfaction with the Administration of Justice*. Dean Pound's address originally was published in 29 A.B.A. REP. 395 (1906); see also 35 F.R.D. 273 (1964) (full text); 57 A.B.A. J. 348 (1971) (abridged version) ' For more on Frank Sander concept on multi door, see Hernandez-Crespo, Mariana D.,' 'A Dialogue between Professors Frank Sander and Mariana Hernandez Crespo Exploring the Evolution of the Multi-Door Courthouse (Part One)' (2008). Available at SSRN: <https://ssrn.com/abstract=1265221> (accessed on 20 February, 2018). See also Gladys Kessler & Linda J. Finkelstein, *The Evolution of a Multi-Door Courthouse*, 37 Cath. U. L. Rev. 577 (1988) Available at: <http://scholarship.law.edu/lawreview/vol37/iss3/2> (accessed on 20 February, 2018).

¹² See Order 3 Rule 2 & 8 of Lagos State (Civil Procedure Rule) 2012 and there are similar provisions in the High Court Rules of Enugu, Port Harcourt, Kano and Abuja etc.

¹³ The 1999 Constitution (Amended).

¹⁴ Cap A. 18 LFN, 2004. The preamble of the Act provides thus: An Act to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting State arising out of international commercial arbitration.

¹⁵ See section 1(1) *supra*.

¹⁶ The Lagos State judiciary has taken a giant stride towards curbing the menace of long delays associated with litigation. This has been achieved by the issuance of Lagos State (Civil Procedure) Rule, 2012. This provides that before a matter is accepted for filing, Counsel must indicate, through a prescribed form, that attempts have been made to settle the dispute through ADR process. See Order 3 Rule 2 & 8. The Rule further provide that process shall upon acceptance for filing by the registry be screened for suitability of ADR and referred to the Lagos Multi Door Court House or other appropriate ADR institutions or Practitioners. See Order 3 Rule 3.

¹⁷ (1990) 4 NWLR (Pt N7) P.1.

¹⁸ (1994) 7 NWLR (Pt 358) P. 545. See also Raz Pal Gaz. V FCDA (2001) 10 NWLR (pt7222) 559 where the court held that the award of the arbitral panel is equivalent to the judgement of a court. For more expository on arbitral awards see generally GC Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria*, (2nd ed.) (Enugu: Snaap Press Nigeria Ltd, 2004) p.19.

¹⁹ (1992) 2NWLR (Pt221) P.1 at 7 Paras 12.

as follows: Parties that voluntarily submit themselves to the decision of the arbitrators who are either the chiefs or elders of their community are bound by such decision.²⁰

4. Conventional Tax Dispute Resolution Process

Tax disputes are conflicts or controversies between taxpayers and tax authorities on the interpretation and application of tax laws. Tax disputes usually arise when taxpayers and tax authorities disagree on the administration of tax laws usually with respect to tax assessments and liability.²¹ Tax disputes are essentially legal disputes; it is 'the extent to that tax disputes relate to contentions over rights and liabilities concerning taxation, they are essentially real legal disputes.'²² Tax collection in Nigeria typically follows a self-assessment system²³. Self-assessment is a situation where taxpayers compute their tax liability and submit the computation to the tax authorities. The tax authority, on the other hand, audits the assessment submitted by the tax payers to ensure its compliance with the relevant tax laws. Where the tax authority disagrees with the taxpayers' self-assessment, the tax authority issues additional assessment.²⁴ A taxpayer that receives a notice of additional assessment may accept or object to it. If the taxpayer objects, a dispute arises. A taxpayer that is aggrieved by the assessment of a Relevant Tax Authority (RTA) may file notice of objection to the assessment issued by the RTA. The RTA will then amend or refuse to amend the assessment. Where the RTA refuses to amend the assessment, the RTA will issue a Notice of Refusal to Amend ('NORA').²⁵ Upon receiving the NORA, and within 30 days, the taxpayer may file an appeal with the Nigerian Tax Appeal Tribunal (NTAT) under section 59 the Nigerian Federal Inland Revenue Establishment Act (FIRSEA) No. 13 of 2007, Section 11 of the Fifth Schedule to the FIRSEA and Paragraph 5 of the Tax Appeal Tribunals (Establishment) Order of November 25th, 2009 (TAT Order). The process above shows that Nigeria is yet to join the trend in the use of ADR in tax dispute resolution. Both the FIRS and different States' Board of Internal Revenue in Nigeria are not statutorily mandated to explore the use of ADR in the settlement of tax disputes. It is evident that no form of ADR is formally explored by Nigerian Tax authorities in resolving tax dispute.²⁶ Tax dispute can be efficiently resolved through the ADR process. In the view of Odinkonigbo and Ezeuko,²⁷ there is need for Nigeria to make a paradigm shift from its current adversarial approach to the global trend of adopting ADR in the resolution of tax dispute.

5. Benefit of ADR in Tax Disputes

Speed

Expeditious determination of cases remains one of the attributes of ADR which is unlikely to be available in the courtroom.²⁸ In Nigeria particularly, litigation is extremely time consuming. It has become a culture that cases must last several years in the courts before they are determined. Even when a case has lasted up to ten years in the court and the judge handling the matter is retired, the case has to start *de novo*. Ogungbe²⁹ rightly noted that; some cases have been pending in our courts for more than ten years as a result of certain constraints like retirement or transfer of judges handling the cases which have been opened and evidence had been taken. Such cases have to start *de novo*. The devastation, frustration, and economic stress which litigants undergo are better imagined than experienced³⁰ The celebrated case of *Ariori and others v. Elemo and others*,³¹ for instance, was

²⁰See also *Eke vs. Okwaranyia* (2001) 12 NWLR (PT 726) P.181 at 184. For where arbitration was used to settle disputes relating to land, see *Larbi v Kwasi* (1952) 13 WACA 76, see also *Okpuruwu v Okpokam* (1988) 4 NWLR (pt 90) where the Court has held that arbitration is not alien to customary jurisprudence.

²¹Lagos Chamber of Commerce International Arbitration Centre (LACIAC) Newsletter, 2nd edition, available at www.laciac.org accessed on 2nd May, 2020.

²²Bidemi Daniel 'Tax Disputes Resolutions: The options and Precedents' available at www.slideshare.net, assessed on 13 February, 2020

²³Section 41 PITA, section 53 CITA

²⁴Section 56 of PITA and section 50 of CITA

²⁵Section 69(5) of CITA

²⁶There is however another form of dispute that operates at the jurisdictional level which is not susceptible to ADR.

²⁷JJ Odinkonigbo and JJ Ezeuko 'Does Nigeria Follow the Contemporary Global Trend In Tax Dispute Resolution Strategy?', *Nigerian Juridical Review op cit*.

²⁸J Nwazi, (2017) 'Assessing the Efficacy of Alternative Dispute Resolution (ADR) in the Settlement of Environmental Disputes in the Niger Delta Region of Nigeria,' Vol. 9(3), pp. 26-41, *Journal of Law and Conflict Resolution* available at <http://www.academicjournals.org/JLCR>

²⁹MO Ogungbe (2003). Arbitration & Mediation: when is either best suited for dispute resolution? *Nigerian Law: Contemporary Issues, Essays in honour of Sir. G. O. Igbiniedion*. P 319.

³⁰Tropill AT (1991). Alternative dispute resolution in a contemporary South African context, cited in Joseph Nwazi, (2017) Assessing the Efficacy of Alternative Dispute Resolution (ADR) in the Settlement of Environmental Disputes in the Niger Delta Region of Nigeria, Vol. 9(3), pp. 26-41, available at <http://www.academicjournals.org/JLCR>.

³¹(1983)1 SC NLR 1.

first instituted in the Court in the month of October, 1960 thereby coinciding with the month and year Nigeria got its independence and took 23 years to reach the Supreme Court which nevertheless remitted it to the trial court for a retrial de novo. Other cases like *Atanda v. Ajani*³² took 10 years to reach the apex court which ordered a trial de novo. Oyesola and Kola noted that parties are discouraged from litigation due to unnecessary delays and the consequent overstay of their cases in the courts.³³ They opined that sometimes, for undisclosed reasons, case files are alleged lost, while transfer of officers handling certain cases may result in the cases being lost sight of or even neglected.³⁴ The problems of delay are consequent upon certain factors such as lawyer's inordinate frequent requests and letters for adjournment of cases³⁵ coupled with administrative incapacities, including lack of modern facilities.³⁶

Most tax cases are also caught in the net of delayed litigation. In the case of *Joseph Rezcallah & Sons Ltd V FBIR*,³⁷ the validity of Best of judgment (BOJ) where a taxpayer has not delivered a return was contested up to Supreme Court within 15 years. In *FBIR v Blue Pelican Casino Co. Ltd*,³⁸ the Supreme Court, within 8 years, held that an assessment which has not been objected to within the time prescribed by law shall be deemed final and conclusive. Such delay in tax adjudication is antithetical to the efficiency of tax administration. ADR will quicken the speed of tax dispute resolution. Where ADR mechanism, like mediation, is employed in resolving tax disputes, issues of assessment and other technicalities bedevilling litigation will be controlled. A tax dispute is sui generis and would require the technical impute of an expert for better understanding and easy resolution.

It is understandable that most tax dispute arises from the time of assessment,³⁹ every tax payer knows his obligation to pay tax and every taxman knows about his duty to collect tax, what is usually in issue is the amount payable which usually start from the assessment stage. Every tax man wants to collect more tax while the taxpayer wants to pay less tax. If a tax mediator is engaged at the time of assessment, it would certainly reduce the dispute associated with assessment. The mediator would help both the taxman and taxpayer understand the genuineness of their liabilities without the later feeling over assessed and the former feeling that he had under assessed. Where the parties are satisfied with the outcome of a mediated process, there will be no dispute that will result in litigation. The mediation time will certainly be less than the period of litigation. The mediation time should not last more than 3 meetings. If there are unresolved issues after mediation⁴⁰, the services of arbitral panel could complement the work of the mediator. The panellists must be experts with special skill in tax matters, unlike the conventional litigation where the Judge may not be skilled in tax matters; and also saddled with more cases in other domains of law. The panellists may not be more than three. It will be important that the confidence of the taxpayer and tax authority is guaranteed in the process to avoid unnecessary appeals. Where, however, the appeal became inevitable, the arbitral award will be considered by the court for timely determination. ADR will certainly speed the rate of tax adjudication in Nigeria.

Cost Effectiveness

No doubt, ADR mechanism is less expensive than litigation. This is an invaluable advantage especially today that the cost of litigation in Nigeria has soared to the extent that many litigants can no longer pursue their cases. Many poor people cannot access the formal legal system because they cannot afford to pay the registration and representation fees necessary to prosecute cases in the courts. Payment of legal fees is probably the largest barrier to formal dispute resolutions for many people in developing countries and in particular by the poor in Nigeria.⁴¹ The cost of litigating a tax dispute is a concern to the taxpayer and tax authority. It has been

³² (1989) 3 NWLR pt. 511 at 103

³³ A Oyesola, OO Kola (2014), 'Industrial conflict resolution using court connected alternative dispute resolution,' *Mediterranean Journal of Social Science* available at <https://www.mcser.org/journal/index.php/mjss/article/view/3620>, assessed on 24th June, 2020

³⁴ *Ibid*

³⁵The case of *Wakino v. Ade John* (1999)9 NWLR pt.619 p.403, for instance, took 11 years in the High Court alone due to series of adjournments.

³⁶Human Rights Watch (1999). The price of oil: corporate responsibility & human rights violations in Nigeria's oil producing communities. P 15 available at <https://www.hrw.org/reports/1999/nigeria/> assessed on 24th June, 2020

³⁷ (1962)1 ANLR1

³⁸ 2FRCR(1976)10

³⁹There are however other categories of tax dispute, for more on this, see NB Amadi: 'Distilling the Contour of ADR Applicability to Tax Dispute in Nigeria' *Journal of Taxation and Economic Development of Chartered Institute of Taxation (CITN)*,

⁴⁰Its most likely that the parties will be satisfied if the mediator is a tax expert. In America, research has shown that 90% of matters that goes to mediation is resolved. See Internal Revenue Manual § 8.6.1.2.3, available at <http://www.irs.gov/irm/index.html> (last visited Sept. 23, 2003).

⁴¹A Oyesola and OO Kola (2014), 'Industrial conflict resolution using court connected alternative dispute resolution,' *Mediterranean Journal of Social Science op cit*.

established that there been delays in tax litigation which last up to 8 to 10 years. Within this period, fees are paid in different categories: professional fees, filing fees, transport fees etc. Both the taxman and the taxpayer is caught in this. Most times, the cost of these fees equates the difference in the litigated tax sum. Where the cost of tax litigation is high, the tax system is inefficient. The cost is more when the service of an expert is required to establish a particular case. By virtue of section 36(6) of the 1999 Constitution, it is only a lawyer that has the right of audience in Court. Where the lawyer is not an expert in tax matter, the service of an expert, like Tax accountant and Chartered tax practitioner, could be hired for professional advice, aggregating the cost of the tax dispute. Most tax professionals are expensive like lawyers. The engagement of both services would amount to double cost jeopardy for the tax authority. But where the ADR process is employed, the tax professional could be engaged alone without a lawyer. The tax professional could save cost by aiding the resolution of the tax dispute at the early stage. This will save the tax authority and tax authority more cost.

Jurisdictional convenience

With the ADR dispensation, the jurisdictional problems of litigation which usually frustrates litigants are tackled. Access to justice is impaired where the courts are located far from the homes of those who need them. Today, about 80% of tax cases in Nigerian courts are lost particularly on appeal for want of court's jurisdiction and other technical issues. Jurisdictional issue is a fundamental problem of tax dispute resolution. The introduction of Tax Appeal Tribunal (TAT) has been lashed with lots of jurisdictional controversies *viz a vis* the powers of the Federal High Court.⁴² In ADR, there is no jurisdictional issue as parties willingly submit to the jurisdiction of an ADR process. The consent of the parties to the jurisdiction shows that they are most likely to accept the outcome of the process. There is however a concern those parties would prefer to approach the court directly instead of wasting time in the ADR and later proceed to court. This position however may be controverted where there is a review of tax adjudication rules that will see parties mandatorily submit to the ADR before going to court; and the outcome of the ADR process could be pleaded in court if the matter eventually gets to the court. The ADR process could serve as case management that will trim and streamline the fundamental issues of litigation.⁴³ The litigation judge will be expected to evaluate the merit or otherwise of the ADR process and pronounce on it. It will also assist the court in resolving most frivolities.

6. The Practice of ADR in Tax

Negotiating Tax Dispute

The Nigerian tax authorities (FIRS)⁴⁴ can embrace the value of resolving taxpayer disputes without litigation. The FIRS can set up an Appeal office where a tax payer can contest tax assessment and negotiate the payment. The appeal office will be designed to be an impartial forum in which a taxpayer can try to settle the dispute. A taxpayer can initiate the appeal process by filing a protest letter. An Appeal officer then considers the merits of the case and the time and cost of the appeal. An Appeal conference will be scheduled so that the Appeal officer and the taxpayer can attempt to review the assessment and arrive at a mutually acceptable settlement. The Appeal process is designed to be neutral and has the purpose of affecting decisions regarding the settlement of taxpayer disputes. After reviewing the facts and evidence, and upon considering the hazards of litigation, the Appeal officer determines a fair position for the tax authority. The model will be designed for an Appeal officer to review the assessment with an open mind enter the negotiations with open mind and genuine interest in working out a mutually acceptable assessment based on the income of the taxpayer. The primary focus of the Appeal process will be negotiation, i.e, the taxpayer and Appeals officer will try to settle the dispute through persuasion regarding the merits of their respective positions. The use of negotiation by Appeal will result in mutual resolution of the dispute in terms that will be accepted to both parties. Most frivolities arising out of assessment can easily be resolved at the appeal office. Evident in America has shown that between eighty-five and ninety percent of the cases that reach IRS Appeal office result in settlement.⁴⁵

⁴² See section 251 of the 1999 Constitution.

⁴³ Order 25 Rule 2(c) of the High Court of Lagos State (Civil Procedure) Rules 2004 provides that pre-trial Conference should be explored before a matter goes into full hearing for the purpose of promoting amicable settlement of the case or adoption of Alternative Dispute Resolution. Order 17 of the High Court of the Federal Capital Territory, Abuja Civil Procedure Rules 2004 provides that: 'A judge with the consent of the parties may encourage settlement of any matter(s) before it, by either arbitration, conciliation, mediation or *any other lawfully recognized method of dispute resolution*'. For more on this, see Edwin Obimma Ezike, Developing a Statutory Framework for ADR in Nigeria, *The Nigerian Juridical Review* Vol. 10, page 248.

⁴⁴This will be used interchangeably between FIRS and State Internal Revenue Service

⁴⁵Gregory P Mathew, Using Negotiation, Mediation, and Arbitration to Resolve IRS-Taxpayer Disputes, available at https://kb.osu.edu/bitstream/handle/1811/77168/OSJDR_V19N2_0709.pdf

Mediating Tax Disputes

Mediation can be thought of as ‘negotiation plus.’ That is, it will take the principles of negotiation and add a third party to facilitate an agreement. The mediator is essentially a third party through whom the parties can engage in negotiation.⁴⁶ Experience over time has shown that Parties may be willing to settle to settle their differences in tax matters but pride will not allow one to approach the other. A mediator can be engaged to initiate the contact. Where tax authority engages mediator, most non-compliance notice could be resolved by without litigation. What happens is that most times, when notice is served, the taxpayer may neglect to act on it, treating it with outmost levity. And where the tax authority notices the levity, it will proceed to court enforcement. But where an accredited tax mediator is engaged, he would visit the defaulter on whom notice is served to sensitise his mind on the consequences of the service and pushed for a meeting with the tax authority to resolve the impasses. On the other hand, the notice maybe taken to a legal practitioner who will advise the defaulter not to negotiate settlement with the tax authority but to push the matter to court, the lawyer incites the mind of the tax payer that the notice is defective; and that an action in court will ward off the tax authority whom he shall describe as ‘Touts’. Of course, the lawyer is in business and would want to make money. But an accredited mediator will open the mind of the defaulter to cost and time of litigation and make the person see need to resolve the assessment by any of the applicable ADR methods.

The success of mediation, then, depends on the presence of open communication and trust among the participants. More open communication can be accomplished when the confidentiality of the mediation session is guaranteed. For example, when parties are confident that the information they disclose cannot be used against them in a subsequent legal action, they will be more likely to engage in full disclosure. Likewise, a greater degree of trust results when the parties are confident that the mediator is impartial. The importance of the mediator’s impartiality centres on the fact that one of the mediator's roles is to evaluate the merits of the claims of each party and to engage the parties in discussion and compromise.⁴⁷ Ultimately, parties will be less willing to fully disclose information and wholly accept the mediator's evaluation of their claim if they have the impression that the mediator is partial to the other side. Therefore, with the preservation of confidentiality and impartiality, information can be freely shared among the mediation participants, which, in turn, will allow the mediator to gain an accurate understanding of the claims.⁴⁸ It will therefore be imperative to engage an independent accredited mediator who must be impartial. The mediator who must be skilled in tax matters must treat the information he comes across in the course in the course of his work with utmost confidentiality. Furthermore, because it is nonbinding, the taxpayer has little to lose in the event that an acceptable settlement is not reached, litigation can still be pursued. Mediation only help both parties to seriously examine their positions and claims and ensures that a neutral third party will examine the merits of each side's claims , providing an untainted perspective in the dispute.⁴⁹ It helps each side see how their dispute may play out in the Tribunal/Court and both parties will be able to consider the strength of their case in the light of the expert’s view. Mediation is the most preferred and recommended ADR process for tax disputes.

Arbitrating Tax Disputes

It is proposed that arbitration can also be used for the resolution of tax disputes. Arbitration should be made available both while a case is still under the jurisdiction of tax authority and after it has gone to the tribunal or Court unlike negotiation where attempt is made to resolve tax dispute through an Appeal Office, an in-house administrative mechanism, before it gets to the Tribunal. If both negotiation and mediation have failed during Appeal, the taxpayer may request arbitration for the issue. Arbitration is a more formal dispute resolution process that involves a third party arbitrator with settlement authority.⁵⁰ That is, once the parties have submitted their case to arbitration, the decision of the arbitrator is binding. Arbitration provides two primary benefits over litigation: relaxed rules of evidence and a relaxed adversarial setting. These factors are particularly advantageous for taxpayers who do not have legal representation because less legal expertise is required. However, the characteristics of arbitration limit its availability and attractiveness and make mediation a more likely preference for many taxpayers in resolving tax dispute.

⁴⁶ See Sharon Katz-Pearlman & Jonathan S. Adelson, *IRS Restructuring and Transfer Pricing Enforcement*, 20 Tax Notes Int'l 2617, 2626 (2000).

⁴⁷ See J S Ware, (2001) , Alternative dispute resolution, 4.13 cited in Gregory P Mathew, *Using Negotiation, Mediation, and Arbitration to Resolve IRS-Taxpayer Disputes*, available at https://kb.osu.edu/bitstream/handle/1811/77168/OSJDR_V19N2_0709.pdf

⁴⁸ See P A Mostovoi, *Tax Mediation: Is It Just a Test?*, 13 Tax Notes Int'l. 1871, 1875 (1996).

⁴⁹ See G P Mathew, *Using Negotiation, Mediation, and Arbitration to Resolve IRS-Taxpayer Disputes*, available at https://kb.osu.edu/bitstream/handle/1811/77168/OSJDR_V19N2_0709.pdf

⁵⁰ *Ibid*

7. Conclusion

The practice of ADR in tax dispute in different forms and styles without legal and institutional back up makes it prone to abuse. ADR should be formally adopted as the internal administrative mechanism of FIRS and States Internal Revenue Service. This would see the tax authorities establish Appeal Offices for ADR process where attempt will be made to resolve every tax dispute without necessarily going to the Tax Appeal Tribunal or court. Accredited tax mediators should be engaged to facilitate discussions between tax payers and tax authorities when disputes arise. This would certainly save time, cost and would be most convenient for tax parties. Since every tax dispute starts from the assessment stage, the ADR expert would start early to engage the taxpayer in order to have a streamlined assessment that would be free of dispute and controversies. There is need for a Legal Framework for the practice of ADR in tax issues and disputes. A legal framework here is meant to be a set of laws or rules of law that is used as an anchorage for the effective operation of the ADR process. There would be need to tinker with relevant provisions of the law which provides that where firms issues notice of refusal to amend, an appeal shall be filed at Tax Appeal Tribunal.⁵¹ The proposed law will mandate the tax authority to set up a tax appeal office where taxpayers can settle their issues, and where accredited mediators or arbitrators can be used if negotiation had failed. These options should be mandatorily explored before appeal can be filed at Tax Appeal Tribunal or court. The findings of the tax negotiator or mediator as the case may be would be part of the process which will guide the Tax Appeal Commissioners in the quick resolution of tax dispute. The process will save time and cost and would be most convenient for tax parties.

⁵¹ See Section 59 the Nigerian Federal Inland Revenue Establishment Act (FIRSEA) No. 13 of 2007, Section 11 of the Fifth Schedule to the FIRSEA and Paragraph 5 of the Tax Appeal Tribunals (Establishment) Order of November 25th, 2009 (TAT Order).