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JOURNAL OF TAXATION AND ECONOMIC DEVELOPMENT (JTED)

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ABSTRACT

The Nigerian Tax Appeal Tribunal (TAT) was established under the Federal Inland Revenue Service (Establishment) Act (FIRSEA) for the purpose of adjudicating tax disputes relating to tax, that is, to settle disputes arising from the operation of various laws. Thus, the main objective of this paper is to examine the jurisdictional scope of the tribunal vis-a-vis the jurisdiction of the Federal High Court (FHC), especially in light of decided cases. This paper is basically done through the examination of the relevant provisions of the 1999 Nigerian Constitution (as amended), the FIRSEA, Tax Appeal Tribunal reports, as well as decided cases relating to the constitutionality of the jurisdiction of the Tax Appeal Tribunal. It has been found that there appears to be an unending controversy regarding the jurisdiction of the TAT vis-a-vis the jurisdiction of the FHC as a result of judicial interpretations of relevant statutory provisions. The paper concluded that the continuous existence of the TAT is of great importance to the adjudication of tax disputes and as such, there is the need to resolve the conflict of jurisdiction confronting it. It was therefore recommended that the FIRSEA should be amended and the deeming provision of Paragraph 20 (3) thereof should be deleted. The Constitution should also be amended and the exclusive original jurisdiction of the Federal High Court in relation to federal taxation should be removed so as to lay to rest any challenge that may arise in relation to the jurisdiction of the Tribunal. The TAT should be made a full court just like the National Industrial Court and the Federal High Court. By doing this the Tribunal will be made a court of co-ordinate jurisdiction with the Federal High Court with exclusive original jurisdiction in tax matters while appeals therefrom will go to the Court of Appeal.

INTRODUCTION

The Tax Appeal Tribunal (TAT) performs a very desirable function as it provides for a speedy adjudication of tax disputes, and since the field of taxation is a specialized field, there is the need for disputes to be adjudicated upon by experts who are not only knowledgeable in the field of taxation but also in the legal profession. This is reflected in the composition of the Appeal Commissioners of each zone of the Tax Appeal Tribunal (TAT) as the Appeal Commissioners are to be knowledgeable about the laws, regulations, norms, practices and operations of taxation in Nigeria or are persons who have shown capacity in the management of trade or business or a retired public servant in tax administration while the Chairman of each zone is to be a legal practitioner who has been qualified to practise for a period of not less than 15 years with cognate experience in tax legislation and tax matters.

However no matter how desirable the function of the TAT seems to be, it can be incapacitated by its lack of jurisdiction the same way the Value Added Tax (VAT) Tribunal was crippled. Thus, the TAT is not exempted from having jurisdiction, the absence of which may call its constitutionality into question.

Jurisdiction is a sacred concept in the legal parlance. It is rated with such high esteem such that if a court is found to be without it, the court cannot dispense its function of adjudicating and ensuring that justice is done. Thus, if a court is found to be without the requisite jurisdiction, the court's hand is tied and it would not be able to hear and determine any matter to which it lacks jurisdiction.

The TAT has been subject of cases which were intended to challenge its jurisdiction. To this effect, there has been different decisions of the Federal High Court (FHC) of different divisions as regards whether or not the exclusive jurisdiction of the FHC to federal taxation conflicts with the jurisdiction of the TAT to hear and determine matters relating to taxation. Since the decisions reached in these cases are not at par with the others, it creates confusion especially because it is settled law that the decision of the FHC of a particular division is not binding on the FHC of another division.

The purpose of this paper, therefore, is to examine the jurisdiction of the TAT in relation to the provisions of the Constitution of the Federal Republic of Nigeria 1999 (as altered) as regards the jurisdiction of the FHC and to determine whether or not the jurisdiction of the TAT conflicts with the exclusive jurisdiction of the FHC. This is done by examining the decided cases of some divisions of the FHC, the provisions of the Nigerian Constitution in relation to the jurisdiction of the FHC, the power of the National Assembly to establish tribunals and the provisions of the Federal Inland Revenue Service (Establishment) Act (FIRSEA) especially the deeming provision of Paragraph 3(3) of the fifth Schedule to FIRSEA.

JURISDICTION OF THE TAX APPEAL TRIBUNAL

The Court of Appeal in *Amechi v INEC* stated as follows:

Jurisdiction is a term of comprehensive import embracing all kinds of judicial action. It is basically the legal right by which judges exercise their authority to hear and determine the subject matter in controversy between parties to a suit. It is the basis, foundation and the conduit of access to court in adjudication under the Nigerian legal system.

The concept of jurisdiction is a threshold issue in legal parlance. The word 'jurisdiction' can be defined to mean the authority a court has to decide matters that are litigated before it. The limits of this authority are imposed by statute, charter or commission under which the court is constituted, and may be extended or restricted by similar means. The issue of jurisdiction is fundamental. In fact, at any point the issue of jurisdiction comes to the fore in any proceedings, it must be given preference by the court tackling it first before taking any step, if need be. This is to avert wasting the stupendous judicial time if it turns out that the court is incompetent to hear the matter. The jurisdiction of the TAT is provided for by the -FIRSEA, 2007 and it covers the two jurisdictions of the TAT which are basically the criminal and civil jurisdictions.

CRIMINAL JURISDICTION

The criminal jurisdiction of the TAT is provided for by paragraph 12 of the Fifth Schedule to the FIRSEA. It provides that where in the course of its adjudication, the TAT discovers evidence of possible criminality, the TAT shall be obliged to pass such information to the appropriate criminal prosecuting authorities, such as the office of the Attorney-General of the Federation or the Attorney-General of any state of the

Federation or any relevant law enforcement agency. This provision goes to show that the TAT is not empowered to adjudicate upon criminal matters in whatsoever form. This position, however, needs to be re-visited so as to allow the tribunal adjudicate on criminal matters arising from the civil jurisdiction of the tribunal in view of the fact that tax matters are peculiar in nature and require experts who are knowledgeable in tax.

CIVIL JURISDICTION

The civil jurisdiction of the TAT is provided for by paragraph 11, Fifth Schedule to the FIRSEA. It empowers the TAT to adjudicate on disputes and controversies arising from the following tax laws:

- (a) Companies Income Tax Act, CAP. C 21, Laws of the Federation of Nigeria, 2004.
- (b) Personal Income Tax Act, Cap. P8, Laws of the Federation of Nigeria, 2004.
- (c) Petroleum Profits Tax Act, CAP. P13 CAP.
- (d) Companies Income Tax Act, C 21, Laws of the Federation of Nigeria, 2004.
- (e) Value Added Tax Act, Cap. VI, Laws of the Federation of Nigeria, 2004.
- (f) Capital Gains Tax Act, CAP. C1, Laws of the Federation of Nigeria, 2004.
- (g) Any other laws contained in or specified in the First Schedule to the FIRSEA or other laws made or to be made from time to time by the National Assembly.

Furthermore, the TAT must apply such provisions of the tax laws referred to above as may be applicable in the determination or resolution of any dispute or controversy before it.

JURISDICTION OF THE FEDERAL HIGH COURT

The jurisdiction of the Federal High Court is provided for by Section 251 of the Constitution. However, section 251(1) (a) and (b) provides specifically for the exclusive jurisdiction of the FHC in relation to revenue and taxation of persons and companies subject to Federal taxation. It provides:

- (1) *Notwithstanding anything to the contrary in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters*
 - (a) *relating to the revenue of the Government of the Federation in which the said Government or any organ thereof or a person suing or being sued on behalf of the said Government is a party*
 - (b) *connected with or pertaining to the taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal taxation.*

Thus, based on the provisions as stated above, it is clear that the FHC has jurisdiction, to the exclusion of all other courts, to hear and determine matters pertaining to Federal taxation.

CONFLICT OF JURISDICTION

A cursory glance at the provisions of paragraph 11 of the fifth Schedule to the FIRSEA and section 251 (1) (a) and (b) of the Constitution shows that there seems to be a conflict of the jurisdiction of the TAT and the FHC, as the TAT seems to have encroached on the exclusive jurisdiction of the FHC. The conflict of the jurisdiction of the TAT and the FHC has been the issue in several cases where the court had to decide whether or not there is indeed conflict of jurisdiction.

Discussing this conflict is of great importance in that it directly affects the constitutionality of the TAT. Thus, if the jurisdiction of the TAT indeed encroaches on that of the FHC, the provisions empowering the TAT to decide on tax issues become null and void based on the provisions of the Constitution. The effect of this is that TAT loses its purpose for existence and would have to be disbanded no matter how desirable its functions seem to be. There is therefore a need to resolve this conflict in a timely manner.

CONFLICT OF DECISIONS

The issue of the conflict of the jurisdiction of the TAT and the FHC has not been made easy to resolve due to conflicting decisions of the same FHC of different divisions. These conflicting decisions has further led to a confusion as regards what exactly the position of law is and what the fate of the TAT is. These decisions are discussed below.

FIRS v GENERAL TELECOM PLC

The respondent, General Telecom, filed a Preliminary Objection to the TAT on a tax appeal commenced by the Federal Inland Revenue Service (FIRS) on the grounds, among other, that the TAT lacked the jurisdiction to entertain tax matter. The respondent relied on the decision in *Stabilini Visinoni v FBIR* and stated that the TAT lacked the requisite jurisdiction since its jurisdiction conflicted with that of the FHC and thus unconstitutional.

TAT, in deciding this appeal, held that it was properly established as an administrative tribunal to tackle tax cases and that most of the cases brought before it were not ripe for litigation and as such the FHC would jettison such cases as premature. Furthermore, the case of *Stabilini Visinoni* was decided on the premise that no other court than the FHC could adjudicate tax disputes and since the TAT unlike the VAT Tribunal was not a court then the case was not applicable.

The TAT further held that:

Whenever the law confers exclusive powers on any particular authority or person, the term 'exclusive' operates to preclude or exclude other authorities or persons from exercising or purporting to exercise those powers. But the other authorities or persons are not at large: a particular class or category is always targeted...the authorities precluded by section 251(1) (a) and (b) from exercising that jurisdiction are other COURTS, hence the phrase "to the exclusion of any other court" in the clause. The term 'court' in that provision means a superior court of record in the sense of section 6(3) and (5) of the Constitution.

In the context of this Constitutional clause conferring exclusive judicial jurisdiction on the Federal High Court, 'any other court' means another court which forms part of the judicature of the Federal Republic of Nigeria. And, bearing in mind that section 251 is advisedly and deliberately situated under Chapter VII of the Constitution, which deals with Judicature, the courts contemplated in that exclusive jurisdiction clause are those listed in the judicial hierarchy set out in Chapter VII or courts that definitively belong in the national or state judicature.

TAT was not created under the provisions of section 6(4) (a) of the Constitution but under the Federal Inland Revenue Service (Establishment) Act and in setting up the TAT under the FIRSE Act, the National Assembly had not created a court but by virtue of section 59 and the Fifth Schedule to the FIRSEA the National Assembly had created an

Administrative tribunal with a limited jurisdictional scope and without the inherent powers of the court.

The TAT held in the instant case that it had the jurisdiction to adjudicate on tax matters and was not precluded from doing so by the provision of section 251 of the Constitution because it was an administrative tribunal and not a court.

CNOOC EXPLORATION AND PRODUCTION NIG. LTD. & SOUTH ATLANTIC PETROLEUM COOPERATION v FIRS & NNPC

The issue, among others, for determination in this case was whether or not the TAT had jurisdiction over the case, a Federal tax matter, because the FHC was the only court with jurisdiction over Federal tax matters.

TAT, in deciding on this issue, relied on the decision reached in *FIRS v General Telecom*. It was held that paragraph 20 (3) of the Fifth Schedule to the FIRSEA did not buttress the purported judicial status of the TAT. The paragraph reads:

Any proceeding before the Tribunal shall be deemed to be a judicial proceeding and the Tribunal shall be deemed to be a civil court for all purposes.

The TAT, holding that it had jurisdiction to adjudicate upon federal tax matters, said as regards the effect of the deeming provision of paragraph 20(3), Fifth Schedule to the FIRSEAs follows:

No rule about the High Court of Lagos State, for example, could conceivably provide that that court 'shall be deemed to be a court'. If an institution is a court you would not have to deem it a court. The deeming clause is thus an acknowledgement that the Tribunal is NOT a court... as one judge described it: 'generally speaking, when you talk of a thing being deemed to be something, you do not mean that it is that which it is deemed to be. It is rather an admission that it is not what it is deemed to be.'

TSKJ v FEDERAL INLAND REVENUE SERVICE

This case was decided on 30th October, 2013 in the Federal High Court, Abuja Division. This case is very significant because it is the first decision of the Federal High Court on the jurisdiction of the TAT. The previous two decisions were reached by the TAT itself. The issue before the court was whether or not TAT had the jurisdiction to entertain the matter *ab initio*.

The court held, *inter alia*, that:

- (a) By the provisions of section 251 (1) (a) & (b) of the Constitution, the Federal High Court exercises jurisdiction to the exclusion of any other court in civil cases and matters connected with or pertaining to the taxation of companies or other bodies established or carrying on business in Nigeria or all other persons subject to Federal taxation. Its exclusivity also affects civil causes and matters pertaining to the revenue of the Federal Government in which the Government or any organ thereof or a person suing or being sued on behalf of the said government is a party.
- (b) In as much as their decisions affect the civil rights and obligations of companies in relation to taxation matters and revenue of the government of Nigeria, and since the Black's Law Dictionary (9th Edition) defines a tribunal as a court or other adjudicatory body, the argument that the Tribunal was an administrative Tribunal was untenable.

- (c) Section 59 (1) & (2) of the FIRSEA were invalid in view of its inconsistency with section 251 (1) (a) & (b) of the Constitution, and by virtue of section 1 (3) unconstitutional.

The Federal High Court thus held that the jurisdiction of the Tax Appeal Tribunal conflicted with the exclusive jurisdiction conferred on it and hence unconstitutional. The court then ordered for the disbanding of TAT.

Fortunately, this case went on appeal to the Court of Appeal in *FIRS V. TSKJ* and the Court upturned the decision of the Federal High Court and held that the jurisdiction of the TAT does not conflict with the exclusive jurisdiction of the FHC, the TAT being an administrative tribunal.

NNPC v TAX APPEAL TRIBUNAL & ORS

In *NNPC v. TAT*, the issue related to the NNPC being the agent of the Federal Government in collecting Petroleum Profits tax assessed against the contractors in OML 133, as well as the exact Education Tax liability for OML for the 2010 year. Justice Buba of the Federal High Court, Lagos Division, held that the FIRSEA that established the Tax Appeal Tribunal was fundamentally different from the Value Added Tax Tribunal Act that purportedly set up the defunct Value Added Tax Tribunals. In defining the jurisdiction of the TAT and whether the FIRSEA violated the exclusive jurisdiction of the Federal High Court under section 251 of the Constitution, Justice Buba started by examining section 251, which provides thus:

Notwithstanding anything to the contained in this Constitution and in addition to such other jurisdiction *as may be conferred upon it by an Act of the National Assembly*, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters...

He then held that the tenor of the first portion of section 251 is to the effect that the National Assembly may make laws from time to time, such as to confer additional powers and jurisdiction on the Federal High Court, and that the intent of this provision is to enable Legislature expand the jurisdiction of the Federal High Court, and in no way can this provision be construed as empowering the National Assembly to 'remove,' or 'restrict' the original jurisdiction of the Federal High Court.

Next, Justice Buba compared the 2 statutes that set up the VAT Tribunal and TAT with each other. Paragraph 24(1) of the second Schedule to VAT Act provided for an appeal from the VAT Tribunal to the Court of Appeal. In contrast, the TAT was created as an administrative framework by which taxpayers could resolve their tax disputes with the FIR before resorting to the FHC by invoking the FHC's appellate jurisdiction. Justice Buba, therefore held that the administrative framework did not derogate from the FHC's original jurisdiction but rather '*serves as a condition precedent to bringing an action before the Federal High Court*'.

Relying on previous decisions relating to the Body of Appeal Commissioners (predecessors to TAT), which allowed appeals from them to the FHC, Buba held that decisions such as *Eguamwense v. Amaghizemwen*, and *Ocean & Oil Ltd. v FBIR* affirmed that TAT was validly created and that its jurisdiction does not conflict with the FHC. Further, relying on Sections 41 and 42 of the Petroleum Profits Tax Act and

paragraphs 13(1) and 17(1) of the Fifth Schedule to the FIRSEA, His Lordship noted that neither of these statutes provided for a direct appeal to the Court of Appeal, unlike the VAT Tribunal Act. While it was clear that the VAT Tribunal proposed to supplant, usurp and sidestep section 251 exclusive FHC jurisdiction, TAT was a precursor to initiating a lawsuit with FHC.

Finally, Justice Buba held that the Legislature was right to have added an appellate jurisdiction to the FHC, in accordance with section 28 of the Federal High Court Act which provides thus:

The Court shall have appellate jurisdiction to hear and determine appeals from
(a) the decisions of Appeal Commissioners established under the Companies Income Tax Act and the Personal Income Tax Act in so far as applicable to Federal law...."

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

OANDO PLC v FIRS

This case was decided in the Abuja division of the Federal High Court on 14th November 2014. The facts giving rise to this appeal can be summarized as follows:

Sometimes in January, 2007, the appellant received two notices of assessment dated December 26, 2006 from the respondent, wherein the respondent indicated that the appellant was liable to pay additional income tax of N65,634,227 and education tax of N7,278,611 for the year 2003 Year of Assessment. The appellant had challenged the notice and in a considered judgement, the TAT directed the appellant to pay N72,912,835 as its further tax liability. It was against this decision that the appellant appealed to the Federal High Court.

Among other grounds of appeal was the issue, whether or not the TAT had the jurisdiction to entertain the subject matter of the appeal. On this issue, the appellant's counsel argued that the TAT lacked the jurisdiction to entertain the subject matter of the appeal based on the following grounds:

That section 251 (1) (a) and (b) of the Constitution of the Federal Republic of Nigeria 1999 confers exclusive jurisdiction on the Federal High Court on matters relating to the revenue of the Federal Government and taxation of companies.

- (a) That paragraphs 11 and 20 (3) of the Fifth Schedule to the Federal Inland Revenue Service (Establishment) Act which confers jurisdiction on the Tax Appeal Tribunal conflicts with section 251 (1) (a) and (b) of the Constitution and is therefore void to the extent of the inconsistency.
- (b) That the decisions of the Court of Appeal in *Stabilini Visonini v FBIR* and *Cadbury v FBIR* support the assertion that the jurisdiction of the TAT conflicts with that of the Federal High Court and is therefore void.

The court held that TAT is not one of the courts created or recognized by the Constitution. This therefore meant that if TAT is one of the courts created by the Constitution within the context of section 251 (1) of the Constitution, then it will automatically be caught by the provision in section 251 (1) of the Constitution. Furthermore, if TAT is shown to have

been conferred with jurisdiction to exercise without the right to appeal to the FHC against its decision, then it can safely be argued that TAT would not have jurisdiction over taxation of companies, personal income tax, etc, but by making the decision of the TAT appealable at the instance of the aggrieved party to the FHC, it shows clearly that the TAT is an administrative tribunal and not a court of law in the strict sense of the term. The fact that a dispute over tax is taken to the TAT first does not mean that it is usurping the jurisdiction of the FHC, as whatever is decided is subject to appeal to the FHC. The court held further that a careful reading of the case of *Stabilini* would show that it was heard by the VAT Tribunal and by virtue of paragraph 24 of the Second Schedule of the VAT Act, the appeal from the VAT Tribunal lies to the Court of Appeal and not the FHC. This meant that the VAT Tribunal had in a way usurped the exclusive nature of the FHC's jurisdiction in matters of taxation on revenue of the Federal Government. This feature made the *Stabilini* case quite distinguishable from the present case and as such the TAT had the requisite jurisdiction to hear and determine tax matters.

NPC v CNOOC & 2 ORS

This case was decided on the 22nd of May, 2015 at the Federal High Court, Lagos Division. The facts of the case are as follows:

There was a litigation commenced by CNOOC and SAP (1st and 2nd Appellants) before the TAT against the FIRS (1st Respondent) as a result of a tax dispute. While the appeal was on-going, the TAT, on application of the Appellants concluded that NNPC is a desirable and necessary party to be joined in the appeal. The TAT therefore assumed jurisdiction over FIRS and NNPC on the basis that the case can only be determined by the presence of NNPC as a party. The Appellant, upon being joined as a party, challenged the jurisdiction of the TAT to entertain the appeal on the ground that same relates to the revenue of the Federal Government of Nigeria. The TAT, in its ruling, held that it had the requisite jurisdiction to entertain the appeal. Dissatisfied with the decision, the Appellant thereafter appealed to the FHC praying the court to determine, *inter alia*, whether the TAT has the jurisdiction to entertain the tax appeal before it.

The Appellant argued that the FHC exercised its jurisdiction to the exclusion of any other civil court in causes and matters relating to the revenue of the Federal government and connected with or pertaining to the taxation of companies carrying on business in Nigeria. It was contended that the FIRSEA vests the TAT with the character of a civil court for all intents and purposes, and that proceedings pending before the TAT that relate to the revenue of the Federal government and/or are connected with the taxation of companies overtly violate section 251(1)(a) and (b) of the 1999 Constitution.

One of the respondents, on the other hand, argued that the TAT was not a court in the context of section 251(1) of the Constitution, but merely an administrative body, and that the FIRSEA is not in conflict with the Constitution in respect of the jurisdiction of the FHC. That it rather preserves and invigorates the jurisdiction of the Court.

The court, in deciding whether or not the TAT was a court for the purpose of section 251(1) of the Constitution looked into the provision of paragraph 20(3) of the Fifth Schedule of the FIRSEA which provides that any proceeding before the TAT shall be deemed to be a judicial proceeding and the TAT shall be deemed to be a civil court for all purposes. The court made use of the literal rule of interpretation which is to the effect that clear and unambiguous words contained in a statute are to be given their ordinary, natural

and literal meaning such that no extraneous matter will be imported to the word used. Thus, under this literal rule, an adjudicating body only has scope to consider what the statute actually says rather than what it might mean. In order to achieve this, the adjudicating body will give the words their plain ordinary meaning.

To ascertain the definition of 'deem', the court relied on the Supreme Court case of *Orji v Dorji Textiles Mills* where it was held that;

... It means to treat a thing as being something that it is not or as possessing certain qualities that it does not possess. It is a formal word often used in legislation to create legal fictions. A deeming provision according to *Advanced Law Lexicon*, Vol. 2 (3rd edition) is a provision of law which makes supposition. The deeming provision is intended to enlarge the meaning of a particular word or to include matters which otherwise may or may not fall within the same provision. When a person, for example, is deemed to be something, the only meaning possible is that whereas he is not in reality that something, the Act of Parliament requires him to be treated as if he were...

The Federal High Court held that when a thing is deemed to be something else, it is to be treated as that something else, together with the attendant consequences, but it is not that something else and that it follows that in so far as paragraph 20 (3) of the fifth Schedule to the FIRSEA deems the TAT to be a civil court for all purposes, the National Assembly has introduced a statutory fiction and all adjudicating bodies are enjoined to proceed on the assumption that such a state of affairs exists from the date the legislation took effect. In other words, from the date the legislation took effect, parliament required the TAT to be treated as if it were a civil court for all purposes.

Therefore, based on the above, it was held that based on the deeming provision of paragraph 20 (3) of the Fifth Schedule FIRSEA, the TAT is now a civil court and as such, its jurisdiction as a deemed civil court conflicted with the exclusive jurisdiction of the FHC against all courts.

On appeal to the Court of Appeal, in *CNOOC Exploration and Production Nigeria Limited*, the decision of the FHC was up-turned and the Court of Appeal held that paragraph 20 (3) of the Fifth Schedule to the FIRSEA does not infringe on the exclusive jurisdiction of the FHC.

FIRS V. CHEVRON NIGERIA LIMITED

This is a ruling in an appeal from the Tax Appeal Tribunal to the Federal High Court sitting at Lagos, Per O. O. Oguntinyin J. and delivered on the 3rd day of May 2018. In this case, the issues before the court are:

- i. Whether, based on the facts that the persons that signed the Notices of Appeal on behalf of the Respondents at the Tax Appeal Tribunal are legal practitioners whose names are on the roll of barristers and solicitors, and that the Notices of Appeal are in conformity with the provisions of Federal Inland Revenue Services (Establishment) Act and Tax Appeal Tribunal (Procedure) Rules, the said Notices of Appeal are competent and valid.
- ii. Whether, based on the provisions of the Constitution of the Federal Republic of Nigeria, 1999, the Federal Republic of Nigeria, 1999, the Federal Inland Revenue Service (Establishment) Act and Tax Appeal Tribunal (Procedure) Rules, more than one legal practitioners can validly represent the tax payer at the Tax Appeal Tribunal and sign processes on behalf of the tax payer.

The Federal High Court re-affirmed the position that the Tax Appeal Tribunal is an administrative body and therefore the processes used before it are not expected to comply with the strict procedure of a normal court. Hence, the court held unequivocally that a party may be represented before the Tax Appeal Tribunal by a legal practitioner, or a chartered accountant, or an adviser as TAT Rules does not limit who may represent a party at the tribunal to only legal practitioner.

It was further held that by the TAT Rules, there is no column for signature of whomever represents the Appellant in the Notice of Appeal Form. The Notice of Appeal was therefore not defective.

EFFECT OF THE CONFLICT OF DECISIONS

The Federal High Court is a court of co-ordinate jurisdiction with the State High Court, High Court of Federal Capital Territory, Customary Court of Appeal and the Sharia Court of Appeal. This means that the decision of one court is not binding, and at best of persuasive authority, to the other courts. Following this line, it follows that the decision of a Federal High Court of a particular division is not binding on a Federal High Court of another division and such decision is at best of persuasive authority.

The effect of the different decisions reached by the Federal High Court of different divisions is that there is no certainty of the position of law and it can lead to confusion. This is highlighted where at first, the Federal High Court of Abuja division held that jurisdiction of the Tax Appeal Tribunal conflicts with that of the Federal High Court, while the Lagos division held that the jurisdiction of the Tax Appeal Tribunal does not conflict with that of the Federal High Court, then later the Federal High Court of Abuja Division held that the jurisdiction of Tax Appeal Tribunal does not conflict with that of the Federal High Court, while the Lagos Division held that the jurisdiction of the Tax Appeal Tribunal conflicts with that of the Federal High Court. Kudos to the Court of Appeal's decisions in *CNOOC Exploration and Production Nigeria Limited (supra)* and *FIRS V. TSKJ (supra)* which has finally reconciled the conflicting positions of the Federal High Court.

DEFINITION OF THE WORDS 'TRIBUNAL' AND 'COURT' IN DETERMINING WHETHER TAX APPEAL TRIBUNAL IS A COURT OR TRIBUNAL

The definition of 'court' and 'tribunal' is important in determining the legal status of the TAT. This is because in arguing for the constitutionality of the TAT, allusion has been made to the fact that the TAT is merely an administrative tribunal and not a court. There is therefore the need to know if there is a difference between a tribunal and a court. In deciding the case of *Oando Plc. v. FIRS*, it was held that the TAT is not one of the courts created or recognized by the constitution. In *TSKJ v Federal Inland Revenue Service*, the court held that according to Black's Law Dictionary (9th Edition) a tribunal is a court or other adjudicatory body.

A court may be defined as a judicial tribunal established to administer justice. Judicial courts are created by the government through the enactment of statutes or by constitutional provisions for the purpose of enforcing the law for the public good. They are impartial fora for the resolution of controversies between parties who seek redress from a violation of a legal right.

Under the Constitution, a court is an adjudicatory body created by the provisions of section 6(5) or section 6(4) (a) thereof. Such court is empowered to adjudicate on matters between persons, or between government and authority and on any person in Nigeria and on all actions and proceedings relating thereto and the determination of any question as to the civil rights and obligations of that person.

A tribunal may be defined as a body with political or quasi-judicial functions set up by law and existing outside the usual court hierarchy. It is a hybrid adjudicating authority which straddle the line between government and the courts. Between routine government policy decision-making bodies and the traditional court forum lies a hybrid, sometimes called a 'tribunal' or an 'administrative tribunal' and not necessarily presided by judges. In *Shell Co. of Australia v Federal Commr. of Taxation*, the court held that an administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a court, strictly so called. It was also held in *Newfoundland Telephone Co. v Newfoundland (Public Utilities Board)* that it was recognized that administrative tribunals hover somewhere in between and are in any event subject to the rules of natural justice and their decisions are reviewable by a superior court.

Some reasons for the establishment of tribunals include the expert knowledge required in respect of some matters which are outside the training of the lawyers who man the regular courts, cheapness, speed, flexibility, informality which are often required in respect of the various subjects covered by the tribunals.

It has been held in *FIRS v General Telecom* that a court is part of the judicature, part of the judicial hierarchy and the TAT forms no part of Nigeria's judicature, and that the members of a court are judicial officers, and belong to the judicial branch of government. Members of the tribunal are not judicial officers, rather, they are servants of the Executive branch of government. The Executive arm is also called 'the Administration', hence the term 'administrative tribunals' used to describe quasi-judicial panels the Administration sets up outside the judicature for specific assignments often having to deal with the administration of specific law or regulation.

Based on the above, it is discovered that there exists a fundamental difference between 'a court' and 'a tribunal' because a tribunal is merely a quasi-judicial panel which is part of the Executive branch of government. By application therefore, the TAT is merely an administrative tribunal with a quasi-judicial function placed under the Executive arm of government and is of subordinate jurisdiction to the superior courts of records.

CONSTITUTIONAL PROVISIONS AS REGARDS CREATION OF TRIBUNALS

Since a tribunal differs from a court, a tribunal is therefore created by an Act of the National Assembly. The Constitution empowers the National Assembly and any House of Assembly of the States to establish courts other than those created by the Constitution with subordinate jurisdiction to that of a High Court.

Section 36 of the same Constitution provides that:

- (1) *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 tribunal established by law and constituted in such a manner as to secure its independence and impartiality.*

- (2) Without prejudice to the foregoing provisions of this section, a law shall not be invalidated by reason only that it confers on any government or authority power to determine questions arising in the administration of a law that affects or may affect the civil rights and obligations of any person if such law –
- (a) provides for an opportunity for the person whose rights and obligations may be affected to make representations to the administering authority before that authority makes the decision affecting that person; and
 - (b) contains no provision making the determination of the administering authority final and conclusive.

It is apparent from the above provision that the 1999 Constitution recognizes and allows the administrative determination of questions that may touch on the civil rights and obligations of individuals, provided that the party affected is given the right to make representations to the administrative tribunal and provided that there is freedom of recourse to the regular courts after the administrative determination. In *L.P.D.C v Fawehinmi*, the Supreme Court held that the test for determining whether a body has judicial powers to act as a tribunal are: whether the decision of the body was binding and whether the decision is cohesive and final.

Commenting on this provision, Professor Ademola Yakubu observed that section 36(2) of the 1999 Constitution clothes the proceedings before administrative bodies or tribunals with legality once the requirement of hearing is observed. Thus, it could be said that trial of issues or determination of contentious issues is not the prerogative of the Courts alone.

MEANING AND EFFECT OF THE WORD 'DEEMED' IN PARAGRAPH 20(3) OF THE FIFTH SCHEDULE TO THE FEDERAL INLAND REVENUE SERVICE (ESTABLISHMENT) ACT

The provision of paragraph 20(3) of the Fifth Schedule to the FIRSEA has brought about another question as to the constitutionality of the Tribunal. It provides thus:

Any proceedings before the Tribunal shall be deemed to be a judicial proceedings and the Tribunal shall be deemed to be a civil court for all purposes.

In *FIRS v General Telecom* and *NNPC v CNOOC & Ors*, the attention of the TAT and the FHC was drawn to the provision of paragraph 20(3) of the Fifth Schedule to FIRSEA and the effect it had on the constitutionality of the TAT. The decision reached by the FHC and the TAT in these cases are not at par. This section is devoted to ascertaining the meaning of 'deem' and to know the effect it has when used in a legislation.

The Oxford Dictionary, defines 'to deem' as 'to regard or consider in a specified way'. 'Deemed' has been defined to mean 'to hold; consider; adjudge; condemn'. These dictionary definitions, by themselves, are hardly helpful.

In the legal context, deeming provisions are generally thought of as creating a fiction – that is, declaring that legislation is to be applied as if something were different from what actually is. Black's Law Dictionary gives as the main definition of the verb 'deem':

"to treat (something) as if (1) it were really something else or (2) it had qualities that it does not have."

In *R v Norfolk County*, 'deemed' was described thus:

When you talk of a thing being deemed to be something, you are not saying it is that which it is deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular thing nevertheless it is to be deemed to be that thing.

'Deemed' is commonly used to create a statutory fiction, that is, for the purpose of extending the meaning of some term to a subject matter which it does not properly designate.

In *R v Verrette*, Beetz J, speaking for the Supreme Court of Canada, noted:

A deeming provision is a statutory fiction; as a rule it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing although it is not or there is doubt as to whether it is. A deeming provision artificially imports into a word or expression an additional meaning which they would not otherwise convey beside the normal meaning which they retain where they are used; it plays a function of enlargement.

However, creating a legal fiction is only one possible function of a deeming provision. Deeming rules have been classified into four broad categories according to their purpose:

- to create a legal fiction by declaring that something exists or has occurred regardless of the truth of the matter;
- to declare the law;
- to create a legal presumption by declaring that certain facts are to be taken as established; and
- to confer discretion.

The deeming provision of paragraph 20(3) of the Fifth Schedule to the Federal Inland Revenue Service (Establishment) Act exists however to create a legal fiction. The scope of application of deeming provisions is typically well defined: some are made 'for the purposes of this Act', whereas others apply only to a specific part, division, subdivision, section, etc. However, when the scope of application of a deeming rule is not explicitly stated, interpretational difficulties arise. As such, the scope of the deeming provision of paragraph 20(3) is extended and limited to proceedings before the TAT only. These proceedings relate to tax disputes in which tax disputes of federal nature are part of.

In the case of *Orji v Dorji Textiles Ltd*, Niki Tobi JSC described the effect of deeming provisions as follows:

In my humble view, a deeming provision in a statute is more of a caricature than anything. It is also more of a camouflage 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; it cannot operate side by side with the real provision.

According to the learned Justice, a deeming provision supplants a reality. However, this can only be done if there is no real provision as it cannot operate side by side with the real provision.

As regards the mode of application of a deeming provision, the Nigerian court decision to that is the case of *NNPC v CNOOC & 2 Ors.* In this case, the Federal High Court applied the expansive approach of interpretation of deeming provisions and as such Tax Appeal Tribunal was held to be subject of all natural consequences occurring from deeming the Tax Appeal Tribunal to be a court.

Thus, the effect of the provision of paragraph 20 (3) of the Fifth Schedule to the FIRSEA is that since the TAT is deemed to be a civil court for all purposes, the TAT will ordinarily be subject of all the consequences arising from it being deemed a court. And this will include the TAT being caught by the provisions of section 251(1) of the Constitution.

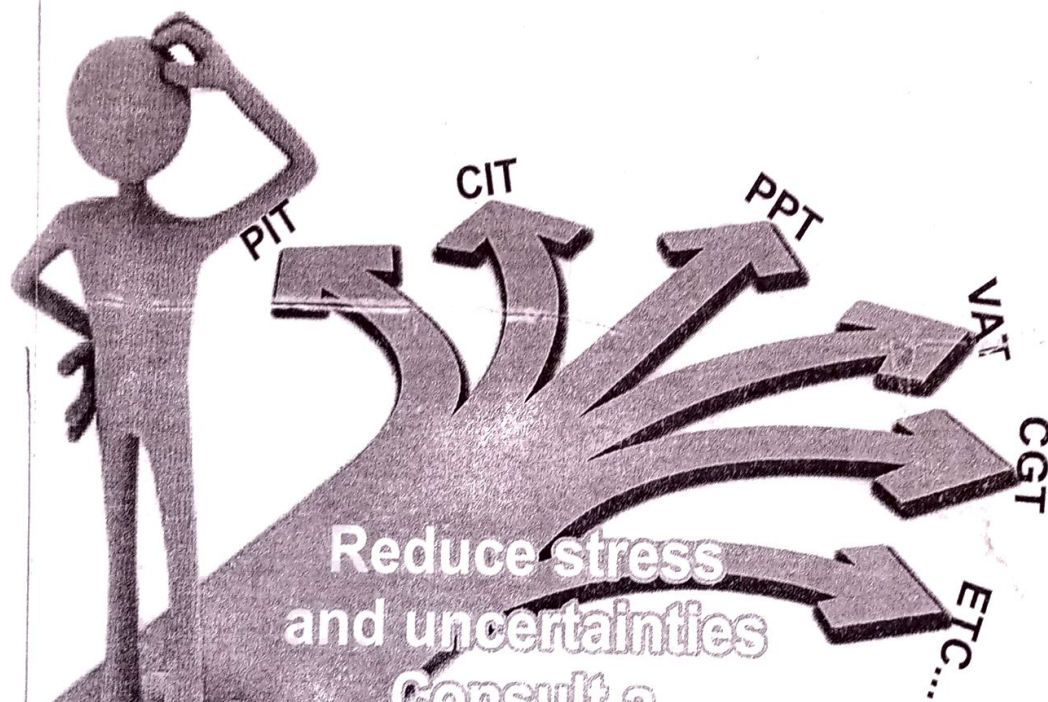
CONCLUSION

This paper is dedicated to analyse the jurisdiction of the Tax Appeal Tribunal in relation to the exclusive jurisdiction of the Federal High Court. In doing this, the paper has examined the jurisdiction of the Tax Appeal Tribunal as provided by the Federal Inland Revenue Service (Establishment) Act, the jurisdiction of the Federal High Court, the decisions reached by the Tax Appeal Tribunal, the Federal High Court and the Court of Appeal, the meaning of the words 'court' and 'tribunal' and a conclusion was drawn that there exists a difference between a tribunal and a court. Special attention was given to the meaning and effect of the provision of paragraph 20(3) of the Fifth Schedule to the Federal Inland Revenue Service (Establishment) Act to shed more light on this. And as a result, it was discovered that a legal fiction can be extended to all its necessary logical consequences which means that the Tax Appeal Tribunal is subject of all the logical consequences arising from it being deemed a court.

RECOMMENDATION

The importance of the Tribunal cannot be overemphasized because the Tribunal takes cognizance of the fact that taxation is a complicated field of study which requires people who are experts in that area, and this is provided for by the composition of the appeal commissioners who are required to be knowledgeable in the laws, regulations, norms, practices and operation of taxation in Nigeria. However, the Tribunal cannot perform these functions without having the requisite jurisdiction. It is therefore recommended that the FIRSEA should be amended and the deeming provision of Paragraph 20 (3) should be deleted. Also, since the issue of the conflict of jurisdiction has been laid to rest by the Court of Appeal in *CNOOC Exploration and Production Nigeria Ltd & Anor v. NNPC and Anor* and *FIRS V. TSKJ*, the Supreme Court should be wary of disrupting the decisions of the Court of Appeal, otherwise there will still be suits challenging the jurisdiction of the Tribunal and the fact that the deeming provision of Paragraph 20(3) is stricken notwithstanding. The Constitution should also be amended and the exclusive original jurisdiction of the FHC in relation to federal taxation should be removed. This is a more desirable position as it will lay to rest any challenge that may arise in relation to the jurisdiction of the Tribunal. Also, this position shows the readiness of the government to support taxation as legal tax experts are allowed to decide on tax matters without worrying about the constitutionality of their jurisdiction to do so. The TAT should be made a full court just like the National Industrial Court and the Federal High Court. By doing this the Tribunal will be made a court of coordinate jurisdiction with the Federal High Court with exclusive original jurisdiction on tax matters. Thus, the Tribunal should be made a court which would be part of the hierarchy of courts of record in Nigeria.

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