

THE JURISDICTIONAL QUESTION ON THE STATUS OF TAX APPEAL TRIBUNAL: REFLECTIONS ON *CNOOC EXPLORATION AND PRODUCTION (NIG) LTD & ANOR V NNPC**

Abstract

The status of the tax disputes mechanism, the Tax Appeal Tribunal has been a thorny issue in the resolution of the disputes in Nigeria. The constitution of the Federal Republic of Nigeria 1999 as amended enumerated the known courts of records but to the exclusion of Tax Appeal Tribunal (TAT). This work examined the laws in Nigeria to discover the status of TAT in the Corpus Juris. Doctrinal method was adopted and analytical approach used to review the provisions of the extant laws, judicial authorities and the opinion of authors on the issue. TAT as presently constituted is not a court, a fact finding or administrative tribunal but a statutory fiction sui generis. It hands down binding decisions yet it is not a court but procedurally the outcome of its decision leads an aggrieved party to the Federal High Court. There is urgent need for the amendment of the constitution¹ to incorporate TAT at least as an inferior court.

Keywords: Tax Appeal Tribunal, Court, Legal fiction, Jurisdiction, Administrative, Fact finding.

1. Introduction

It is not an overstatement to state that the tax matters now occupy a prominent place in the life wire of Nigeria. Tax being a compulsory contribution² enforced to support government on persons, property, income, commodities, transactions, services and others, there is no gain saying that there are bound to be disputes between the tax authority and tax payers. The status of the disputes resolution mechanism has been a thorny issue that calls for the reappraisal of the status. The jurisdictional issue such as constitutionality, legality or otherwise of same has continued to generate issues in the public fora. It is also imperative that now TAT is on an expansionist evangelism for enlightenment of tax payers in Nigeria, that the constitution, powers and efficacy of the adjudicatory body in resolving tax issues requires further review juxtaposing same with the provisions of the extant law.

Just as it is naturally expected that there would be disputes between tax payers and tax authority, the law made some safeguard provision. The Constitution³ generally recognizes the right of every Nigerian to submit disputes to court⁴ for adjudication whether he is a tax payer or not. Other than the general disputes procedure, there is a specialized mechanism and process relating to the resolution of tax or fiscal disputes. In this regard, the TAT process which is an integral and important part of tax administration is provided for under relevant tax legislations.⁵ The appeal process is available to a taxpayer who is aggrieved or dissatisfied with a decision or ruling made by tax authority relating to the tax status of such a tax payer. It is important to note that the status and jurisdiction of the TAT is not only subjected to a lot of criticisms by writers but the court has also adjudicated on them in some cases⁶. In those cases the constitutionality of the jurisdiction of the TAT were seriously challenged. It is however, yet to be settled on the jurisdiction except with the intervention of *CNOOC Exploration and Production (Nig) Ltd & Anor v NNPC & Anor*⁷.

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¹ Constitution of the Federal Republic of Nigeria (CFRN) 1999 as amended s.251(i)

² I A Ayua, *Nigeria Tax Law* (Ibadan, Spectrum's law publishing 1996) 9. He defined tax as a pecuniary burden laid upon individuals or property to support the government and is a payment exacted by legislative authority. In *Mathew's v Chicory Marketing Board* (1938) 60 CLR 263 at 276, a tax is compulsory exaction of money by a public authority for public purposes.

³ CFRN, 1999 as amended, S.6 (6) , 251 (1) and 272 (1)

⁴ Ibid, s.6 (1) (3); personal Income Tax Act 2011 (PITA) s.78, companies Income Tax Act (CITA) 2007, S.48 and Federal Inland Revenue Services (FIRS) (Establishment) Act, 2007 s.59(2).

⁵ FIRS (E) Act 2007, S.59 and the 5th schedule to the Act, CITA 2007, S.8., PITA 2011, 5.60, Petroleum Profit Tax Act (PPTA) 1996, 5.41 (1) and Value Added Tax Act (VAT) 2007, S.20 (1-5).

⁶ *Stabilini Visionni Ltd V FBIR (2005) 2 CLRN 269, Cadbury (Nig) PLC V FBIR (2016 1 CLRN 215, CNOOC Exploration and production (Nig) Ltd & Anor v NNPC & Anor (2017) LPCLR-43800 (CA) and Shell Exploration and Production & Ors v FIRS & Anor*, unreported judgment in Appeal No CA/A/208 12012 delivered on 13/8/2016

⁷ (2017) LEPELR-43800.

2. Creation of Tax Appeal Tribunal (TAT)

The judicial powers⁸ of the Federation are vested in the courts established for the Federation. However the National Assembly or any House of Assembly can establish courts other than those created by the Constitution⁹ though with subordinate jurisdiction to that of the High Court. Following this provision the Federal Inland Revenue Service (Establishment) Act¹⁰ created TAT. TAT's proceedings in accordance with the Act¹¹ shall be deemed to be a judicial proceedings and the tribunal shall be deemed to be a Civil Court for all purposes. Despite series of interpretations, the court in *CNOOC Exploration and Production Nig (Ltd) v NNPC*¹² held that the statute creating TAT did not intend that it be a court but only that it be deemed a civil court. The decision saw TAT as merely administrative body, the proceedings before it a condition precedent to the assumption of jurisdiction by the Federal High Court. The Personal Income Tax Act¹³ provides that TAT established pursuant to the Federal Inland Revenue Service (Establishment) Act 2007 shall have powers to entertain all cases arising from the operations of the Act. The FIRS (E) Act¹⁴ established TAT and conferred the powers of determination of tax issues on it. In fact the Tribunal was conferred the powers to settle disputes arising from the operations of the Act and under the items in the first schedule. By this provision¹⁵ TAT shall have power to adjudicate on disputes and controversies arising from the following tax laws: Companies Income Tax Act¹⁶, Personal Income Tax Act¹⁷, Petroleum Profits Tax Act¹⁸, Value Added Tax Act¹⁹, Capital Gains Tax Act²⁰, and any other law contained in or specified in the first schedule to the Act or other laws made or to be made from time to time by the National Assembly.

3. Appeal Procedure

A person aggrieved by an assessment or demand notice made upon him by the service may appeal to the Tribunal within 30 days from the date of service of the notice²¹. The present state of the laws is that an application for extension of time could be made and the tribunal would readily grant same²². TAT exercise jurisdiction, power and authority as conferred on it by the Federal Inland Revenue Services (Establishment) Act²³. Prior to April 7, 2011, an aggrieved tax payer who desires to challenge an assessment must first forward a notice of objection to the FIRS within 30 days of being served with the assessment²⁴. Where a tax payer fails to serve the objection to the FIRS within the time prescribed by law, the assessment will become final and conclusive. In *FBIR v The Nigerian General Insurance Co. Ltd*²⁵, a company failed to forward its objection to the board within the time. The company's contention while seeking to set aside the assessment was that the notice of assessment ought to have been sent to the company's tax consultant was rejected by court. The court held the assessment to be final and conclusive. However, where a valid objection is received by the tax authority, the authority may accept the objection and accept the tax payers prayers, revise the assessment to what is considered appropriate or refuse further amendment and issue a Notice of Refusal to Amend (NORA) to the tax payer. In *Oando Supply and Trading Ltd v FIRS*²⁶, the appellant was served with notices of additional assessment for the 2006, 2007 and 2008 years of assessment imposing liability on it. The appellant forwarded the notice of objection to the FIRS in accordance with the provisions of Acts. The appellants application was based on the provisions of the TAT rules²⁷ which provides that a person aggrieved by an

⁸ CFRN 1999 as amended S.6 (1)

⁹ Ibid, S.6 (4) (a)

¹⁰ FIRS (E) Act 2007, paragraph 20(3) of the first schedule

¹¹ Ibid

¹² Supra at 19

¹³ 2007 N0 56, S.60

¹⁴ FIRS (A) Act, 2007 S.59(1)

¹⁵ Ibid

¹⁶ 2007 No 58

¹⁷ 2011 No 20

¹⁸ 1999 No 30

¹⁹ 2007 No 53

²⁰ 1999 No 45

²¹ *Oando supply and Trading Ltd v FIRS (2011) 4 TLRN 133*

²² Supra

²³ FIRS (E) Act 2007, para 11 of the schedule to the Act

²⁴ CITA 2007, S.72

²⁵ (1969) ANLR S.33

²⁶ Supra

²⁷ Order 3 rules 1 of TAT (Procedure) Rules, 2010, FIRS (E) Act 2007, S.59 (1) and fifth Schedule, Paragraph 13

assessment or demand notice made upon him by the service under the provisions of tax laws referred to in the rules may appeal against such decision or assessment or demand notice within the period stipulated. The question is whether the appellant, a tax payer can appeal to the TAT against a tax assessment served on him by the respondent, the tax collector, while his objection to the assessment is yet to be resolved by the respondent. The TAT held that Notice of Refusal to Amend is no longer a condition precedent to filing an appeal.

4. Re-occurring Jurisdictional Issues

No matter the proactiveness exhibited by TAT, the preliminary question in every case that comes before it is whether considering the provisions of the Constitution²⁸ vis-à-vis the provisions of the FIRS (E) Act²⁹, the tribunal can entertain an appeal that come before them. It appears Federal High Court enjoys exclusive jurisdiction in accordance with the provisions of the Constitution³⁰ on tax matters to the exclusion of any other court. Hence, the constitutionality of the jurisdiction of the tribunal has been so much questioned as to whether the tribunal could also be considered to be or fit into any of the following fall out of the jurisdictional issues: a court, an administrative tribunal, a fact finding tribunal, and an arbitral body. In *Stabilini Visiononi v Federal Board of Inland Revenue*³¹ the question was on the provisions of the Value Added Tax Act³² pertaining to the tribunal shall not be considered to be in conflict with and violates the provisions of the constitution³³. The Court of Appeal upheld the objection and declared the offending section of the value Added Tax inconsistent, null and void. In *Cadbury v FBIR*³⁴, the question to the jurisdiction of the VAT Tribunal came up again and the Court of Appeal approved the decision in *Stabilini Visiononi v FBIR*³⁵ and further declared the creation of VAT Tribunal inconsistent with the provision of the constitution. The decision in *Stabilini v FBIR*³⁶ and *Cadbury PLC v FBIR*³⁷ followed the decision in *Shell v Federal Commissioner of Taxation*³⁸ in analyzing and considering the jurisdictional status of VAT Tribunal. In the case the judicial Committee of the Privy Council held amongst other reliefs that the following characteristics do not make a panel a court; giving final decisions, hearing witnesses on oath, deciding between parties appearing before it and availability of appeal to court.

Furthermore, the Privy Council added that an administrative tribunal may act judicially but still remain an administrative tribunal distinguished from a court strictly so called. Administrative tribunals are hybrid adjudicating authorities which straddle the line between government and the courts. They are not necessarily presided over by judges. They may at times be imbued with adjudicating authority which is quasi-judicial because it directly affects the legal rights of persons³⁹. Notably, the decisions in both *Stabilini Visinoni v FBIR and Cardbury v FBIR* was based on the provisions of paragraph of the second schedule to the Value Added Tax Act⁴⁰ which provides;

Any party aggrieved by the decisions 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 30 days after the date on which the decisions was giving setting out the grounds on which the decision is being challenged.

(1)

²⁸ CFRN 1999 S.251 (1) (a) (b)

²⁹ FIRS (E) Act, S.59 (1)

³⁰ CFRN 1999, Op cit

³¹ (2009) 1 TLRN 1 at 22

³² VAT Act 1993, S.20

³³ CFRN 1999 as amended, 5.1 (3) & 251 (1) (a) (b0)

³⁴ (2010) 2 TLRN 16 AT 33

³⁵ Supra

³⁶ Supra

³⁷ Supra

³⁸(1931) AC 275. However, it has been observed that Civil litigation is the template for administrative hearings and so the use the terms like adjudicate, judicial and so on cannot convert a tribunal into a court of law. Administrative and even domestic tribunals adjudicate on disputes. When a person or panel is required to decide judicially, it is often means no more than to decide fairly.

³⁹*CNOOC & SAPC v FIRS & Anor* (2013)9TLRN 28 at 35. It is also interesting to note that in *Durga Shakar Meilta v Raghuragi Singh* (19995) 15CR269, the Indian Supreme Court held that both court and administrative tribunals adjudicate and finally determine disputes between parties over whom they have jurisdiction.

⁴⁰ VAT Act 1993, paragraph 24(10) of the second schedule to the Act

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Furthermore, the Value Added Tax Act⁴¹ in the main provides that appeal from the VAT Tribunal shall be made to the Federal Court of Appeal. These provisions of the law placed the jurisdiction of the VAT Tribunal and the Federal High Court on equal footing as courts of co-ordinate jurisdiction. This has been so much criticized.⁴² It is wrong for the Act to provide that appeals from VAT Tribunal shall lie to the court of Appeal. This provision circumvented and usurped the powers and jurisdiction of the Federal High Court. The court rightly held in the two cases of *Stabilini and Cardbury* cases that both provisions of the VAT Act are invalid in view of its inconsistency with the provisions of the constitution⁴³.

Interestingly both unconstitutional provisions of the VAT Act are no longer part of the extant VAT Act.⁴⁴ The Act⁴⁵ makes appeal from the decisions of the Federal Inland Revenue Services (FIRS) to lie to the TAT and appeals from TAT shall be made to the Federal High Court.⁴⁶ Despite the amendment to the VAT Act the controversies rages. In *TskJ II Construcioe s Intenacionais socialadade unipersonal LDA v FIRS*⁴⁷, the court still followed the precedent and held that the provisions of FIRS (E) Act⁴⁸ which created TAT is in direct conflict with constitution which established and conferred exclusive jurisdiction on Federal High Court on matters connected with or pertaining to federal taxation.⁴⁹ This decision was wrong in law as the court could not distinguished the facts of the previous case to note that the law did not provide same as it has been amended.⁵⁰ However, in *CNOOC & SAPC v FIRS*⁵¹, the tribunal distinguish the cases of *Stabilini Visioni v FBIR* and *Carbury v FBIR* and held that the authorities do not govern the appeal before it. In *NNPC v TAT or Ors*⁵², the court distinguished the cases and held that the FIRS (E) Act unlike paragraph 24(11) of the second schedule to the VAT did not create the 1st respondent to usurp, supplant or sidestep the jurisdiction of the Federal High Court thus;

The FIRS (Establishment) Act 2007 on the other hand did not create the 1st respondent to usurp, supplant or sidestep the jurisdiction of the Federal High Court. Rather, the 1st Respondent was created as an administrative framework by which aggrieved tax payers could resolve their tax disputes with the 4th Respondent before resorting to the Federal High Court by invoking its appellate jurisdiction.

This was the position of the Federal High Court in *Ocean and Oil Ltd v FBIR*⁵³ which beautifully captured the position of the Supreme Court in *Egwanwense v Amaghizenwen*.⁵⁴ The court held that the administrative frame work of TAT does not derogate from the jurisdiction of the Federal High Court.

5. The CNOOC Exploration and Production (Nig) Ltd & Anorv NNPC & Anor⁵⁵ Intervention

The facts of the case was whether it would be practically impossible to resolve the issues between the appellant and the FIRS (2nd respondent) without joining the 1st respondent. The appellants were aggrieved over tax assessment

⁴¹ Ibid, S.20(3).

⁴² M.N. Umunweke & KK Ezeibe, *Nigerian National Petroleum Corporation (NNPC) v Tax Appeal Tribunal & 3ors-* The constitutionality of the jurisdiction of the Tax Appeal Tribunal Revisited, *International journal of Business & Law Research* 3(2) 73-81-April June 2015 at 92

⁴³ CFRN 1999 as amended, s.1 (3) & 251(1)

⁴⁴ VAT Act, 2007 No 53 but section 20(3) of the 1993 Act and Paragraph 24(10) of the second schedule to the Act have been repealed.

⁴⁵ Ibid, s.20 (2) (4)

⁴⁶ Ibid, s.20(5)

⁴⁷ (2014) CLRN 220

⁴⁸ FIRS (E) Act 2007, S.59(1) (2)

⁴⁹ CFRN, 1999 as amended, S.251 (1)

⁵⁰ This decision reached in *Stabilini Visiononi and Cardbury* cases which was decided based on a repeated law. It would be recalled that in *Ritz & Co Kg V. Techno Ltd* (1994) 4 NWLR (pt. 598) 298 at 310 the court of Appeal called it primary requirement of judicial discipline under the principles of *stare decisis*. However the court depreciated the decision of the Court of Appeal in *NBCI v European Traders (UK) Ltd* (1990) 6 NWLR (Pt. 154) 36 at 41.

⁵¹ (2013) 9 TLRN 28 at 36

⁵² (2013) 9 All NTC 119 at 142

⁵³ (2011) 4 TLRN 135

⁵⁴ (1993) 9NWLR (pt.315) 1 at 25

⁵⁵ (2017) LPELR-43800 (CA)

made by the 1st respondent which was submitted to the jurisdiction of the Tax Appeal Tribunal to determine whether the appellant's appeal No TAT/22/004/2012 as provided under the paragraph ⁵⁶ of the fifth schedule to the FIRS (Establishment) Act, 2007 infringes on the exclusive jurisdiction of the Federal High Court to hear tax disputes. The decision calmed nerves on the issue of jurisdiction of TAT. The court of Appeal in the case approved and relied on the decision in *Shell Nigerian Exploration and Production & Os v FIRS & Anor*⁵⁷ and *ESSO Exploration and production Nigeria Ltd & Anor v Nigerian National Petroleum Corporation*⁵⁸ as both recognised TAT as a vital step forwards to the resolution of tax related disputes. The decision may not be the final on this issue until the Supreme Court had the opportunity of pronouncing on this thorny issue of jurisdiction of TAT.

Whether TAT is a Court

The Act⁵⁹ did not buttress the purported judicial status of TAT. However, it is obvious that nobody would say that with reference to courts established under the Constitution.⁶⁰ TAT therefore is a court within the contemplation of the sections. It is evident that no High Court rules of any state did or could conceivably provide that the court shall be deemed to be a court. The deeming clause is an acknowledgment that the tribunal is not a court. Going through the list under chapter VII of the constitution which deals with the judicature, the courts contemplated in that exclusive clause does not include TAT⁶¹. Furthermore, section 251(1) of the constitution did not intend to confer exclusive original jurisdiction in the Federal High Court on tax matters, if it was the intention, it would have expressly stated so. Any doubt as to the valid existence of an exclusive appellate jurisdiction in the Federal High Court has been settled by the enabling statute of the court. The Federal High Court Act⁶² provides that;

The court shall have appellate jurisdiction to hear and determined appeals from

- (a) The decisions of Appeal Commissioners (now TAT) established under the Companies Income Tax Act in so far as applicable as Federal law...
- (b) The decision of any other body established by or under any other Federal enactment or law in respect of matters concerning which jurisdiction is conferred by this Act.

Again, on the reoccurring issue of the provisions of paragraph 20(3) of the Act⁶³, it is a trite law that the schedule to an Act cannot override the provisions of the Act. In *FCSC v Laoye*⁶⁴, the Supreme Court held it would be quite contrary to recognised principles of construction of statute to restrain the operation of clear and unambiguous words of sections of law by reference to what appears in a schedule, table or form. Hence, TAT cannot be morphed into a civil court by the deeming provisions of the paragraph of the schedule as the word deem means to treat a thing as being something it is not or as possessing certain qualities it does not have. In legal drafting (which includes legislative drafting) deemed is commonly used to create a legal or statutory fiction⁶⁵. In *St Aubyn v Attorney General*⁶⁶, it was held that it is used to extend the meaning of a word or concept to include a subject not otherwise within its nominal or ordinary meaning. In *R v Norfolk County Council*⁶⁷, the reasoning was that generally speaking when you talk of a thing being deemed to be, it is not what it is rather an admission that it is not what is deemed. In *Orji v DTM (Nig) Ltd*⁶⁸, the Supreme Court further explained the essence of deeming provisions in statutes, thus: In my humble view, a deeming provision in a statute is more of a caricature than anything. It is more of a camouflage,

⁵⁶ FIRS (E) Act, 2007, paragraph 20(3) of the fifth schedule.

⁵⁷ Unreported judgment of Court of Appeal in Appeal No CA/A/208/2012 delivered on 31st day of August 2016 at 28

⁵⁸ Unreported judgment of Court of Appeal in Appeal No CA/A/507/2012 delivered on 22nd July 2016 at 11-12

⁵⁹ FIRS (E) Act 2007, para. 20 (3) fifth schedule

⁶⁰ CFRN, 1999 as amended, S6 (3) (5) and 251 (1) (a) (b). See also the detailed list under part 1 of chapter 11.

⁶¹ Part 11 of chapter VIII list states courts and part 111 relates to Election tribunals. All these courts and Tribunals are precluded by Section 251 (1) (a) (b) from assuming or exercising powers as a court of first instance or original tax dispute resolution jurisdiction in competition with the Federal High Court. *FIRS v General Telecom PLC* (2012) 7 TLRN 108 at 138.

⁶² Federal High Court Act, Cap F12, Laws of the Federal Republic of Nigeria 2004, S.28

⁶³ FIRS (E) Act 2007, paragraph 20(3) of the fifth schedule

⁶⁴ (1989) 2 NWLR (pt.106) 652

⁶⁵ *Muller v Dalgety & Co Ltd* (1909) 9 CR 693, M Duckworth and A Spyrou (ed) 30 Essays on Legal words and phrases, the centre for plain legal language, faculty of Laws University of Sydney Australia State, p13

⁶⁶ (1952) AC 15,53

⁶⁷ (1891) 60 LT Qas 379, 380

⁶⁸ (2009) 8 NWLR (pt. 173) 467, *Akeredolu v Akinremi* (1986)

than anything. The word in short, stands in the place of a reality. And a deeming provision in a section of a statute will always operate in the absence of the real provision.

The reality is that TAT is merely an inferior administrative tribunal. It only means that TAT is carrying out its functions will be expected to adopt the practice and procedure of a civil court. It is to be noted that TAT owes its existence to the Minister of Finance,⁶⁹ unlike judges and other officers of the court who are judicial officers but are servants of the Executive arm of government appointed by the minister of finance.⁷⁰

An Administrative or a Fact Finding Tribunal?

Administrative tribunals conduct their proceedings in an adjudicatory manner, in the sense that they sometimes engage in fact finding, then apply legal rules to such facts impartially, without regard to executive policy. They remain administrative tribunal strictly so called. The only problem with this classification is that as a fact finding tribunal, the tribunal can only make recommendations to another body. However, Tax Appeal tribunal (TAT) is not a fact finding tribunal⁷¹. The reason is that the Constitution⁷² has not preserved the jurisdiction. They are hybrid adjudicating authorities that straddle the line between government and the court. By virtue of the FIRS (E) Act, the National Assembly has set up an administrative tribunal with a limited jurisdictional scope and without inherent powers of courts. Finally, the fact that a panel renders decisions and determines or even deliver judgments and rulings will not constitute it into a court. The truism is that a hood does not make one a monk (*cucullus non facit monachum*). Put simply administrative tribunals may wear the hood of a court but one should not trust costumes.

6. Conclusion

Tax Appeal Tribunal, a legal fiction created by the statute which seems as if the original state of the object is swallowed and lost to the new statutory deeming states. The recognition of the Tax Appeal Tribunal portends that it is only but a vital step towards the resolution of tax related disputes. It is found to be administrative tribunal set up to determine the correctness of assessment to tax without undue fixation and formality. Following from the state of the law, this administrative framework does not derogate from the jurisdiction of the Federal High Court but rather serves as a condition or step to bringing an action before the Federal High Court. An applicant therefore is supposed to explore the avenue first, before going to the Federal High Court. It was introduced as a statutory fiction hence all papers of the tax sector must proceed on the assumption that such a state of affairs exists. However, there is need for the amendment of section 251(1) of the constitution at least to accommodate TAT as an inferior court.

⁶⁹ FIRS (E) Act, 2007, paragraph 21 of the fifth schedule

⁷⁰ Ibid, paragraph 2(1) of the fifth schedule

⁷¹ *Carbury (Nig)Plc v FBIR* Supra

⁷²CFRN, S.6 (d), *Stabilini Visinoni Ltd v FBIR* (2009)2 CLRN 269.