Disputes Resolution in Nigerian Taxation, Critical Appraisal of Jurisdictional Powers.

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Abstract

This paper presents a critical appraisal of the disputes' resolution mechanisms in Nigerian taxation by looking at the jurisdictional powers via salient cases decided by the superior courts of records such as States' High Courts, Federal High Courts, Court of Appeal and Supreme Court. Also supplemented are cases from South Africa, Zimbabwe, Kenya, Zambia, Malaysia, West Indian States of Guyana, Jamaica, Barbados, Trinidad/Tobago and other contemporary countries which are utilized here to throw more light in our taxation jurisprudence. This paper further attempts to delve into some identified areas of conflicts which are principally the disagreements, controversies over excessive amount in the assessment of income tax, under-assessments, under-payment of taxes leading additional assessment, tax audit processes and the exercise of powers of adjustments by the relevant tax authority (RTA). The other contentions areas examined here are extent of fiscal jurisdictions conferred on the RTA such as the scope of the taxing powers of the Federal Government of Nigeria (FGN) exercised through its agency Federal Inland Revenue Service (FIRS), 36 (thirty-six) States of Nigeria through their agencies, the States' Board of Internal Revenue (SBIR) and the Local Government Authorities (LGA) through its agency, the Revenue Collector (LGARC). The other spheres of the conflict such as the right of the taxpayer to question any of the RTA three-tiers hierarchies' over irregular manner of expenditures of public revenue. This paper attempts to address the above conflicts in the light of the review of some selected cases. Conclusion is drawn from these developments to make our tax jurisprudence and proposals are made to facilitate the reformation of our tax laws and align with the global best practices.

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1. Introduction

Tax disputes by way of explanation or clarifications, are synonymous with conflicts arising from implementation and enforcement of taxation laws which the law provided the specific channels for the resolution of grievances or redress. The areas apparent in the controversy are the States' Houses of Assembly's (SHA) attempts to usurp the tax law making jurisdictions of the National Assembly (NA) in the Nigerian federal structure. The doctrine of the 'covering of the field' which operates to bar the subordinate SHA and nullify any legislation which is in conflict with the ones enacted by the NA. The powers of the States' House of Assembly to promulgate tax laws in respect of the concurrent legislative list and the borderline cases, are examined. The various attempts made by the components States' Legislatures (House of Assembly) to promulgate tax laws and the responses by the Judiciary – the pronouncements made by the Superior Courts of Records to invalidate what they perceive as encroachments on the powers of the National Assembly to make laws for peace, order and good Governance of the federation, are critically appraised. We shall assess the extent which the courts are able to discharge this onerous duty imposed on them as the watch-dog to detect the excesses of the States' and Federal Legislative Houses. The courts in Nigeria, have resorted to the reliance on use of exclusive legislative lists and the concept of double taxation to curtail the unlawful encroachment by SHA into the legislative powers of the National Assembly, in attempt to safeguard the concept of separation of powers in the tax law-making jurisdictions. The other controversial areas are the reliance by the RTA such as the FIRS, the SBIRS and the LGARC, through the processes of 'internal, external' 'tax audits[1] and the examinations and reviews' of taxpayers' returns" to discover deficiencies or under-payments of taxes, as valid and sufficient ground for RTA to raise additional assessments which would result into the liability to pay additional taxes. In course of the above interactions, disputes arise between States' and Federal government, one State and another, States and Local governments, Executives and Legislatures and the governments and taxpayers on other hand. Disputes resolutions in taxation disagreements have been exhaustively dealt with through

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[1] Tax audits processes assist the Relevant Tax Authority (RTA) to ascertain the amount of tax claimable and without it and claims of tax indebtedness would fail – See NDDC v. RSBIRS (2020) 3 NWLR (Pt. 1711) 371 at 375-380

objections and appeals elsewhere[2] and repetition here is unnecessary. The summary of the areas covered, are as follows; -

1. Disputes between Federal Government and States Governments
   (a) Perceived encroachment and invocation of the doctrine of covering d field in the tax disputes,
   (b) Doctrine of double taxation,
   (c) FGN and States' adhering strictly to areas of jurisdiction - the separation of taxing powers guaranteed by the Constitution and fiscal legislations,
   (d) Areas of non-interference by FGN are limited to residual areas such as tourists' traffic (as distinct from tourism itself,), hotels, motels, hospitality and other matters peculiar to their locality.
2. Disputes between FGN and Taxpayers –
   (a) the right of taxpayers to question government expenditures to ensure tax revenue is utilized prudently.
   (b) Claims for Tax Exemption as Government Parastatals and status of the Co-operate Taxpayers
   (c) Deductibility of Interests for Companies for Arms-Length Loans granted from Sister-Companies
3. Disputes between States' Government and Taxpayers over Powers to Promulgate Tax Legislation and Enforcements of payments of Taxes outside Part II of Taxes and Levies (Approved Lists for Collection) Act 1998 –
   (a) Property Law
   (b) Urban Development tax
   (c) Social Services Contribution Levy
   (d) States' Government Setting-Up Agency to Intrude, Rival and Derogate the Powers of SBIRS to Collect Revenue Bestowed by the law,
4. Disputes between LGAs and Taxpayers
   (a). Bye Laws Promulgated by LGAs Requiring Payment of Taxes on Education, Youths' Empowerment, Unified Sticker, Community Development Levies, Discharge Pollution, Niger Delta Development Permit, Land Index Oil Levy, Agricultural Resources and Craftsmanship Development Skills Taxes, Are Ultra-Vires by Part III Taxes and Levies (Approved Lists for

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[2] Jack-Osimiri U. & O'Sullivan, M. – Dynamics of Tax Appeals in Nigeria (2014) vol.13 (No.1) pp.1-38 CITN Journal of Taxation & Economic Development and Gregory Ayodele DaSiva – Understanding the Dynamics of Tax Appeals (2014) Vol. 13 (No. 1) pp. 75 – 100 CITN JTED

Collection) Act 1998 – Lagos State High Court Declared as Unconstitutional, Taxes and Levies (Approved Lists for Collection) Order 2015.

(b) Appraisal of the Taxes and Levies (Approved Lists for Collection) Order 2015 and its Nullification by the Lagos High Court in 2020

(c). Areas validly enacted by the LGAs Councils such as Land Use Charges, are enforceable,

5. Alternative Disputes Resolutions (ADR) and its Application to Tax Disputes Jurisprudence,
6. Refund of Taxes lawfully collected pursuant to the nullified taxation Act – Nigeria contrasted with developments in Zimbabwe, Malaysia, Zambia and West Indian State of Guyana.

(7) Proposals for Reforms – Tax Appeal Tribunal (TAT) should be decentralized to all States' capitals. It is not cost-effective, it is inhibiting taxpayer litigants, lawyers and accountants incurring heavy travelling expenses/hotel bills from remotest part of Nigeria to contest taxation disputes in the 6 (six) zones.

(a) Convert Tax Appeal Tribunals (TATs) into National Tax Court of Nigeria like our National Industrial Court comparable to USA, Canada, Jamaica, South Africa and other countries.

(b). Alternatively, abolish TATs' jurisdiction outside Lagos, Ibadan, Enugu, Abuja, Jos, Kaduna and transfer all their functions outside the above areas, to Revenue Courts staffed with Chief Magistrate and assisted by the Experts' Assessors comprising Tax, Fiscal Specialists drawn from CITN to Sit with Magistrates like those at Uyo Akwa-Ibom and Abeokuta Ogun States of Nigeria. Countries such as Jamaica and South Africa operate Revenue Courts that have jurisdiction over Federal and State taxes.

(c). Reconstitution of the 'Panels Handling Objections' in FIRS, SBIR and LGARC. It is imperative that its membership could be enlarged to encompass some independent persons knowledgeable on fiscal matters and representatives of Chartered Institute of Taxation of Nigeria (CITN) and they should be given 3-6 months to discharge their duties.

Disputes between Federal and States Government

The Federal Government of Nigeria (FGN) like others in different parts of the world has plenary powers to impose any form

of tax legislation and at whatever rate it deems appropriate[3]. The National Assembly is empowered to make laws for peace, order and good government of the Federation or any part thereof[4]. This includes tax laws for and on behalf of the entire country in respect of items specified in the exclusive and concurrent legislative lists. In respect of the powers to promulgate tax laws, it appears to be the exclusive preserve of the National Assembly[5] to enact laws governing taxation such as customs and excise duties[6], stamp duties[7], taxation of incomes, profits and capital gains[8], except as otherwise prescribed by the Constitution. In fact, taxation law making is a federal matter under the **items 58 and 59** exclusive legislative list which empowers the National Assembly to make tax laws, impose any form of tax for any purpose and at whatever rate under **S. 4 (1) (2), 1999 Nigerian Constitution.** The general rule is that the Constitution of the Federal Republic of Nigeria is the 'fons juris' - the source of all laws from which all other laws flow and derive their validity, it is the supreme law of the land - the alpha and omega of the judicial system - it is supreme over and above all other statutes, every Act of the National Assembly or State Houses of Assembly, all other legal norms must conform and not in conflict with the Constitution as the grundnorm.[9]

The general rule is that none of the three tiers of the government can usurp nor encroach on the legislative powers of the other. In the case of *Attorney General of Ogun State v. Aberuagba*[10] the plaintiffs (respondents) who are wholesalers of beer in Ogun State for themselves and on behalf of others sought a declaration that SS. 3(1), 3(4), 3(7), 4, 5, 8 and 21 Sales Tax Law 1982 (Ogun State) which imposed tax upon the purchase of specific goods and services and made provisions for the collection of same. The issue was whether the taxing powers of the FGN under item 38 of the Exclusive list 1979 Constitution covers tax payable in respect of the sales and purchases of commodities. The question was whether the Ogun State Sales law 1982 is valid or inconsistent with the S. 5(4) 1979

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3 S.4. Nigeria Constitution 1999.

4 S.4 (2) (3) Nigerian Constitution 1999.

5 2nd Schedule Legislative Powers Part 1 Exclusive Legislative Lists Nigerian Constitution 1999.

6 Item 16, 2nd Schedules Part 1 Nigerian Constitution 1999.

7 Item 58, 2nd Schedules Part 1 Nigerian Constitution 1999.

8 Item 59, 2nd Schedules Part 1 Nigerian Constitution 1999

9 Attorney General Abia State v. Attorney General of Federation (2006) 16 NWLR (Pt.1005) 265 per Tobi JSC.

10 (1997) 1 NRLR (Pt.1) 51 at 55-56, (1985) 2 NWLR (Pt. 8) 395 at 405,

Constitution. Under S. 3(1) Ogun Sales Tax Law, all products brought into the state, i.e. supply of goods and services are taxable? It was contended that FGN encroached on the jurisdiction of the States legislative power of taxation. The Supreme Court held that since the Sales tax law imposed on the goods brought into the State which as a matter of fact was within what is called inters States' trade and commerce; it is within the exclusive list of FGN and therefore invalid. **BELLO JSC** (as he then was) held that any tax as used in the provision empowers the state to impose tax on all matters in the concurrent and residual matters and this can only be exercised subject to the rule of inconsistency under S. 5(4) and the **doctrine of covering of the field** and since FGN had enacted law on the concurrent list, that enactment forecloses the ability of the State government to make law on the same issue.

As an off-shoot to the concept of the covering of the field, the concept double taxation has been used to settle the dispute over taxation between the FGN and States' Government. Recently, in *Attorney General Lagos State v. Eko Hotels Limited & FBIR*[11] the Supreme Court of Nigeria held that the impositions of Value Added Tax (VAT) and Sales Tax simultaneously, violates the double taxation principle prohibited and forbidden by the law. *Kekere-Ekun JSC* was emphatic when he held thus: -

> ….''VAT is an existing law by virtue of S.315 (1) of the 1999 Nigerian Constitution and since **VAT has covered the field on the subject of sales tax, it therefore prevailed over Lagos Sales Tax** (Schedule Amendment) Order 2000. I am in complete agreement with the learned counsel for the 1st and 2nd Respondents that not only do **both legislations cover the same goods and services, they are also targeted at the same consumer**. The tax has already been collected by Eko Hotels Limited pursuant to VAT Act. When disputes arose as to which of the two claimants (FBIR or LSBIR), the tax collected, should be remitted to, it rightly approached the court for direction. There is no doubt in my mind that it would **amount to double taxation for the same tax to be levied on the same goods and services**, **payable by the same consumers under two different legislations''**

[11] (2018) 31 TLRN 1 at 9

While the above two cases appear faultless, the implication of it is that FGN can use the doctrine of covering of field to indirectly encroach and override on legislative powers of other component States but the States and local government cannot do likewise. The above principle is now limited to areas where the Federal Government could legitimately legislate and basically not in respect of residual local matters peculiar to States by virtue of residual legislative powers reserved for the States' Houses of Assembly such the regulation, registration, classification and grading of hotels, motels, guests house, restaurants, travels, tourists' agencies and hospitality.[12]

Pursuant to the powers of the National Assembly to make tax laws for the entire country, it promulgated the following legislations;

- The Taxes and Levies (Approved List for Collection) Act, 1998[13].

S. 1 TLALC Act provides thus:

> Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria, as amended, or in any other enactment or law, the Federal Government, State Government and Local Government shall be responsible for collecting the taxes and levies listed in parts I, II and III of the Schedule to this Act respectively.

The rationality of the uniform taxation laws as a guide for all the components States in Nigerian federation has been defended in the case of *Eti-Osa Local Government v. Jegede*[14] where *Dongban-Mensem JCA* held:

> "… To leave taxation at large at the whim and caprice of the different tiers of government would expose the entire citizenry to undue, multiple and over lapping taxes and levies."

For ease of reference, it is noteworthy to hereunder reproduced **Parts I**, **II** and **III** of the Schedule to the said TLALC Act 1998 thus;

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12 Minister of Justice & Attorney General of Federation v. Attorney General Lagos State (2013) TLRN 55 at 61-66 (2013) 16 NWLR (Pt. 1380) 249 (Supreme Court of Nigeria held Lagos State and other component States have jurisdiction over tourisms and matters within their locality (FGM power is limited to tourists traffics of foreigners/toursts coming into and out of Nigeria)

13 N0.28 Laws of Federation of Nigeria 2004

14 (2007) 10 NWLR (Pt1043) 537 at 559 See also Mobile Producing (Nigeria) Unlimited v. Eleme Local Government Rivers State (2004) 10 CLRN 99 per Nwodo J.

Part I

Taxes to be collected by the Federal Government

1. Companies' income tax.
2. Withholding tax on companies, residents of the Federal Capital Territory, Abuja and non-resident individuals.
3. Value added tax.
4. Education tax.
5. Capital gains tax on residents of the Federal Capital Territory, Abuja.
6. Bodies corporate and non-residents individuals.
7. Stamp duties on bodies corporate and residents of the Federal Capital Territory Abuja.
8. Personal income tax in respect of-
    a. Members of the armed forces of the Federation
    b. Members of the Nigerian Police Force
    c. Residents of the Federal Capital Territory Abuja[15] and
    d. Staff of the Ministry of Foreign Affairs and non-resident individuals.

Part II

Taxes and levies to be collected by the state Government

1. Personal income in respect of-
    a. Pay-As-You-Earn (PAYE); and
    b. Direct taxation (self-assessment)
2. Withholding tax (individuals only)
3. Capital gains tax (individuals only)
4. Stamp duties on instruments executed by individuals.
5. Pools betting and lotteries, gaming and casino taxes
6. Road taxes
7. Business premises registration fee in respect of-
    a. Urban areas as defined by each state, maximum of-:
        i. N10,000 for registration and
        ii. N5,000 per annum for renewal of registration and
    b. Rural areas-
        i. N2,000 for registration and
        ii. N1,000 per annum for renewal of registration
8. Development levy (individuals only) not more than N100 per annum on all taxable individuals
9. Naming of Street registration fees in State Capital.

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[15] Federal Capital Territory Internal Revenue Service Act Cap.10 (2015) FCTIRS is now in charge of personal income taxes of the residents of FCT.

10. Right of Occupancy fees on lands owned by the State Government in urban areas of the state.
11. Market taxes and levies where state finance is involved.

Part III

Taxes and levies to be collected by the Local Government

1. Shops and Kiosks rates
2. Tenement rates
3. On and off liquor license fees
4. Slaughter slab fees
5. Marriage, birth and death registration fee
6. Naming of street registration fee, excluding any street in the state Capital.
7. Right of occupancy fees on lands in rural areas, excluding those collectables by the Federal and state governments.
8. Market taxes and levies excluding any market where state finance is involved.
9. Motor park levies.
10. Domestic animal license fee.
11. Bicycle, truck, canoe, wheelbarrow and cart fees, other than a mechanically propelled truck.
12. Cattle tax payable by cattle farmers only.
13. Merriment and road closure levy.
14. Radio and television license fees (other than radio and television transmitter).
15. Vehicle radio license fees (to be imposed by the local government of the state in which the car is registered).
16. Wrong parking charges.
17. Public convenience, sewage and refuse disposal fees
18. Customary burial ground permit fees.
19. Religious places establishment permit fees.
20. Signboard and advertisement permit fees.

2. States' Government Powers to Prumulgate Taxation Laws Relating to Tourism, Sundery Matters in Residual Areas Peculiar to their Locality

As can be demonstrated, the **litigation mechanism** - resort to courts is the most durable means of resolution as it provides precedents for taxation jurisprudence which would guide tax administrators, tax practitioners and tax teachers towards subsequent identical situations. Some of the residual areas reserved for the

States' Houses of Assembly is to promulgate law relates to the regulation of tourism[16] (as opposed to tourists' traffic). The regulation, registration, classification and grading of hotels, motels, guests house, restaurants, travels, tourists' agencies and hospitality and other matters peculiar to their locality are reserved.[17] The States' Houses of Assembly have power to promulgate taxation laws regulating these residual areas. The most notable of the tax disputes arose between the FGN and Lagos State recently in the most celebrated case of *Minister of Justice & Attorney General Federation v. Attorney General Lagos State*[18] the FGN challenged the Lagos State's Hotel Licensing Law (2003), its amendment (2010) and Hotel Occupancy & Restaurant Consumption Law 2009, as invalid by reason of their inconsistency with the provisions of Nigerian Tourism Development Act 1992 (NTDA which set up NTD Corporation) on the ground that Item 60 Second Schedule Part 1 Exclusive List Nigerian Constitution 1999 vests on the National Assembly powers to make laws on tourism as a whole which by extension invalidates the Hotel Occupancy and Restaurant Consumption law of Lagos State. LASG opposed the action contending NTDC is only responsible for rendering technical advice to States' Governments in the field of tourism and to make laws for the regulation, registration, classification and grading of hospitality and tourism enterprise. The NTDA also provides for the establishment of States Tourism Board for each State and Local Government Tourism Committee for each Local Government in each State. S. 4 Nigerian Constitution 1999 divided the legislative powers between National Assembly for the Federation and House of Assembly for the States into the Exclusive, Concurrent and Residual Legislative Lists. LASG contended that "hospitality and tourism enterprises" not being contained in the exclusive and concurrent lists, are residual matters for the LASG to legislate on. From the inception of 1999 Constitution, FGN did not attempt to repeal or modify NTDA 1992 which FGN continues to enforce in Lagos State by seeking to regulate, register and grade the hospitality and tourism facilities. The LASG further maintained that NTDC Act is no more valid as regards the subject matter competence – "tourist traffic"

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16 Attorney General Federation v. Attorney General Lagos State (2013) 16 NWLR (Pt.1380) 249 at 383

17 Bello, A.O - Legislative Powers to Regulate Hotels and Tourism Business (2014) vol. 32 pp.148-154 Journal of Private and Property Law University of Lagos.

18 (2013) 12 TLRN 55 at 61-66 (2013) 16 NWLR (Pt. 1380) 249 (Supreme Court of Nigeria)

under S. 60 (b) in Exclusive Legislative List only concerns the movement of foreigners coming into Nigeria, as tourists may be regulated by ways of visas and the limited periods that tourists may remain in the country. That power does not extend to regulation, registration, classification and grading of hospitality enterprise and therefore the NTDC Act is unconstitutional, null and void.

The Supreme Court of Nigeria unanimously upheld the contention of LASG and held that the powers of National Assembly to make laws on tourism within S.6O(1)(b) Second Schedule 1999 Constitution is limited to **tourists' traffic** which alludes ingress and egress of tourists from other countries, international visitors or foreigners. These include any one who moves from place to another even within Nigeria for site seeing, relaxation and possibly for cultural purposes. Their Lordships were emphatic thus: -

1. That within the context of S.60 (1) (b) it connotes a tourist as an international traveler who travels to another country for the purpose of sight-seeing, who must obtain visa to visit such country including Nigeria and tourists traffic calls for the exercise of the functions of immigration department of the ministry of internal affairs as governed by the Immigration Act[19].
2. That matters pertaining to the regulation, registration, classification, grading of hotels, motels, guests' houses, restaurants, travel and tour agencies and other hospitality and tourism related establishments are not matters within the exclusive legislative lists and National Assembly for FGN lacks the constitutional vires to make laws outside its legislative competence for these residual matters reserved for the State House of Assembly. It is an encroachment on exclusive constitutional authority conferred on the State House of Assembly to legislate on residual list.
3. The three laws passed by the Lagos State House of Assembly are intra-vires and valid under S.4(7) Nigerian Constitution 1999 because these matters are neither in exclusive nor on the concurrent legislative lists.
4. That the doctrine of the covering of the fields has no application on the laws passed by National Assembly on exclusive legislative lists. It is only applicable where the FGN has validly passed laws pursuant to the subject matter on the concurrent lists. The NTDC Act was not validly made because the National

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19 Ibid at 90-92 per Galadima JSC.

Assembly has no legislative competence over the regulation of hotels, motels and similar tourism facilities in Laos State since they are residual matters. The NTDC Act was not validly made and there is therefore no inconsistency.

5. That there is no connection between tourist traffic and regulation of hotels, motels and other hospitality and tourism establishments as tourists' traffic is in exclusive list because of its national and international implications. All over the world, regulation of tourists' traffic is handled exclusively by the National Government. The practice in a Federation is to vests in the regional government the power to regulate hotels and similar establishments[20].

Comments – The decision of the Supreme Court is commendable for the succinct analysis of the distinction between tourist traffic which concerns foreigners who need to comply with immigration rules in order to have ingress and egress - come into and out of Nigeria exclusively vested on the Federal Government (FGN) and tourism as a business enterprise which concerns hotels and hospitality as residual local matters vested in legislative jurisdiction of Lagos State and all other component States of Nigeria. This judicial pronouncement from the apex court has doused unnecessary rivalry between FGN and component States' governments[21] over perceived encroachment. The case clarified legislative sharing powers between the FGN and SG predicated in three principles (a) – the FGN's power should be limited to maters of general interests to the nation as a whole[22] while the SG should concentrate on matters within their locality. This case is faultless because the Supreme Court recognized earlier that the States' Houses of Assembly have residual legislative competence to enact laws to regulate urban and regional planning of their respective locality.[23]

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20 Ibid at 97-105 per Galadima JSC

21 Bello, H.O. – Legislative Powers to License Hotels and Tourism Business in Nigeria (2014) 32 Journal of Private and Property Law (University of Lagos) pp.148-154.

22 Adediran, M.O. (Prof) – Critical Examination of the Constitutional Provisions on Legislative Powers of the Federal & States – Quoted from D.A. Ijalaye (Prof) – The Imperatives of Federal/States Relation in a Fledgling Democracy for Nigeria (2001 NIALS) pp. 1 at 2-3. See also Akande, J.O – (Prof) –The Future of Federalism in Nigeria (1985) 1 Nigerian Current Law Journal pp.63-66

23 Attorney General of Lagos State v, Attorney General of Federation (2001) 14 WRN 1

a. Disputes between Federal Government & Tax Payers

The resolution of the disputes between the Federal Government and individual is through the public purpose litigation declaratory reliefs. Public interests' litigation should be encouraged amongst lawyers, accountants, economists and business men/women who are versed in the interpretation of taxation laws and other fiscal legislation particularly members of CITN in their personal capacity. Where the government funds are being misused or channeled into wrong expenditures, an individual taxpayer can initiate litigation against that particular government department, ministries and parastatals to correct the anomaly. The tax payers' right to challenge irregular expenditure of public funds was recognized in the case of *Gani Fawehinmi v. President of Nigeria*[24] where the taxpayer challenged the President payment of salaries allowances in dollars $247,000 and $1117,000 respectively to certain categories of choice Ministers above the one approved by Revenue mobilization, Allocation and fiscal commission (RMAFC)) i.e ₦794, 085 as violation of SS. 15, 84, 124 & 153 Nigerian Constitutions 1999 and Political, Public and Judicial Office Holders (Salaries and Allowances) Act cap. 6 (2002). The High Court dismissed the suit holding that the Claimant was a busy body who has no locus standi to challenge the government expenditure. The *Court of Appeal* reversed the judgement and held that the taxpayer has locus standi to sue because it will definitely be a source of concern to any taxpayer who watches the funds he contributed or is contributing as tax towards the running of the affairs of the State being wasted when such funds could have been channeled into providing jobs, creating wealth and providing security to the citizens. Aboki JCA was emphatic that such a taxpayer has sufficient interest to protect by coming to court to enforce the law and ensure his tax money is utilized prudently.[25]

b. Disputes over qualification of Government Parastatals to gain Tax Exemption and Deductibility of interests on Arm-length Loans from Sister Companies.

Strictly speaking, a company owned exclusively or where the Federal or State Government owns controlling shares does not qualify as government parastatal because an incorporated company

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24 (2007) 14 NWLR (Pt.1054) 275 at 299.

25 Ibid at 299.

wears a legal personality separate, distinct and different from those who own it.[26]

Similarly disputes between governments' owned companies and the RTA are resolved through the medium of litigation. In the case of *Nigerian Liquified Natural Gas PPLC v. Federal Board of Inland Revenue*[27] where the NLNG claimed to be exempted from payment of taxes since it is a parastatal of the government because FGN has controlling shares of 49 percent. *Mustapha J* rejected this contention and held that a subsidiary company has its own corporate personality and even if FGN has 49 percent shares in the company through its agent Nigerian National Petroleum Corporation (NNPC) and the composition of its Board is controlled by FGN through NNPC, the Claimant does not qualify as a parastatal of FGN, at best it is a subsidiary or associate of NNPC and nothing more and it is liable for the payment of Stamp duty and other taxes.

There are other cases decided by the Tax Appeal Tribunal involving tax disputes resolution over the deductibility as expenses, of interests paid on arms-length loans from sister-companies.[28] In *Shell Petroleum Development Company Limited v. Firs*[29] Section 10(1) (g) of the Petroleum Profits Tax Act (PPTA) allows deduction of interests paid on inter-company loans. The conditions for deductibility include: (a) the loans were secured at arm's length; and (b) the interests have been paid. In filing its annual tax returns for 2007-2011, the Appellant deducted interest it had paid on loans from sister companies. The Respondent disallowed the deductions and assessed the Appellant to additional petroleum profits tax (PPT) and education tax (EDT). The questions are whether these deductions were valid? Under the Appellant's joint venture with the Nigerian National Petroleum Corporation (NNPC), NNPC had some financial obligations. The joint venture provides that should NNPC fail to meet these obligations, the Appellant should take measures to fill the funding gaps. NNPC did indeed fail to meet these obligations. Then the Appellant got loans from two sister companies: - Shell Petroleum N.V and Shell Oman Trading Limited. In computing its tax returns for those years, the Appellant deducted interest it had paid on the loans. Rejecting these deductions, FIRS assessed the Appellant to

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26 Marina Nominees Limited v. FBIR (1986) 2 NWLR (Pt.20) 56, C/F Salomon v. Salomon (1895) AC 22

27 (2011) 5 TLRN 97 at 101-102.

28 FBIR v. Akwa-Ibom Water Co Limited (2010) 3 TLRN 114

29 (2015) 18 TLRN 67 (TAT/LZ/003/2104 & TAT/LZ/005/2014)

additional PPT and subsequently EDT liability. The amounts due are US $94,707,348 and US $2,228,408 respectively. The Appellant argued that it is not liable to pay additional PPT and EDT because the deductions which the Respondent disallowed were valid as they are allowed under section 10 (1) (g) of PPTA. In answer to the FIRS's invocation of section 13(2) of PPTA, the Appellant traces the legislative history of SS 10(1) (g) and 13(2) of PPTA. It submitted that section 13(2) existed before S 10(1) (g) was introduced into PPTA in 1999. It argued that the Sections conflict and thus Section 13(2), being the earlier clause, ought to have been impliedly repealed. The Appellant therefore urged the Tribunal to invoke the doctrine of implied repeal to exclude the application of section 13(2) of PPT. The Appellant argues that even if Section 13(2) of PPTA were in force, at best it modified Section 10(1)(f) of PPTA not Section 10(1)(g). The Appellant relied on Nigerian Agip Oil Company Ltd v FIRS (TAT/LZ/015/2014 & TAT/LZ/016/2014 Unreported, decided 19 September 2014), where the Tribunal upheld the deductions of interests paid on inter-company loans obtained at arm's length. FIRS contended that while Section 10(1) (g) of PPTA provides for loans between companies generally, Section 13(2) provides for loans between sister-companies specifically. FIRS maintained that Section 13(2) of PPTA operates as a proviso to limit the generality of Section 10(1) (g) of PPTA. FIRS further argued that Section 10(1) (g) does not apply here because the borrower and lender are related companies. The provision that governs loans between related-entities is Section 13(2), not 10(1) (g), FIRS insisted that under section 13(2) interests are not tax deductible. Section10 (1) (g) states; -

(1) In computing the adjusted profit of any company for any accounting period from its petroleum operations, there shall be deducted all outgoings and expenses wholly, exclusively and necessarily incurred, whether within or without Nigeria, during that period by such company for the purpose of those operations, including but without otherwise expanding or limiting the generality of the foregoing-

(g) All sums incurred by way of interest on any inter-company loans obtained under terms prevailing in the open market that is the London Inter-Bank Offer Rate, by companies that engage in crude oil production operations in the Nigerian Oil Industry…

The *Tribunal Lagos Zone held* that the Appellant borrowed the funds from two-sister companies. Section 10(1) (g) allows deduction of interest on inter-company loans whenever those loans are obtained at arm's length. It says nothing about the relationship between lender and borrower. The Appellant's loans from its sister companies were at arm's length and therefore qualify for interest deductions under Section 10(1) (g). This conclusion is consistent with our earlier decision in Nigerian Agip Oil Company Ltd v FIRS (TAT/LZ/015/2014 & TAT/LZ/016/2014, Unreported, decided 19 September 2014). The tribunal set aside the 2007-2011 PPT Notice of Additional Assessment No PPTBA 95 and EDT Notice of Additional Assessment no. PPTBA/ED 87.

c. Disputes between States' Government & Tax Payers over the Powers of Houses of Assembly of 36 States of Nigeria, to Promulgate Taxation Laws?

The components States' Houses of Assembly have powers to make laws for peace, order and good governance of that particular State in respect of matters specified in concurrent lists[30] provided such legislation shall not in conflict with Federal legislation. In case of conflict, the federal legislation would override and nullify any legislation passed by the States' Houses of Assembly.[31] It appears what is actually vested on the States Governments are limited power to promulgate taxation laws but unlimited power to collect of taxes in respect of the specified areas of authority[32] such as the taxation of personal income of individuals (collectable by the States Board of Internal Revenue) while the duty to collect taxes of companies or corporate bodies is vested on Federal Inland Revenue Service.[33]

The *Property Tax Law Rivers State* was passed on 1st January 1995. It contravenes part II Taxes and Levies (Approved Lists for Collection) Act 1998 and any assessment base on it, is a valid ground of objection. RVSG (Board of Internal Revenue Service) can no longer collect Property Rates Tax which is exclusively preserved for the Local Government because the Property Tax Law 1995 had

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30 SS. 4(6)(7) Nigerian Constitution 1999.

31 S.4(5) Nigerian Constitution 1999.

32 Items 8 and 9 Part 2, Concurrent Legislative List 2nd Schedule Nigerian Constitution 1999.

33 Items 7(a)(b) and 8 Part 2, Concurrent Legislative List 2nd Schedule Nigerian Constitution 1999

impliedly been repealed[34] by **Part II Taxes and Levies (Approved Lists for Collection) Act 1998** which vest its collection on the Local Government Authorities Revenue Collector (LGARC).[35]

In the case of *Attorney General Cross Rivers State v. Ojua*[36], the taxpayer raised objection on the ground that the **Urban Development Tax Law** promulgated by the **Cross Rivers' State House of Assembly** usurped Local Government powers to levy rates assessment on privately owned houses or tenant was upheld by the **Court of Appeal** on the ground that the State House of Assembly lacked legislative competence to enact such law.

Similarly, the court would grant a declaratory judgement where assessments are based on taxes whose jurisdiction are vested in another sphere of government. It would declare it an infringement of Law and therefore ultra-vires.[37] This is called the judicial review on the grounds that the tax assessments are ultra-vires, irrational, procedurally deficient, defective and unfair.[38] This is also the position in the case of *Thompson & Grace Investment Limited v. Akwa-Ibom State Government*[39] where AKSG imposed and attempted to recover the sum of N5, 650,000.00 as unpaid registration fees and renewal of business premises from the Claimant's residential property building situated at Eket LGA. *Ebienyie J* held that the assessments were made without jurisdiction and therefore ultra-vires because of the excesses – the Development Levy of N50,000.00 instead of N10,000 and Renewal for the Urban Areas of N5,000.00, were outrageous and unconstitutional, null, void and of no effect whatsoever.

3. Social Services Contributory Levy 2010 (Rivers State).

From the **Separations of Powers** in Nigerian taxation, the Social Services Contributory Levy has no legislative foundation. The Rivers States' House of Assembly has no power to promulgate such tax law. The Social Services Contributory Levy 2010 (Rivers State) was

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34 National Inland Waterways Authority v. Shell Petroleum Development Company Ltd. (2005) 8 CLRN 132 at 132 per Faji J. (Federal High Court Port Harcourt).

35 Eti-Osa Local Government v. Tegede (2013) NRLR 99 ((CA) Thompson & Grace Investment Ltd. v. Government of Akwa-Ibom (2010) 3 TLR 94 at 95 -98 (High Court Eket).

36 (2011) 5 TLRN 1 at 56 per Akaahs JCA.

33. Thompson & Grace Limited V. Government of Akwa-Ibom State (2010) 3 TLRN 96 (High Court Eket) and Attorney General of Cross Rivers State V. Ojua (2011) 5 TLRN 1 at 56 (Court of Appeal).

38 Ian Saunders – Taxation Judicial Review and Other Remedies (1996) pp 122-332

39 (2010) 3 TLRN 94 at 95-98.

classified as a double taxation[40] because from its content, it runs contrary to Personal Income Tax Act (1993) as amended in (2011). Some parts of its contents deserve appraisal.

S. 15 (1) of the Social Services Contributory Levy 2010 provides: -

a. A person resident in the Rivers State
b. An employee in the State Civil or Public Service.
c. An employee in the Federal Public Service resident in the State
d. A person engaged in any trade or vocation as self-employed and operating in Rivers State.
e. An employee in the Local Government Service.

15 (2) A company or an organization operating in the State shall deduct the prescribed levy from the remuneration of its employees and remit same to the Board of Internal Revenue.

The above legislation was challenged. In *Institute of Human Rights & Humaniterian Law v. Attorney General Rivers State & Rivers State House of Assembly & Rivers State Board of Internal Revenue*[41] the Claimant as a taxpayer contended that the Social Services Levy Law enacted by the Rivers State House of Assembly as double taxation in view of Personal Income Tax Act. *Okpara J* nullified the SSCL as double taxation overburdening on the resident taxpayers. Her Ladyship was emphatic that; -

> ….''After a careful consideration of Part II, I find that RVSG cannot collect the Social Services Contributory Levy through via the SSCL Law 2010. The power of 2nd Defendant (RVSHA) to make laws on taxes and levies are subject to Section 4 Nigerian Constitution 1999, item 8, Part II of the same Constitution and Part II of the Taxes and Levies (Approved List for Collection) Act. I therefore hold that the 2nd Defendant (RVSHA) has no power to enact laws on taxes and levies outside Part II of the Taxes and Levies (Approved List for Collection) Act and item 8 Part II of the 2nd Schedule of the Constitution. The SSCL Law enacted by the RVSHA is inconsistent with … Act and therefore void under Section 4(5) Nigerian Constitution 1999 (as amended). Looking at the Part II of Act…the only levy allowed is 'Development Levy' for individuals only which is not more N100 per

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40 IHRHL v. AG Rivers State (below)

41 (2014) 14 TLR N 9 at 21, 46- 47 Port Harcourt High Court of Rivers State of Nigeria.

> annum…the SSCL cannot by any stretch of imagination be translated to mean development levy[42].

It is submitted that the Rivers State Board of Internal Revenue refund with interests, the amount illegally collected as tax on a legislation which has been nullified. Since it is usually too difficult to obtain refund from the government treasury, RVSBIR should at best grant them tax credits in arrears to off-set subsequent future tax liabilities. This is the most logical conclusion.

The State House of Assembly cannot enact the Social Services Contributory Levy Law, N0.9 of 2011 by virtue of the Taxes and Levies (Approved List for Collection) Act[43] and the Constitution of the Federal Republic of Nigeria 1999 (as amended). They do not have the capacity and powers to legislate on taxes and levies outside the provisions of Part II of the Schedule of the Taxes and Levies (Approved List for Collection) Act.

The powers of the State House of Assembly to make laws on taxes and levies are subject to Section 4 of the 1999 Constitution, Item 8, Part II, Second Schedule of the same Constitution and Part II of the Taxes and Levies (Approved List for Collection) Act.

The Rivers State House of Assembly has no power to enact laws on taxes and levies outside Part II of The Taxes and Levies (Approved List for Collection) Act and Item 8, Part II, Second Schedule of the 1999 Constitution (as amended). The Social Services Contributory Levy Law enacted by the Rivers State House of Assembly is inconsistent with the Taxes and Levies (Approved List for Collection) Act and therefore void.[44]

Looking at 'Part II' of the of the Schedule of the Taxes and Levies (Approved List for Collection) Act, the only levy closest to the levies provided for in the Social Services Contributory Law is "development levy for individuals only" which is not more than ₦100 per annum on all taxable individuals.[45]

Members of the States House of Assembly swore to uphold and defend[46] the Constitution of the Federal Republic of Nigeria, therefore the court should not on the structure and background of locus standi allow them to thrive in illegality by making a law that is

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42 Ibid at 46-47. Italics the authors'
43 (Cap T2, LFN, 2004)
44 See Section 4 (5) of the 1999 Constitution (as amended)
45 IHRHL v. AG Rivers State (above)
46 IHRHL v. AG Rivers State (above)

grossly inconsistent with the same Constitution they swore to defend.[47] The only power reserved for the House of Assembly, is to pass laws regulating collection of taxes in respect of their areas of jurisdiction. It is on this basis that the *Rivers State Board of Internal Revenue Law No. 12 of (2012)* appears valid because it is a law which seems to consolidate and elaborate the functions of the State Board of Internal Revenue, Rivers State Internal Revenue Service, the Local Government Revenue Committee and the State Joint Revenue Committee and specified for the collection and administration of Revenue and Taxation and matters reasonably incidental thereto.

4. States' Government Oftentimes set up agency to Intrude, Derogate and Rival Board of Internal Revenue Service

Strictly speaking, the States Boards of Internal Revenue (SBIR) must be allowed to perform its constitutional duties. Sometimes States' Government Authorities try to set-up an Agency to intrude, rival and derogate the powers to collect revenue bestowed by the law on the States' Board of Internal Revenue. They do it in various forms in attempt to increase revenue drive generation.

This can be tested in the courts. In the case of *Attorney General Osun State v. International Breweries Plc*[48] the taxpayer through the originating summons challenged the Osun State Government *Revenue Generation, Collection and Accounting Agency* (OSSRGCA) Law because it is inconsistent with Personal Income Tax Act 1993. The High Court held that under the "doctrine of the covering of the field" the law was covered by PITA and nullified OSSRGCA Law. The Court of Appeal upheld the judgment of the lower court and affirmed thus; -

> …. "1. By virtue of the Personal Income Tax Act 1993, the FGN made provisions for the collection and general services relating to taxes and revenue of all states in the federation. It also established the States Boards of Internal Revenue (SBIR) charged with specific functions in connections with the collection and general services relating to the taxes and revenues of the States. On its own part OSSARGAA Law made provision for collection and general services relating to taxes and revenues in the State at an accelerate rate and established its own agency charged with such functions instead

[47] IHRHL v. AG Rivers State (above)
[48] (2001) NWLR (Pt. 713) 647 at 651.

> of a board. In particular S. 5(c) (f) OSSARGAA Law provides that the Agency shall perform the duties of the SBIR in assessing, charging, collection and enforcements of all taxes, rates and levies due on behalf of OSSG. In enacting the OSSARGAA Law, the object and aim of OSSG is to create because it considered PITA and SBIR created under it as inadequate in the effective collection of taxes, revenues and dealing with defaulters. In creating its own agency to take over and perform the functions of SBIR and render it idle and redundant or possibly scrapped, it sought to amend or repeal PITA 1993. OSSARGAA Law is null and void because it is sharp conflict and utterly inconsistent with PITA[49].

Similarly, *RE Revenue Task Force*[50] *Adeloye CJ* nullified Revenue Ondo State Revenue Generation Task Force Law which authorized the sequestration of goods and properties of alleged debtors without order of the court because it was ultra vires, unconstitutional and violates legitimate mode of collection of taxes and levies in violation of S.42(2)(a) Nigerian Constitution.

5. Disputes between Local Government & Tax Payers

The disputes between local government Council and individual tax payers are resolved through filing originating summons or judicial reviews in the courts. The powers of the local governments over taxation are strictly regulated by Part III of the TLALC Act stated above. Any deviation shall be restrained by the courts.

This is the position in the case of *Fast Forward Sports Marketing Limited v. Port Harcourt Local Government council*[51] where the tax payer receives notices of assessment for agricultural development levy, Economic development levy with threats from agents of the defendants to impound their goods and seal their premises. The amounts of taxes were far in excess with the ones stipulated in Part III of TLALC Act. The tax payer challenged it in court and defendants in spite of the repeated services of the court processes did not defend the action. *Olotu J* granted injunction restraining the defendants from invading the premises of the claimant. His Lordship

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49 Ibid at 662-663 per Adamu JCA. See also the case of Re Revenue Task Force (1987) ODSMLR 13 at 14.

50 (1987) ODSMLR 13 at 14

51 (2011) 4 TLRN 45 at 47

was emphatic that the Local Government Council has no power to unilaterally distrain and seize the goods of the taxpayer without the order of the court and held thus; -

> …." No law authorized the distraint or seizure of the goods of the tax payer by the local Government Council for non-payment of taxes without order of the court even where the taxes demanded are legal. No law empowers the Local Government or any other tier of the government to distrain or seize goods for non-payment of taxes. The Local Authority must go to courts to seek this redress or the local government would be construed as acting as a judge, jury and executioner when it purports to threaten the claimant as that it would seize their goods if it does not pay the levies[52].

In order to resolve the disputes between the Local Government Council and individuals and corporate tax payers, the attitude of the courts is to adhere strictly to the regulating legislation and the constitution as the grundnorm. In *Mobil Producing (Nigeria) Unlimited v. Tai Local Government Rivers State*[53] the Local Government Council passed a Bye Laws requiring the payment of taxes on education, youths' empowerment, unified sticker, community development, discharge pollution, Niger Delta Development permit, land index oil levy, agricultural resources and craftsmanship development skills taxes. In a bid to enforce the payment, LGC mounted road blocks, impounded vehicles and the claimant who was affected filed originating summons seeking declaratory reliefs. *Nwodo J* held that LGC has no statutory authority to impose taxes, levies outside the specified areas stipulated in Part III of the TLALC Act 1998 and Fourth Schedule of the Nigerian Constitution 1999 and that it is a criminal offence to mount road block in order to demand or collect taxes[54]. His Lordship was emphatic that under *S.251(1)(b) Nigerian Constitution 1999*, the claimant being a corporate body, the Federal High Court has exclusive jurisdiction to entertain civil matters connected with or pertaining to taxation of companies.

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52 Ibid at 47 and 53. Italics supplied.
53 (2004) 10 CLRN 100 at 101
54 S.2 (3) Taxes and Levies (Approved Lists for Collection) Act 1998.

The court took the same view in the case of *Cornerstone Insurance Plc v. Surulere & Mushin Local Government Councils*[55] where the issue was whether LGC can impose a levy called "mobile advertisement tax" on vehicles bearing the logo and names of the owners. Their drivers were intimidated and harassed by the officers of the LGC, the claimant initially refused to pay but later succumbed and challenged the validity of the tax paid and sought to recover the sum of N106,000.00 paid under protest. *Akinsanya J* held that LGC has no power to impose and collect mobile advertisement tax because it is illegal, unconstitutional, illegal, null and void because it violates the Fourth Schedule of Nigerian Constitution 1999. His Lordship ordered the return of the refund of the money[56]and also opined that vehicles which have been duly registered and licensed can ply all routes in the federation of Nigeria.

When once the LGC complies with the legal requirements, its taxes and levies are enforceable. This is the position in the case of *Ayoidowu v. Attorney General Lagos State, House of Assembly & Kosofe Local Government Council*[57] the issue for determination is whether S.1(3) Land Use Charges Law (Lagos State) which subject privately owned properties to tax, is inconsistent with S.7(5) Paragraph 1 of the Fourth Schedule of Nigerian Constitution 1999? *Oyefeso J* returned negative verdict and held that there was nothing in the Land Use Charge Law which contravenes the Constitution because the constitution confers the power to assess and levy privately owned properties for tenement and other rates on the Local Government Council and Land Use Charge Law affirms that in every material particular. His Lordship stated thus; -

> …." If one reads S.1 (3) in isolation as the Claimant has done in his suit; it would certainly appear that there may be contravention. But a reading of S. 1(2) along with S. 1(3) shows very clearly that for the purpose of levying and collecting Land Use Charge, the Local Government Area is the sole collecting authority and the only body empowered to by the Constitution and Land Use Charge Law to levy and collect the Land Use Charge as prescribed by the House of Assembly. In other words, the LGA is the only body charged with the responsibility to

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55 (2013) 2 NRLR 100 at 101.

56 Regrettably His Lordship over sighted to order interests for the money unlawfully collected.

57 (2011) 5 TLRN 86 at 88-89

> assess, levy and collect Land Use Charge as required by the Constitution. It is only when that power is delegated by written agreement to the State that the State can carry out that function. It is not compulsory or mandatory that the LGA to delegate that power as the word "may" is used in S.1 (3). Where an LGA refuses to delegate its power, it would remain the collecting authority and the only body empowered to levy and collect Land Use Charge for its area of jurisdiction.[58]

6. Alternative Disputes Resolution (ADR) and Tax Disputes.

The general rule is that alternative disputes resolution popularly called "ADR" is unknown to Nigerian tax law jurisprudence[59]. This is because the legislation creating taxes and levies exhaustively provided statutory mechanisms for the resolution of tax disputes and ADR is not one of them. The parties cannot by their own contractual agreement opt out of the procedures[60] stipulated by the tax Acts.[61] The legislative option of litigation is favoured because it provides precedents of tax cases whose judgements on identical facts and situation provide principles which would guide resolution of future disputes. The application of ADR in tax matte stifling and could frustrate appeals whose clarifications by the appellate courts would help shape and molding our jurisprudence of taxation as guidance for the future disputes.

7. Encroachment on the Powers of National Assembly to Promulgate Tax Laws - Taxes and Levies (Approved lists) Order 2015?

The inevitable question is S. 1(2) Taxes and Levies (Approved List for Collection) Act 1998, gives the Minister of Finance authority to usurp the powers of the National Assembly to make tax laws for the FGN? This is a constitutional question that needs to be answered through litigation processes considering the fact that new items of taxes had been slotted into the approved lists by the ministerial/executive fiat rather than the act of the legislature whose duty is to make laws including that of taxation.

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58 Ibid at 95-96. Italics supplied.

59 Onyia, Festus Ezedinachi – Arbitrability of Tax Disputes under Nigerian Law (2009-2013) Index To Nigerian Tax Law Report pp.1-22.

60 NNPC v. Esso & Shell (2009-2013) Index to Nigerian Tax Law Report pp.1-22.

61 FIRS v. NNPC 2009-2013) Index to Nigerian Tax Law Report pp.1-22.

The *'executive-made tax laws* are thus: - National Information Technology Development Levy has been added into the Part 1 of the schedule to make it 9th in number. Similarly13 (thirteen) new tax have been added into Part 2 such as Land Use Charge, Hotel/Restaurants/Events Centre Consumption tax, Entertainment tax, Environmental/Ecology fee or levy, Mining/Milling and Quarrying fee, Animal trade tax, Produce Sales tax, Slaughter/Abattoir fees, Infrastructure Maintenance charge/levy, Fire Service Charge, Property tax, Economic Development levy and Signage/Mobile Advertisement tax (jointly by the State and Local Government). Only one new tax – Wharf Landing tax has been added into Part III.

Finally, an entirely new strange 21 (twenty one) taxes have been created such as: -a single inter-States' Roads Sticker for all States, a single Haulage payable at the point of loading in the State of departure and a single haulage fee payable at the point of discharge of goods which the States are required to set institutional structure to collect, Wharf landing fee to be collected by the State where there are facilities to administer such fees which may be jointly administered by the State and Local Government and proceeds from collection share in line with agreed proportion, a single parking permit sticker designed by the Joint Tax Board (JTB) and issued by the operators where vehicles are packed in course of their journey, Fire Service levy should be charged on business premises and corporate organizations only and the Federal Fire Service can only collect can only collect fire service levy in FCT and not in States and Road Worthiness Certificate fee should be collected by the State in which the vehicle operate and should be administered by Board of Internal Revenue in conjunction with appropriate agencies

The attempt by the Minister of Finance to slot new taxes without the input and concurrence of the legislature constitutes encroachment on the power of the National Assembly to make laws including taxation. This lack of consensus and approval may create the problem of unenforceability because of the anticipated public opposition and outcry. No doubt, with the declining revenue attributable to oil glut, taxation would constitute major government source of funding for the government subventions but imposition of new taxes through executive is an outright transformation of power to make subsidiary legislation into full law-making functions in breach of the doctrine of separation of powers. The Nigerian electorate entrusted this function to an elected member of National

Assembly. The processes of law making is a tedious one involving first, second, third readings, committees' stages and public hearings whereby bills are debated, panel-beated and transformed into laws. In this respect, the Taxes and Levies Order dated 26th May 2015 recommended by the JTB and approved by the Minister, would at best constitute a working which would undergo the normal legislative processes at the National Assembly or States' Houses of Assembly depending whether the subject matter is the exclusive, concurrent or residual list.

Tax law is statutory and it represents the policy power of the State which must be exercised only upon the clear powers of the statutory enactment and consequently, a taxpayer can only be taxed pursuant to a legislative authority.[62] Fiscal legislations which impose financial burden must receive the approval of the Parliament. In *Williams v. Lagos State Development and Property Corporation*[63] where the assignee of unexpired residue of a term of lease contested his liability to pay 5 percent of the consideration or valuation of the land leased by Defendant who purported imposed a levy on the strength of a letter setting out the policy of the corporation acting pursuant to Town planning Regulation, which stipulated a covenant to pay "outgoings of whatever description as implied in every building lease". The Supreme Court held the defendant could not unilaterally and arbitrarily impose such a tax under the guise of outgoings unsupported by any statutory authority and since such a charge was not otherwise payable, it was a transparent attempt to impose an illegal levy.

Alexander CJN has this to say: -

> …." The rule of law is that no pecuniary burden can be imposed upon the subject by whether name whether tax, dues, rate or tolls except upon a clear and distinct legal authority established by those who seek to impose the burden.

8. Executive-fiat-made Tax Law lists would Constitute Mere Proposal for Legislative Reforms?

It is submitted the order made by the Minister would at best constitute legislative proposal with which the National Assembly would deliberate as a bill preparatory for its passage through all the stages of the law-making processes.

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62 Williams v. Lagos State Development & Property Corporation (below)

63 (1978) 3 SC 11 at 1719

The true position is that the Minister as a member of the executive under the principle of separation of powers cannot transform power to make subsidiary legislation into full-blown power to enact new substantive tax laws without the consent or concurrence of the Parliament as this would amount to ultra-vires. A critical examination of some parts of the Order reveal many defects which could have been cured or streamlined through legislative scrutiny processes.

The specific amounts of levies chargeable in respect of the National Information Development and Business premises in urban/rural registration/renewal fees, are not stated. In absence of liquidated sum, this would create confusion because every State Government would now impose arbitrary/oppressive sums as taxes, under the guise of accelerated revenue drive - the very evil or mischief which the courts nullified in the cases of *Thompson & Grace Investment Limited v. Akwa-Ibom State Government*[64] whereby the arbitrary charges of N5, 650, 0000. Those styled as Urban Development Taxes which failed in *Attorney General Cross Rivers State v. Ojua***,**[65] had respectively resurfaced in the lists of taxes without the consent and approval of the legislators – the Nigerian Parliament of the House of Representatives and Senate. These ought not to be so because law-making is a very serious business and this should be left to those who were elected and properly equipped to do the required job of the enactment of Acts, particularly those concerning controversial subject matter such Revenue and other Fiscal matters.

The Social Services Contributory Levy and other which were hitherto held as violation of the principles of double taxation on the face of Personal Income Tax Act 1993 by the court in *Ihrhl v. Attorney General Rivers State*[66], had reappeared through executive fiat, in the Taxes and Levies (Approved Lists for Collection) Order 2015 without the proper cleansing, debates, harmonization, public hearing and painstaking panel-beating involved in the legislative processes. The inevitable question is whether the legislation – Social Services Contribution Levy 2010, Urban Development Law and other arbitrary fiscal impositions which the High Courts of the Rivers State invalidated, lost or shaded-off its offending ingredients prior to its being reintroduction into our statute book, through the back-door?

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64 (above)
65 (above)
66 (above)

The **Property Tax** which is another form of **Tenement Rates** within the exclusive jurisdiction of the Local Government taxation prohibited by the double or dual taxation principle.[67] It had also resurfaced amongst the taxes' assigned and made collectable by the States' Governments. The above enumerated factors, are bound to create conflicts between the States' Governments and Local Government Authorities. Unless these taxes are thoroughly harmonized by the Legislative houses, they would surely face stiffer challenges in the law courts. These multiplicities of taxes which were the very mischiefs that was supposedly cured through the passage of Taxes and Levies (Approved lists) Act 1998, have reappeared. This would undoubtedly cripple many businesses in the private sector which had not fared well and for many years have not been able to play its pivotal and resuscitating role to improve the Nigerian mono-export economy entirely dependent on oil revenue. How can the Minister of Finance pass far-reaching in nature substantive legislation through the subsidiary/bye laws processes without the accompanying matured, painstaking debates by the Honourable Members of the National Assembly? With the greatest respect to our respected Minister, this is a naked usurpation of the powers of the Parliament. The universal principle of taxation which postulates that any fiscal legislation which seeks to impose financial burden[68] on the citizenry must be sanctioned by the Parliament, appears breached by the ministerial order stated above.

The inevitable question is whether S. 1(2) Taxes and Levies (Approved List for Collection) Act 1998 gives the Minister of Finance authority to usurp the powers of the National Assembly to make tax laws for the FGN as per Taxes and Levies (Approved Lists for Collection) Order 2015? This is a constitutional question that has been answered through litigation processes considering the fact that new items of taxes had been slotted into the approved lists by the ministerial/executive fiat rather than the act of the legislature whose duty is to make laws including that of taxation. In accordance with our predictions, these taxes imposed through executive-made-fiat, have been declared ultra-vires, unconstitutional, null and void for infringement of the principle of separation of powers and its attempted transformation of the delegated legislative power into full-blown-law-making power in *Registered Trustees of Hotel Owners & Managers' Association Lagos State v. Attorney General of*

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67 Delta Oil (Nigeria) Limited v. FBIR (1988) FHCLR 100 at 103 per Belgore CJ

68 Williams v. Lagos State Development & Property Corporation (above)

Federation & Minister of Finance[69] where the Claimants through originating summons challenged the Taxes and Levies Order 2015 made by Finance Minister – a member of the Executive Arm of the FGN as inconsistent with S. 315 Nigerian Constitution 1999 (as amended). The Claimant alleged that Taxes and Levies Order 2015 made by Minister of Finance, went beyond delegated legislation permitted under S.1 (2) TALALC Act 1998 and merited the status of law-making which the Constitution vested on the National Assembly. In a well-considered judgement, *Faji J* held thus: -

1 The Claimants' locus standi is established as taxpayer because they have interest in the legislation which affects their business interests above that of ordinary Nigerians.
2. It is not a delegated legislation as **it seeks to add, override the main legislation** and has the same legal force as the Act itself. It is an **amendment of the existing Act of the National Assembly**, contrary to S.315 Nigerian Constitution 1999.
   His Lordship nullified the Executive-Fiat-Made-Tax-Act and declared it; -
3. Unconstitutional, null and void as it also violates S. 4 Nigerian Constitution 1999.
4. That S.1(3) TALALFC Act 1998 (the particular Section of the extant law which was interpreted as purporting to give the Finance Minister power), is inconsistent with S. 1(3) Nigerian Constitution 1999 and therefore null, void, unconstitutional and of no effect whatsoever. Commentaries – this case appears sound and faultless in principle. It is most unlikely that the Court of Appeal and Supreme Court would set it aside because the decision accords not only with common sense but with the jurisprudence of our tax laws and constitutional law, long ago established in our legal system.

9. Refund and Recovery of Taxes, though Lawfully Collected Pursuant to Taxation Laws Nullified by Courts.

The court is not a Father-Christmas and does not award remedies not claimed by the parties. Curiously, in these cases of Mobil Producing (*Nigeria) v. Tai LGA* (above), Fast Forward *Sports Marketing Limited v. Port Harcourt LGA* (above), *Cornerstone Insurance Plc v. Surulere & Mushin LGA* (above), *AG Cross Rivers State v. Ojua* (above), *IHRL v. AG Rivers State* (above) and

69 (2020) 52 TLRN 1 at 5-10

Rtohomals v. AG Fed (above) the Claimants and their Lawyers over-sighted the possibility to ask the Honourable Courts for the refund and repayments with interests, of the taxes and levies, though lawfully collected from the taxpayers pursuant to the Urban Development taxes, Social Services Contributory Levy etc which were invalidated because their enactments were made without legislative jurisdiction?

The taxes unlawfully collected are recoverable through cumbersome refund processes[70] because overpayment is recoverable and could be used as a set-off against future tax liabilities and **tax credits** could be granted to the taxpayers on this basis.[71] Strictly speaking, interests are also claimable. In *FBIR v. Integrated Data Services Limited*[72] claimant sued for N15, 2002,397.00 as unremitted Value Added Tax (VAT) plus penalty and interests thereon because D failed to deliver monthly VAT returns for period from January 1994 to October 1999 - 43 months instead of monthly as required by the S.12(1) VAT Act. The trial court gave judgement for the principal sum but refused the claim for interests and penalty but the Court of Appeal granted it by virtue of SS.15 and 31 VAT Act[73]. If interests are claimable by the Relevant tax Authority for late payment of taxes,[74] there is no justification why the taxpayers could not be entitled to claim interests for taxes unlawfully collected pursuant to unlawful, illegitimate and nullified legislation. This equivalent to overpaid taxes.

This is also the position in the **Zimbabwean** jurisdiction, this view is supported by the case of *Ellis v. Commissioner of Taxes*[75] the COT assessed the taxpayer for Capital Gains Tax on *Expropriated* shares. The tax demand was paid but the provision of the legislation was subsequently held to be invalid by the Supreme Court as being contrary to the Constitution. COT thereafter reimbursed the bulk of the tax paid. The estate of the taxpayer brought an action to require the payment of interests on the tax paid from the date of payment to the date of repayment. The COT held it was immune from the claim of interests but the High Court held that interests were claimable only from the date when the Supreme Court nullified the legislation. On appeal the **Supreme Court of Zimbabwe** held that where a

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70 S. 21 (2) (3) (3) Board of Internal Revenue Law No.12 (2012 Rivers State)
71 S. 21 (2) (3) (3) Board of Internal Revenue Law No.12 (2012 Rivers State).
72 (2009) 8 NWLR (Pt. 1144) 615.
73 Ibid at 620 - 624
74 Lagos State BIR v. Mobotson Ventures (Nigeria) Limited (2012) 6 TLRN 141 per Adebiyi J
75 (1994) 1 Zimbabwe L.R. 422 at 435

demand for tax is made pursuant to invalid legislation, the taxpayer has the right to recover the tax paid together with the interests from the date of the payment and there was no immunity which prevents the court from payment of interests. *Gubbay CJZ* observed thus; -

> …." the view that there is in general a right to restitution of monies paid upon an ultra-vires and illegal demand, and so a right to the recovery of interests thereon, is both attractive and compelling. For such principal payment would have been made either in consequence of a perceive presumption on the part of the payer of the constitutional validity of the demand and the holding out of the such legality by the legislature, or on account of the prospect of the payer being subjected to penal interests were his opinion of the illegality of the demand being ruled to be incorrect. It matters not which it be, since payments made under unconstitutional legislation cannot be deemed voluntary. In short, an ultra vires demand alone by a government body provides a ground for restitution. It operates outside the field of and focuses on the preposition of the government body as payee rather than circumstances of the payer".[76]

This jurisprudential line of reasoning also draws support from the **Malaysian** jurisdiction. In the case of *Pelangi Limited v. Ketua Negeri*[77] the Inland Revenue (IR) (respondent) had subjected gains arising from a compulsory land acquisition to income tax and consequently had retained the applicant's tax refunds. The applicant successfully applied for judicial review and obtained a declaration that the tax was unlawful and sought a refund of RM2, 360,723.62 together with interests. The IR contended that mandamus cannot be granted against it as a public body and that the taxpayer is not entitled to the refund. It was held that interest was the consequent to unlawful imposition of tax; the IR unlawful assessment did not follow the established principle[78]. *Yusuf J* was emphatic that since the tax was unlawful, the IR must refund it with interests and the S.

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76 Ibid at 435 and COT v. F. Kristiansen Limited 57 SATC 238, BAT v. COT 57 SATC 238 (Zimbabwean cases).

77 (2012) 1 MLJ 825 at 826

78 Ketua Negeri V. Penam Realty Limited (2006) 3 MLJ 597 (2006) 2 CLJ 835.

111 Income Tax 1967 relied upon by IR concerns overpayment but the case here was unlawful payment.

The same line of reasoning was similarly followed in the case of *Power Root (Malaysia) Limited v. Director General Customs*[79] where the applicants manufactured drinks (goods) and the Respondent classified it as Sales Tax of 10 percent instead of 5 percent. The applicant paid and the appeals to High Court and Court of Appeal were in their favour. Applicant wrote to the Respondent demanding refund of the 5 percent was refused and they filed consequential relief. The court held it was an injustice and a breach of fundamental constitutional principles to permit the respondent to retain the illegally collected tax. *Yusuf J* was emphatic that the court was not functus officio when the applicant filed consequential relief and discountenanced the assertion by the Respondent that it was relieved of the obligation to make restitution because the illegally collected taxes had been 'passed on' to the end users as unfounded. His Lordship further stated thus; -

> …." the Respondent had no right to retain illegally collected taxes and the applicants should have recourse to restitution as of right. The defense of 'passing on' was rejected because it was inconsistent with the basic principles of restitution law, it was economically misconceived and the task of determining the ultimate burden of tax was exceedingly difficult and constituted as an inappropriate basis for denying relief. The court had no jurisdiction to convert the originating motion, let alone interlocutory application such as filed by the applicant into writ of summons. It was clear when the matter was disposed of at the High Court and at Court of Appeal; there was no longer any cause of action or matter to be converted into a writ"[80]

These same lines of tax jurisprudential reasoning were stated in South African cases in support of the proposition that refunds and interests should be paid to taxpayers for overpayment of taxes in *KNA Insurance & Investments Brokers Limited (in Liquidation) v. South Revenue Service*[81]*, Commissioner for Inland Revenue v. First*

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79 (2014) 2 MLJ 271 at 252

80 Ibid at 26, 29-30 italics supplied.

81 71 SATC 155

National Industrial Bank Limited[82]*, Sage Life Limited v. Minister of Finance*[83]

a. Assessments of Tax Liabilities made Pursuant to repealed Tax Laws, are Recoverable by Taxpayers in Zambian Jurisdiction.

The general principle is that assessments must be predicated on existing law. If an assessment is based on a law which has been repealed, it is invalid. In *Zambian Revenue Authority v. Stallion Motors Limited & African Cargo Services Limited*[84] the High Court held that exemption granted by the Tax Appeal Tribunal pursuant to the repealed law was unlawful and that the Respondent was not entitled to the zero-rating of their invoices for the purpose of Value Added Tax Act. *Kajimanga J* set aside the judgment of the lower tribunal and awarded to the appellant the sum of K43, 689,599.00 being the VAT payments for transportation and ancillary services because the grant of zero-rating exemption was not legally correct for the services 1st Respondent rendered to 2nd Respondent on which exemption was claimed and granted by the tax appeal tribunal.

b. Assessment made on Tax Laws Promulgated by Parliament without Legislative Authority, is also Void in West Indian Jurisdiction.

The general rule is that the Legislative Houses must have the legitimate capacity to promulgate the particular taxation statutes. If the Parliament passes Income Tax Acts in which it does not have the power enact, the purported legislation is a nullity and the tax statute could be set aside and income taxes already levied and collected together with interests, are recoverable.[85] Mistake in the promulgation of tax law contrary to Caribbean Community Law which resulted in unlawful tax levied on the taxpayer, was challenged and the law was set aside and the unlawfully collected revenues were recoverable.[86] In *Rudisa Beverages & Juices NV v. State of Guyana*[87] it was held that the imposition of **environmental**

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82 52 SATC 224

83 66 SATC 181

84 (2011) Zambia LR 86 at 88.

85 Rudisa Beverages & Juices NV v. State of Guyana (2014) 84 West Indian L.R. 217.

86 JM Jaleel & Co Limited v. Guyana (below), Rudisa Beverages & Juices NV v. State of Guyana (above), AG Cross Rivers State v. Ojua (below), IHRHL v. AG Rivers State (below).

87 (2014) 84 West Indian L.R. 217

tax was incompatible with the Caribbean Community Treaty which prohibits the imposition of taxes and import duties on goods originated from the Community and the taxes paid were recoverable.

Similarly, in *SM Jaleel & CO Limited v. Guyana*[88] the taxpayer manufactured and sold beverages in non-returnable containers. Although, it was incorporated in Trinidad and Tobago but it has subsidiary in Guyana. In 1995, Guyana government promulgated environmental tax of G$10 dollars per container on all imported beverages. The legislation did not seek to exempt containers which qualified for exemption under the Caribbean Community Act. The **Caribbean Court of Justice** held that Guyana had been unjustly enriched by unlawful environmental tax in breach of fundamental obligations under the Caribbean treaty and ordered for a refund as Guyana has no legal basis to retain the **ultra-vires tax** it collected – an illegal profit from legislation known to be unlawful.[89]

10. Conclusion

On the general assessment of the tax disputes resolution processes, the court has been playing pivotal roles to uphold the principles of separation of powers. The courts have also ensured that the jurisdictions as to collection is maintained without permitting encroachment from other segments of tax collection agencies. We also advocate amendments and reforms. It is advocated that tax statutes which were nullified by the court may be reintroduced as legislative proposals (bills) to the Parliament of National Assembly who would undergo panel-beating processes, into law.

The National Tax Court of Nigeria (NTCN) could be established to transform the present Tax Appeal Tribunals (TATs) into Courts of Superior Records in the 36 States of Nigeria including Abuja Federal Capital Territory (comparable to the National Industrial Court of Nigeria (NICN) to make the adjudication of tax disputes more functional comparable to the Revenue/Taxation Courts obtainable in Canada, USA. South Africa and Jamaica.

Before this is done, we advocate the abolition of TATs' jurisdictions outside Lagos, Ibadan, Benin, Enugu, Abuja, Kano and Jos. The jurisdiction of TATs' outside the above urban areas, should

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88 (2017) 91 West Indian LR 276 at 277 -276 (Caribbean Court of Justice is equivalent to Supreme Court of Nigeria).

89 Unanimous decision from 5 appellate Judges – Byron P, Saunders, Wit, Hayton and Anderson JJCCJ

be abolished and all their functions outside Lagos, Ibadan, Enugu, Abuja, Jos, Kaduna Tax Appeal should be transferred to Revenue Courts staffed with Chief Magistrate and assisted by the Experts' Assessors comprising Taxation and Fiscal Specialists drawn from CITN. The Chief Magistrates, like the ones at Uyo Akwa-Ibom and Abeokuta in Ogun States of Nigeria, are notable examples. This would cure the perennial and soaring costs of litigation which compels litigants from Ogoja, Ikom, Obubra, Calabar, Ikot-Ekpene, Uyo, Eket, Port Harcourt, Degema, Bonny, Yenagoa to incur hotel bills, travelling costs, long-distance journeys-risks for 2-3 days tos and fros Benin City in Edo State, in order to contest taxation dispute cases. Others in Zamfara, Sokoto, Kebbi, Borno, Yobe, Bauchi and Plateau States of Nigeria suffer the same fate.

We further advocate the reconstitution of the **'Panels Handling Objections' in FIRS, SBIR and LGARC**. It is imperative that its membership could be enlarged to encompass some independent persons knowledgeable in taxation and fiscal matters and representatives of Chartered Institute of Taxation of Nigeria (CITN). There should be specified time-limit with which objections should be handled and disposed-off. A maximum of three to six months, should be given to them to complete their review, make decisions and discharge their duties timeously. It is advocated this should be reformed in like with the Jamaican Revenue Administrative Agency (RAD) an independent tax disputes resolution agency comparable in our tax resolution system.