TAX APPEAL PROCESSES: A COMPARATIVE ANALYSIS BETWEEN NIGERIA, WEST INDIES AND OTHER JURISDICTIONS

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Abstract

This article examines the fundamentals of tax appeal processes in Nigeria, the West Indian and other comparative jurisdictions. Comparative laws are essentially corroborative laws. Nigerian jurisdiction has something to learn and profit from foreign jurisdictions. There are abuse of powers amongst few Tax Administrators in Nigeria, - all they want is to maximize collections of revenue - taxes both authorized ones and unenforceable ones in a bid to meet the target set by masters/politicians. In doing so oftentimes in most brute manners - they not only trample on the rights of the Taxpayers, they disadvantage them, seal-off premises

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when demands are not met. Citing cases from similar jurisdictions would enable all of us to educate ourselves - tax teachers, tax administrators, tax practitioners, tax policy makers and the Parliament of National Assembly, shall know what is happening in other jurisdictions and how to reform our own domestic tax laws in line with 'global best practices'. This paper attempts to scrutinize the applicable principles in the commonwealth countries with identical common law such as the Caribbean States of Jamaica, Barbados, Guyana, Saint Lucia, Trinidad and Tobago in contradistinction with international best practices obtainable from Nigeria, USA, UK, Ireland, Canada, Malaysia, Singapore, New Zealand, Australia, Nigeria, Kenya, Uganda, Tanzania, Zambia, Zimbabwe, Malawi and others in an effort to reform the subject-matter.

Key Words: Comparative Tax Appeals, Reforms in Tax Disputes Adjudication, Tax Policy, Tax Administrators.

1. INTRODUCTION

Addressing the similarities, differences, statutory developments and judicial responses thereof; this paper evaluates the processes of tax appeals[1], the roles of Tax Appeal Tribunals (TATs) to hear, adjudicate tax disputes and the finality of tax litigations through the hierarchies of appellate courts. The discourse aims to provide international benchmark to guide, tax administrators, tax practitioners prosecute and defend tax cases to avoid pitfalls. The reforms are proposed for the establishment of the **National Tax Courts of Nigeria (NTCN)** as superior court of records comparable to international standards existing in US, Canada, Jamaica and South Africa to handle and determine 'tax appeals' fairly, quickly for Federal, States and Local Government taxes and levies. These would make tax disputes' adjudication more functional, if these reforms are introduced in Nigeria. There is also the need to alleviate the hardship caused to taxpayers'

[1] Tax Objections Processes in Nigeria, West Indies and Comparative Jurisdictions had been exhaustively dealt with elsewhere in accordance with the anonymous Reviewers advice. For those who want to delve into further details of it – See (2022) Delta State University Law Review pp.1 -54.

litigants' escalated expenses and journey risks in long distance travels to various zones of **Tax Tribunals**. The reversal of burden of proof through legislative reform is advocated. Instead of burdening the taxpayer, it is better to impose the onus on the Relevant Tax Authorities (RTAs) to establish that their tax assessments were predicated on the right principles. The adaptation of US model Internal Revenue Service (IRS) styled 'National Taxpayers Advocate' is suggested as a form of legal aid to assist indigent taxpayers who cannot afford legal representation in tax resolution matters. These reforms are vital as litigation is a crucial component in tax administration as per its utility to provide precedents which would guide future actions of both the taxpayers and RTAs[2] in development of tax jurisprudence for cases that are similar or identical in material facts to the decided cases.

Tax Appeal is the process of resolution of grievances of taxpayers in the court of law. The taxpayers' complaints would naturally arise from the unsatisfactory actions/decisions of tax administrators who constitute the RTAs. While tax objection is **in-house, interna**l **handling - administrative mechanism, tax appeal** is the external process - the resort to litigation in the court of law.[3] Through tax appeals, complaints and grievances over tax assessments are reviewed, addressed and settled through external litigation in the Tax Tribunals, Magistrate Courts, High Courts, Federal High Courts, Court of Appeal and Supreme Court. The disagreements over tax calculations are settled externally in the courts through mechanism of tax appeals.[4] Appeal is the **external review of complaints over**

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2 The equivalent to FIRS (Federal Inland Revenue Service), SBIR (States' Board of Internal Revenue Service), LGARC (Local Government Revenue Committee) are the Australia Tax Office (ATO), Canadian Revenue Agency (CRA), New Zealand Inland Revenue Department (NZIRD), TAJ (Tax Administration Jamaica) which replaced the Inland Revenue Department (IRD) 2011 pursuant to - Revenue Administration (Amendment) Act 2011 (RAAA Jamaica).

3 Guilders, Taylor, Richardson & Walpole – Understanding Taxation in, Interactive Approach pp.992-994 (2004) 2nd Ed Lexis Nexis Melbourne Australia.

4 S.54 (1) (2) (a) PITA 1993 as amended 2011 (Nigeria). S. 75 (4) Income Tax Acts (Jamaica), S. 94 (St Lucia), S. 57 (Barbados), S. 86(1) (Trinidad & Tobago).

tax charges by judicial processes involved in court litigation.[5] Objections and appeals both constitute the joint-machineries of adjudication of tax controversies.[6] Both centers principally on **over-payments** – tax improperly paid - taxpayers' successfully asserting right to refund and verification of **deficiency-in-payments**[7] successfully asserted by the RTAs and ability of taxpayer to successfully rebut, disprove, resist or defend it.[8]

2. PRELIMINARY ISSUES ON THE SUBJECT MATTER OF TAX APPEALS PROCESSES

Assessments are raised on income, gains or profits of companies/individuals in respect of trade, profession, employment or vocation on income which accrued in, derived from, brought into or received in respect of business, property, office or employment, in the country of residence or where the transaction was operated.[9] Apart from the above provisions relating to income tax, there are others governing the Capital Gains Tax, Corporate or Company Income Tax, Withholding Tax, Value Added Tax, Petroleum Profits Tax[10], inheritance tax, Stamp Duty Tax, Deep Off-shore and Valued Basic Tax and supplementary fiscal regulations introduced by the various regimes through the yearly Finance Acts. The taxpayer has obligation to file tax returns[11] through self-assessment[12] which shall contain duly completed form, audited financial statement,

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5 S.41 Personal Income Tax Act (PITA) 1993 as amended in 2011, S. 51 Company's Income Tax Act 1977 (CITA) as amended (Nigeria) S. 75 (1) Income Tax Acts (Jamaica), S. 97(1) (St Lucia), S. 59(1) (Barbados), S. 86 (7) (Trinidad & Tobago) See Roberts v. Commissioner of Taxes (below).

6 Claude H Denbow (Dr) – Objections and Appeals chapter 12, Income Tax Law in Commonwealth Caribbean (1997) pp. 168 – 176 (Butterworths London) and Jack-Osimiri, U; & O'Sullivan, M. (Dr) - Dynamics of Tax Appeals in Nigeria (2014) Vol. 13 (No.1) Journal of Taxation and Economic Development pp.1-37

7 The recovery of outstanding debts arising from under-deductions and deducted but unremitted taxes and levies due to RTA – See NDDC v. RVSBIRS (2020) 3 NWLR (Pt. 1711) 371 CA

8 Freeland, Lind & Stephens – Fundamentals of Federal Income Taxation in USA (1982) pp.959-1007 4th Ed. (Foundation Press Inc. Mineola New York).

9 S. 5 (1) (a) (ii) Income Tax Acts (Jamaica), SS. 3(1), 5(1) (a) (b) (c) (d) (Barbados), SS. 5(1) (c) (d) (e) (Trinidad & Tobago).

10 Oando Plc v. FIRS (2016) 3 NWLR (Pt. 1509) 494 CA

11 S. 53 (2) Income Tax Act (Barbados)

12 Nigerian Tax Administration (Self-Assessment) Regulations 2011.

tax computation and evidence of payment of the whole tax or part of it. Tax disputes occur when there is a disagreement between taxpayer and RTAs over the former's tax liabilities,[13] entitlements to expenses wholly, exclusively, reasonably incurred[14], reliefs[15] and related issues.[16] It basically goes beyond mere complaint,[17] expression of dissatisfaction by taxpayer or his/her agent about the quality of services, actions or inactions of the staff of RTAs such as undue delays, unclear/misleading information, staff demands, misbehaviours, mistakes leading to misunderstanding, omission or oversights.[18]

It is obligatory for individuals' and corporate taxpayers,[19] to file[20] and deliver annual returns[21] in a prescribed form. The annual tax returns must contain details/particulars of their taxable income,[22] proper books of account kept with records of transactions from trade, business, profession or vocation to RTA - Federal Inland Revenue Service (FIRS) for taxation of

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13 Binh Tran-Nam & Michael Walpole – Independent Tax Disputes Resolution and Social Justice in Australia (2012) 35 University of New South Wales Law Journal 470 at 477

14 Example such expenses incurred in provision of scholarships to host communities and Bank charges – See Shell Petroleum Development Co. Limited v. FBIR (2004) 3 FWLR (Pt. 859) 46. The permissible deductible expenses are many and listed under S.10(1)(ii) Petroleum Profits Tax Act – See Mobile Producing Nigeria (Unlimited) v. FIRS (2021) 16 NWLR (Pt. 1788) 485 CA

15 Under Para 24 Second Schedule Companies Income Tax Act – Agro-Allied and Manufacturing Companies are entitled to 100 percent Capital Allowance as relifs and as tax incentives – See Oando Plc v. FIRS (2016) 3 NWLR (Pt. 1509) 494 CA

16 Melinda Jones – Evaluating Australia's Tax Disputes System: A System Design Perspective (2015) vol. 13 (No.2) 552 at 563 e-Journal of Tax Research in Australia

12. Tania Sourdine - Alternative Dispute Resolution p.133 (Thomson Reuters 4th Ed.2012)

18 Canadian Revenue Agency – What is Service Complaint and What is not? (26 June 2013 <http://www.cra-arc.gc.ca/gncy/cmlntsdpts/srvccmplnts/dfntn-eng.html>

19 NDDC v. RVSBIRS (2020) 3 NWLR (Pt. 1711) 371 CA

20 S.41 Personal Income Tax Act (PITA) 1993 as amended in 2011, S. 51 Company's Income Tax Act 1977 (CITA) as amended (Nigeria). See Roberts v. Commissioner of Taxes (below).

21 Infra Quest Limited v. Negeri (below).

22 S.161 Tax Assessment Act 1936 (Australia), S.33 Tax Administration Act 1994 (New Zealand)

income of companies and States Board of Internal Revenue (SBIR) for taxation of income of individuals. Assessment is a tax charge on income – the chargeable gains or profits of every chargeable person for an accounting period – that particular year of income.[23] On receipt, RTA may accept the returns and issue notice of assessment.[24] The compliance with this legal stipulation is strict. In *Robert v. Commissioner of Taxes*[25] it was held that annual return of income must be filed by the end of the financial year and the assessment must reflect the computation of income for the 12 months ending on 31 March in the year in question. Similarly, in *Infra Quest Limited v. Negeri*[26] it was held that the law expects reasonable taxpayer to use due diligence to submit his returns, the court found that the taxpayer complied by filing its returns within time-frame in year 2003-2004 and that the impugned notices issued by RTA's officials were invalid, wrong in law and therefore of no effect whatsoever.

This process has been replaced by **on-line electronic filing via e-tax** website together with **TIN** – **tax identification number**. The obligation to file a return subsists whether a profit is made or loss was incurred.[27]

Strictly speaking, the reporting of income is a constitutional matter imposed on individuals, corporate citizens and foreign residents. **S.24 (F) NIGERIAN CONSTITUTION 1999** provides that: -

> *….it shall be the duty of every citizen/resident to declare his/her income honestly to the appropriate and lawful agencies and pay his/her tax promptly.*

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23 S. 72 (1) Income Tax Acts (Jamaica), S. 83 (1) (Trinidad & Tobago), S. 53 (1) (Barbados), S. 85 (1) (St Lucia)

24 S.54 (1) (2) (a) PITA 1993 as amended 2011 (Nigeria).

25 (1924) Rhodesian LR 33 (High Court Bulawayo Zimbabwe)

26 (2017) 7 MLJ 35 at 36 per Bache J (Malaysia High Court).

27 Commissioner for Inland Revenue v. Grover (1987) 2 NZLR 736 (New Zealand CA).

Violation of this obligation is a despicable act which strips the defaulter protection afforded by law.[28] Self-assessment is mandatory constitutional requirement imposed on all taxpayers to furnish returns. On receipt, RTA may accept the returns and issue notice of assessment.[29] There may be a pre-assessment query in form of rejection of a claimed deductible expenses or inclusion of amount of income such as undisclosed interest or dividend.[30]

3. ASSESSESMENTS OF TAXES – ADMINISTRATIVE ASSESSMENTS, DEFAULT ASSESSMENTS AND BEST OF JUDGEMENT (BOJ) ASSESSMENTS

If the tax payer fails to deliver self-assessment returns, the RTA would normally issue **"Administrative Assessment**" in **default**[31], based on estimates on the basis of information generated from the access to taxpayer's books and documents. This may also be in form of the **"Best of Judgment**" **(BOJ) assessment** which determines or estimates the total amount or chargeable income.[32] Where the taxpayer defaulted in

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28 Independent Television/Radio v. Edo State Board of Internal Revenue (2015) 12 NWLR (Pt.1474) 442 at 443 where Nigerian CA condemned the scuffle over non-remittance to Edo State BIR, of taxes deducted from employees' salaries and that this conduct is detrimental to the development of the nation.

29 S.54 (1) (2) (a) PITA 1993 as amended 2011.

30 Binh-Tran-Nam & Michael Walpole (above) at 478

31 To ensure the validity of BOJ, RTA must first of all send written request demanding the taxpayer to file return – See Mohammadu v. Oturkpo LGA (1973) NNLR 112 where the court held that service of notice of assessment cannot be inferred and failure to serve it is not a mere defect in the procedure but nullifies all subsequent proceedings. It is only in default that valid BOJ could be issued. Strictly speaking, assessment must comply with this condition otherwise, it is null and void - See Ebosele v. State Tax Board (1976) 6 ECSLR 281 where the court held that income tax assessment made without a request for returns of income as provided by income tax law was made without jurisdiction. In Makurdi LGA v. Billa (1973) NNLR 101, it was held that the court would only act where there is a certificate signed by duly authorized RTA showing sufficient evidence of the amount of tax which the taxpayer is owing.

32 S.54 (1) (2) (a) PITA 1993 as amended. Where the taxpayer does not furnish the returns within the 30 days' time limit the FBIR/SBIR is entitled to raise best of judgment assessment taking into account his/her earnings for the period in question – See Board of Internal Revenue v. Sholanke (1974) FHCLR 40 (Federal High Court of Nigeria Law Report) where taxpayer, a legal practitioner was assessed for arrears of tax and penalty for 3 years 1965 / 66, 1966 / 67, 1967 / 68 which he did not file statement of accounts of his professional income

supplying the relevant information, the RTA issuing the BOJ must not act capriciously but exercise his judgement honestly – fair estimate of proper figures attributable to the taxpayers' income taking into consideration his previous returns. In *Bi-Flex (Caribbean) Limited v. Board of Inland Revenue,*[33] a garment manufacturing company's returns for the years 1971-74 could not be traced due to destruction by fire in 1975 but it furnished duplicate copies of its returns for those years. The figures showed trading losses for each of those years. On the basis of information obtained from other garment manufacturers, IRC discovered the percentage of the gross profits were understated. The privy council upheld the court of appeal judgment and held the BOJ was sustainable because in absence of records from the company, IRC was justified to use an acceptable accounting method utilizing the sparse materials available. The court was emphatic that a large element of guess-works must be involved and it was on this basis that a reference to the average gross profit of other garment manufacturers, formed the foundation of a rational BOJ assessment.

The RTA may nevertheless issue **additional assessment** where they dispute self-assessment returns on the basis of

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even though he was served with notice in writing. It was held that under S.24 PITA 1961 (Lagos State), if a notice was sent and taxpayer failed to furnish his professional income, the IRC was entitled to raise best of judgment assessment which must be fair, not punitive and not excessive. See also Government of Malaysia v. Singh (1986) 2 Malaya LJ 185 where the Supreme Court held that since there was no response to the various notices issued, the RTA was entitled to compute tax based on BOJ under S.91 (1) Income Tax Act and the onus to prove the allegation that the assessment was excessive, erroneous, malicious, vindictive lies on the taxpayer and in this case the burden had not been discharged. Similar views were expressed in Tanzanian cases – Karia v. Shah (1962) EALR 43 and Income Tax Commissioner v. Ngaremtoni Estate Limited (1970) EALR 511 (East African Law Reports) where CA held that the onus of proving the assessment was excessive, expenditures reasonably, necessarily, exclusively incurred cannot be discharged by providing false accounts. See also the West Indian – Guyana case of Argosy company Limited v. Commissioner Inland Revenue (1971) 2 WILR 502 at 503 where Privy Council held that RTA must also show the grounds on which they formed opinion that taxpayer was liable to pay tax on BOJ assessment and where there is no such prima facie evidence which no reasonable person could rely upon, such assessment is bad.

33 (1990) 38 WILR 344 Privy Council appeal from CA Trinidad and Tobago.

deficiency or under-declaration of income,[34] it discovered new facts or where it has formed different opinion as to the legal effect of the same facts on which the same assessment was made.[35] These fresh materials, evidence or information could be obtained from whatever source including the examination of books, records of accounts, the internal and **field tax-audits**, especially where additional source of income is discovered which ought to be charged to tax and they will increase the liability to higher amount of tax.[36] This would also be so where on the examination of the returns the taxpayer under-stated his/her tax liability due to discovered mathematical errors.

Sometimes unapproved claims or over-stated allowable expenses may have been deducted which led to under-payment of tax due.[37] Therefore, after totaling these sums of moneys, profits are discovered which show deficiency in the sum assessed to tax. In *Negeri v. Chong*[38] the taxpayer was found to have under-declared, his income for certain years. Notice of additional assessment was issued base on 22 percent of gross profit ratio (GPR) - the figure based on the first tax returns. GPR was upheld by the Special Commissioners for Income Tax. The High Court reduced it to 8 percent. The Court of Appeal Malaysia held that there was no basis for the reduction as it was not supported by evidence but mere opinion of the judge and therefore reinstated the 22 percent and was emphatic that it was just, appropriate and based on the evidence available.

The discovery of additional income and its sources must be backed by evidence that the income was actually received

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34 In Negeri v. Chong (below).

35 S. 72 (4) Income Tax Acts (Jamaica), S. 54 (Barbados), S. 86 (St. Lucia), S. 89 (Trinidad and Tobago)

36 S.55 (1) PITA 1993 as amended 2011. Under S.48 CITA additional income latter discovered could induce FIRS to send additional assessment to the taxpayer. See the case of OLA v. FBIR (1974) FHCLR 70 at 71 where the Court held that if the FBIR after making an assessment discovers some source of income not included in the earlier assessment, they are justified to raise additional assessment after the service of the relevant notices on the taxpayers.

37 Robinson – An Inquiry into Tax Assessment Processes (1980) Vol. 35 Tax Law Review 285

38 (2012) 4 Malaya L.J 184 at 185

by the taxpayer. Where the alleged income is not received, the taxpayer is not obliged to pay. In *Cosmos v. Board of Internal Revenue*[39] where the appellant was originally assessed to pay N37. It was later revised because BIR substituted reassessment of N905 tax and N64 development levy because they obtained fresh information based on declaration the taxpayer erroneously made his application to Ministry of Lands, Enugu for allocation of a plot of land where he claimed his income was N6000. The taxpayer rejected the additional assessment on the ground that he confused capital income from his overseas assets with his real income in Nigeria. The Court held that the Additional income tax cannot stand unless there is proof and that the plea of mistake of inserting N6000.00 as his income when it was in fact capital expenditure must be accepted because there is no denial through counter-affidavit by the Internal Revenue.[40]

Similarly companies are required to file their returns[41] or further returns[42] through self-assessment process, compute the tax liability payable and show evidence of direct payment of the whole or part of the tax due in the currency such as dollars, pounds sterling and Euro in which the transaction giving rise to the assessment was affected.[43]The RTA may proceed to issue assessment to the company's chargeable income where its audited accounts and return are acceptable.[44] Alternatively, the RTA may refuse to accept the return and proceed with its own

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39 (1973) ECSLR 661 at 662-663 (East Central State of Nigeria Law Report).

40 See also Mobil Oil Nigeria Limited v. FBIR (2011) 5 TLRN 167 at 176-182 (Tax Law Report of Nigeria) where the Supreme Court of Nigeria held that additional assessment can be made on the discovery of new facts such as new source which disclosed additional income.

41 S.57 Companies Income Tax Act (CITA) 2004 as amended. Individual tax payers must furnish FIRS or SBIR all information relating to the taxable income so that an assessment can be made regarding the amount payable as tax - See SS. 41,42,43,44,47, 51 CITA 1990 - see Mgbemene v. Board of Internal Revenue (1980) IMSLR 460 (Imo State of Nigeria Law Reports).

42 S. 58 CITA 2004 as amended. Petroleum Profits Tax is also payable in dollars into Central Bank of Nigeria (CBN) account with designated Banks – See Shell Petroleum Development Co. Limited v. FBIR (2004) 3 FWLR (Pt. 859) 46

43 SS 52, 53, 54 and 55 CITA 2004.

44 S. 65 (1) (2) (a) CITA 2004.

best of judgment and determine the amount of the total profits of the company and make an assessment on it accordingly.[45] Like the private individual taxpayer, where the Company fails to deliver its return, the RTA may use its "Best of Judgment" to determine the amount of the total profits and make the assessment accordingly.[46]

Similarly, if there is evidence (obtained from whatever source such as tax-audit[47] of a return) of additional income and the company tax payer has not been assessed the full amount it ought to pay, the RTA may determine additional tax giving notice of the assessment of additional amount of tax which ought to have been changed.[48] In Jamaica, the RTA[49] is empowered to make additional assessments to tax where it appears the taxpayer has not been assessed or has been assessed to a less amount that he ought to haven charged within the year of assessment or within 6 years thereafter.[50] In *Chang v. Commissioner for Taxpayers Appeals*[51] additional assessments of $12, 125, 393.75 and $8, 136, 090.94 being the value of **investment gains derived** from **business activities** conducted from a non-licensed Investment Club. The taxpayer challenged it and alleged the incomes were not his but investments of funds he made on behalf of his friend, a foreign national. **Anderson J**[52] disbelieved him and dismissed his appeal. The **Jamaican Court of Appeal upheld** the additional assessments were well-founded. because the taxpayer's claims were not supported with documentary evidence[53] and therefore constitute additional income arising from trading gain from

45 S. 65 (1) (2) (b) CITA 2004.
46 S. 65 (3) CITA 2004. 2004.
42. Suzette Chapple – Income Tax Dispute Resolution; Can We Learn from Other Jurisdictions? (1999) 2 Journal of Australian Taxation 312 at 318
48 S. 66 (1) CITA 2004. There is a requirement that the notice of assessment shall specify the particulars or details of tax liability of the tax payer - See Ola v. FBIR (above) per Omoh-Eboh J (as she then was)
49 Commissioner for Taxpayers' Audit and Assessment (CTAA)
50 S. 72 (4) Income Tax Act (Jamaica)
51 (2016) JMCA Civil 16
52 Jamaican Revenue Court is the equivalent of High Court.
53 Unanimous decision of Dukharan, Sinclair-Haynes and Morrison JJA.

business activity he conducted and therefore properly charged as additional income tax.

Once this process is completed, there must be compelling reason for a tax duly assesses and paid to be reopened and reassessed again, the court would determine what circumstance the additional assessment shall become arbitrary and capricious.[54]

a. ***Notice of Assessments must be served on Taxpayer***

In all cases, there is a requirement that notice of assessment stating total profits, amount of tax payable[55] shall be served on the taxpayer[56] by RTA. It could be sent by registered post or through courier service or electronic mail stating the amount of assessable, total or chargeable income, the amount of the tax charged and the designated banks where payment should be made.[57] The issuance of notice of assessment is a condition precedent to liability of the taxpayer to discharge obligation to pay tax. In *Barclays Bank Limited v. Zimbabwe Revenue Authority*[58] **MAKONI J** held that ZRA could not garnish the taxpayer's funds, without assessments issued and served in compliance with the requirements of SS. 2 and 51 Income Tax Act stating taxable income, credits to which the tax payer is entitled and any assessed loss ranking for deductions and since the document failed to comply with these requirements, it is invalid.

Similarly in *Nizaba International Trading Limited v. Kenya Revenue Authority*[59] the Kenya High Court held that

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54 Ukpong v. Commissioner for Finance & Economic Development (2006) 19 NWLR (Pt. 1013) 187 (2006) 11-12 SC 36 (2007) 2 CLRN 1 at 24

55 S. 68 CITA 2004, Mohammadu v. Oturkpo LGA (below), Barclays Bank Limited v. Zimbabwe Revenue Authority (below).

56 In Mohammadu v. Oturkpo LGA (1973-1975) NNLR 112 (Northern Nigeria Law Report) the CA held that the service of notice of assessment cannot be inferred but failure to serve it is not a mere defect in procedure but its effect is to nullify all the subsequent proceedings.

57 S. 57 PITA 1993 as amended 2011.

58 (2004) 2 Zimbabwe L.R 151 at 152

59 (2000) Kenya L.R. 587 at 588. In Ireland's cases of Deighan v. Hearne (1990) 1 IR 499 and Criminal Assets Bureau v. M (2001) 1 IR 121 O'Sullivan J held that

notice of assessment[60] must be served on the taxpayer, he must be informed of his right to lodge an objection and once an objection has been raised, it is incumbent on the Commissioner of Taxation to act on its statutory duties and it is not enough to remain inactive and state that there is no provision in the Income Tax Act to amend an assessment which has been made pursuant to an earlier assessment. Finally, the notice of assessment must also inform the taxpayer of his right to raise objection to the assessment within 30 days. The taxpayer may either agree or disagree with the assessment. If he/she agrees, the tax must be paid within the statutory period of 60 days from the date of the receipt of assessment notice.

b. ***Failure to serve Taxpayer notice of Assessments Accompanied by Field-Tax-Audit, is fatal to Tax Recovery Litigation***

The failure of RTA to serve the taxpayer notice of assessment is fatal to the tax recovery litigation. In most cases, in order to enforce and recover the amount of tax, evidence of **field tax-audits** of the taxes due such as income tax, withholding tax etc must be produced to the satisfaction of the court.. In *NDDC v. Rivers State BIRS*[61] field-tax-audits were not carried to ascertain the emoluments of the employees[62] and inspite of this defect, RVBIRS proceeded to issued BOJ assessment. The **Court of Apeal** held

1. RVBIRS cannot resort to issue BOJ assessment without field-tax-audits in ascertainment of the taxes due,
2. Under PAYE, it is the duty of the employer (NDDC) to File Annual Returns under S. 82 (1) (2) PITA containing all the emoluments paid to employees latest on 31

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prior demand note of the unpaid tax is required before the commencement of proceedings for the recovery of income tax which was due and payable.

60 In Malaysian jurisdiction, the notices of assessment validly posted to the taxpayer's last known address, may be accepted by the court as judicial and official acts regularly performed, in absence of the controverting evidence adduced by the taxpayer refuting the assertion – see Kerajan Malaysia v. Central Strata Limited (2013) 5 Malaya L.J 728 at 729 (High Court)

61 (2020) 3 NWLR (Pt. 1711) 371 CA

62 Pursuant to SS.54 (5) (a), 81 (1) (2) (3), 82, Personal Income Tax Act as amended (2011)

January every year – they musty deduct tax from the salaries and emoluments of the employees and account to the Tax Authority and failure to do so renders NDDC to make deductions and account renders NDDC to punishment N500,000 under S.82 PITA.

3. RVBIRS must give notice of Assessment to the taxpayer and the notice must contain the amount of assessment as ascertained under S. 57 PITA,
4. Before NDDC can enforce and recover the payment of tax – by the distraints of the taxpayer's goods, chattel, bond, security, land, seal his premises or place of business in execution of the obligation to pay tax, there must be ordxer of the High Court predicated on the field-tax-audit predicated under S.104(1) Personal Income Tax (as amended) in 2011.

c. Objection must be determined and the Notice of Refusal to Amend (Nora) served on Taxpayer before Tax matter becomes Ripped for Appeal-To-The Hierachies of Appeal Courts

Objection is the method available to taxpayers to formally protest, dispute assessment, challenge errors in tax computation or inaccurate and improper decision by RTA. Taxpayer is only obliged to pay tax where a valid assessment had been served. An informal tax dispute would commence where assessment is under review - post-assessment review of affairs such as value of rental property, its associated claims, audited income and expenditures in the taxpayer's returns[63] or where the disputes cannot be resolved through amended assessment issued based on adjusted taxable income. If the taxpayer disagrees with the assessment, he/she may apply to RTA by **notice of objection in writing,** urging them to review and revise the assessment made.[64] Dissatisfied taxpayer may do this by himself or through tax adviser/chartered-tax-practitioner

63 Binh-Tran-Nam & Michael Walpole (above) at 478

64 S. 69 (1) CITA 2004.

within **30 days**[65] from the date of the service of notice of assessment.[66] The filed notice in writing must specify the relevance **grounds of objection** - amount assessable, total profits in year of assessment and amount of tax[67] payable as contained in notice[68] of assessment served personally or sent by registered post, courier or electronic mail, within 30 days.[69] At this stage, formal tax dispute had commenced. The grounds of objection must be backed with supporting documents and contain alternative tax computation.

The next consideration is who can file written objection? Taxpayers must file written objection personally or through their agent/chartered-tax-advisor.[70] In respect of the employer/employee relationship, it is the employee who is the taxpayer that can do so personally[71] or through employers on his/her behalf.[72] especially where RTA served demand notice/assessment on the employer and not the employee, it can validly file written objection on behalf of the employee.

d. Suspension of Obligation to Pay of Tax until objection is validly determined and matter heard through Appeal Processes.

RTA is under a duty to communicate its decision[73] (to reconsider the deficiency of tax complained of) whether with positive or negative result after it has considered the objection. As long as the objection is pending and unresolved, the amount

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65 It is 90 days – See S.165 Income Tax Act (Canada), 60 days - SS. 84 & 85 Income Tax Act (Kenya), 30 days – S.91 (4) Income Tax Act (Tanzania) , 30 days – SS. 101 &102 Income Tax (Uganda), 60 days - S. 14ZW(1)(aa) Tax Administration Act 1992 (Australia)

66 30 days – See S. 76(1) Income Tax Acts (Jamaica), 59(1) (Barbados), S.97 (1) (St. Lucia) and S. 86(1) (Trinidad and Tobago).

67 S. 69 (2) (a) (b) (i) (ii) CITA 2004 (Nigeria).

68 S.57 PITA 1993 as amended 2011(Nigeria).

69 S. 58 (1) PITA 1993 as amended in 2011(Nigeria).

70 ICAN v. CITN (below).

71 Westoil Petroleum Services Limited v. LSBIR (2012) 6 TLRN 48 50-51 and LSIRB v. SPDC (below)

72 Lagos State Board of Internal Revenue v. Shell Petroleum Development Company Limited (2011) 5 TLRN 60 at 62 -63 per Adebiyi J

73 Azikiwe v. FEDECO (below)

of tax being disputed shall not be enforced[74] but must be held in abeyance.[75] In *Azikiwe v. Federal Electoral Commission*[76] *Araka CJ* held that notwithstanding the provisions of the **S.20 (3),** a taxpayers' liability to pay tax only arises and becomes final under **S. 29 (1) Finance law (Anambra State Nigeria**) after RTA had first served him with a written notice demanding returns and secondly, with a written notice of assessment stating the amount of tax assessed, total income and amount of tax payable and where no extension[77] of time has been granted for making the payment.[78] and the tax payer has not objected[79] to the assessment.[80]

e. Notice of Refusal to Amend (NORA) must be issued by RTA before Tax Matter becomes ripped for Appeal to Hierachies-Of-Appeal Courts

In most cases, decisions of RTAs verdicts in terms of taxpayers' liabilities, are upheld, vacated or referred-back to them, for second review and issuance of new decisions. If the tax payer agrees with the amount of tax liability, the assessment is varied or adjusted in form of **amended assessment"**. It shall be served accordingly and the amount of tax payable shall be stated.[81] In *Ilorin Tax Authority v. Ajao*[82]

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74 Adesola, S. M – Tax Law & Administration in Nigeria (1998) 2nd Ed. pp. 53-55 (OAU Press ILe-Ife).

75 Azikiwe v. FEDECO (below)

76 (1979) NCLR 276 (1979) 3 LRN 286 (1979) ANSLR 1 (1979) BNSLR 136. (1979) 3 PLR 236 per Araka CJ

77 S. 72 (1) Electoral Act 1977 sets out the qualification for candidates for election and the word "year" in S. 72 (2) in relation to a failure to pay income tax refers to the 'fiscal year and not the calendar year'.

78 Azikiwe v. FEDECO (above) Anambra State High Court.

79 Objection suspends the obligation to pay the disputed tax in some countries such as Argentina Bolivia, Nigeria, Chile, Columbia, Peru, Dominic, Grenada, Trinidad and Tobago, Barbados, Guyana and Jamaica (50 percent of only VAT is payable) and interests are payable if objection is frivolous and failed.

80 In some countries such as Costa Rica, Uruguay, Venezuela, St. Lucia, St Kitts & Nevis, St. Vincent and Grenadines, allow certain percentage of the tax to be paid.

81 S. 69(5) CITA 2004. Amended assessment is a situation where the submitted administrative assessment is faulted and the original assessment earlier made is revised or amended in line with the new information revealed in the computation of tax liability.

82 (1967) NNLR 25 at 28 (1967) NCLR 99 (Nigerian Commercial Law Reports).

Reed J. held when a taxpayer objects to his income tax assessment, the RTA is under obligation by virtue of S.94 Personal Income Tax Act to either confirm the assessment by refusal to amend or revise it and failure to do so means the objection has not been determined so as to render the assessment final and conclusive. In *Federal Inland Revenue Service v. Mega Tach Software Limited*[83] TAT held that it is only where there is a notice of assessment predicated on the returns submitted that a tax dispute would result and RTA could not recover value added tax where they failed to issue notice of assessment containing the amount of tax due under SS. 15 (1) and 18 Value Added Tax Act.

If the **disagreement** persists or lingers over the amount of tax payable, the RTA shall reconsider all the factors and issue **written decision[84] - notice of refusal to amend[85]** (NORA). Sometimes, RTA may further revise the assessment where appropriate to include **additional assessment** and thereafter issue **notice of revised assessment**[86] and total amount of tax payable shall be stated. As soon as RTA confirms the assessment or disallows the objection through the issuance of NORA, the tax payer's right of appeal had crystallized. The RTA may, after serious appraisal of all the circumstances, disallow the tax payer's objection and maintain or confirm its original cum additional assessment(s).[87]

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83 (2012) 7 TLRN 65 at 67-68 (TAT Lagos Zone). See also Cnooc Exploration & Production Limited V. FIRS (2012) 7 TLRN 1 at 6-7 where TAT Lagos Zone held that the tax payer is foreclosed from initiating the process of tax appeal but in unusual circumstance where there is a material stake which would impact on the outcome of the determination of the case, the tribunal is duty bound to give all the necessary parties the opportunity to be heard.

84 The Jamaican RAD Commissioner must issue written decision within 60 days.

85 NORA is issued in Nigeria, Kenya, Uganda, Tanzania and Zambian jurisdictions.

86 S. 58(3) PITA 1993 as amended 2011.

87 Onuigbo v. Commissioner for Internal Revenue (1963) 10 ENLR 123 (1992) 1 Nigerian Tax Cases 101 at 104 (2011) 4 TLRN 149 at 150 -152 where the tax payer was assessed to pay tax of £96, 6 shillings and 3 pence. He filed a statement of account with schedule. See also FBIR v. Nigerian General Insurance Company Limited (2012) 8 TLRN 106 at 109 where the Supreme Court held that the court has no power to reopen assessment which has become final and conclusive.

f. Time-Limit to issue and Serve Nora on Taxpayer and the Failure of RTAS to Serve Nora on Taxpayer–borrowing from International Best Practices Obtainable from Canada, Tanzanian, Jamaica and Australia

Although, there is a requirement that objection should be filed within 30 days by the tax payer, subject to extension of time at the appropriate circumstances but there is no corresponding **time-frame** in which the RTA could hear and determine the notice of objection filed. In view of this lacuna in many Commonwealths fiscal legislations, reform is suggestion by the adaptation of the Jamaican model. The **Commissioner Revenue Appeal Division** (CRAD), after receiving all the relevant information pertaining to the particular tax case, has **60 days** to issue **written decision,** he/she is bound to follow the relevant legislation and decisions made by courts – case law judicial precedents.[88]

Borrowing further leaf from **Canada**, **S.165 (3) (a) Income Tax Act (Canada**) provides: -

> *…. On the receipt of notice of objection, the Minister of National Revenue of Taxation (MNRT) must "with all* ***due dispatch****" reconsider the assessment and vacate, confirm or vary the assessment or reassess.*[89]

In **Tanzanian** jurisdiction**, S. 92 (1) Income Tax Act** provides, if the taxpayer further disagrees with the **Notice of Revised or Amended assessment (NORAA)**, the **Commissioner of Taxation** shall issue **Notice of Non-Agreed Amended Assessment (NAAA)** and inform the taxpayer of his/her right of appeal. This is equivalent to the Nigerian NORA (notice of refusal to amend).

The phrase with due dispatch in **Canadian jurisdiction** though has no precise meaning but it is synonymously with **all due diligence**[90] and within a reasonable time. In the Canadian

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88 Revenue Appeal Division Act 2015 (Jamaica).

89 The taxpayer's right of appeal - S. 92 (1) Income Tax Act (Tanzania).

90 Canadian case of Jolicoeur v. Minister of National Revenue of Taxation 60 DTC 1254 (Exc. Ct.)

case of **MINISTER OF NATIONAL REVENUE OF TAXATION v. APPLEBY**[91] a lapse of time of 22 months between the service of notice of objection and confirmation was allowed in view of the work that had to be done before the reassessment could definitely be confirmed. However, if the delay persists beyond 180 days, the taxpayer who had served notice of objection without receiving definite response can proceed with his/her appeal to tax court[92] and the minister shall be deemed to have confirmed the assessment to which the notice relates and the taxpayer shall be deemed to have instituted[93] an appeal[94]. This is also the same position in Australia to the effect that where objection has validly lodged within 60 days of the notice of assessment and if the Commissioner of Taxation has not made any decision within 60 days from the date which objection was filed, the taxpayer may by written notice require the COT to make decision on the objection[95] if COT fails to make the decision within a further 60 days, COT is deemed to have disallowed the objection[96]and the taxpayer may after the expiration of these cumulative **180 days**, commence the appeal proceedings[97].

Even though the lacuna in tax legislation is noticeable, the **Jamaican, Tanzanian, Canadian and Australian better practices** demonstrated above have been followed in Nigeria. The acceptable practice is that RTA must act within a reasonable time to issue a notice of refusal to amend in order not to keep the tax payer unduly waiting. If there is unreasonable delay, the tax payer as an aggrieved person in a taxation dispute, can apply to the tribunal to commence the process of appeal to enforce his/her rights. This is position in

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91 64 DTC 5199 (Ex.Ct)

92 S.169 Income Tax Act (Canada)

93 Arthur Scace & Douglas Ewens - Income Tax of Canada pp.580-584 (1983) (Carswell Publishers)

94 Appeal becomes operative after 180 days have elapsed - See SS.169, 170 Income Tax Act (Canada)

95 SS. 14ZYA (1) (2) Taxation Administration Act (1953) as amended.

96 SS. 14ZYA (3) Taxation Administration Act (1953) as amended.

97 Julie Cassidy – Concise Income Tax Law pp.65-73 (2004) 3rd Ed. (Federation Press New South Wales Australia)

Oando v. Federal Inland Revenue Service[98] where the RTA served the notice of additional assessment for 2006, 2007 and 2008 years of assessment. By a letter dated 26th May 2010, the taxpayer filed written objection and 6 months later RTA claimed it was still reviewing the notice of objection. The tax payer filed the appeal at the tribunal. The RTA filed a preliminary objection to strike out the action on the ground that "notice of refusal to amend" (NORA) has not been issued by RTA pursuant to S. 69 Company Income Tax Act and Paragraph 13(2) of the Fifth Schedule Federal Inland Revenue Service Establishment Act (FIRSEA) 2007. The **Tax Appeal Tribunal** held that since there is no time table stipulated for taking a step required by the law, **it does not lie prostrate because reasonable time is always imposed**. What is reasonable depends on the circumstances of the case. Inspiration is drawn from the 30 days' time limit allowed the tax payer to file his notice of objection. We shall not insist on that the tax collector should respond to issue NORA within the same time frame but instead a generous and **reasonable time table of 90 days is ideal bearing in mind the extremely busy schedule of RTA**. Failure to serve NORA within 90 days from the receipt of the objection should enable the tax payer who has opted to exhaust the RTA in-house complaints handling system to approach the tribunal for redress. 6 months' time frame is unduly oppressive against tax payer who is entitled to get correct information on his precise tax liability quickly. **The law is lopsided in favour of the tax collector and the tribunal is entitled to treat failure to issue NORA within a reasonable time or at all and is interpreted as a deemed refusal to amend** and NORA as part of FIRS internal tax complaints handling procedures are now optional[99].

g. Continuous objections to Assessment/Amendment of Assessment, may be Frivolous? And its effect?

98 (2011) 4 TLRN 113 at 115-119

99 Ibid at 115.

The inevitable question is whether the RTA is bound to respond to continuous objections or series of letters of objections? The answer appears in the negative because the law requires the RTA to respond once through the issuance of amended assessment or the issuance of NORA (notice of refusal to amend). Once it has discharged either of these requirements, it has fulfilled its obligation. In *Nigerian Bottling Company Plc v. Lagos State Board of Internal Revenue*[100] where the taxpayer was assessed N2,456,289.46 as per the demand notice covering the deductions from pay as you earn (PAYE) not remitted, State development levy inclusive of the 21 percent interests and 10 percent penalty. The demand notice stipulated 14 days to pay. The taxpayer sent its letter of objection dated 3rd September 1997. After series of meetings between the parties, the RTA reviewed the assessment to N1, 142,180 and by a letter dated 24th October 1997; it gave the taxpayer 3 days (27th October 1997) to settle this liability. The taxpayer filed this suit contending that NORA has not been issued to amend the assessment in line with taxpayer's objections required by **SS. 33(3) and 57(3) PERSONAL INCOME TAX ACT 1993** prior to LSBIR sealing the premises on 6th November 1997 which was suspended on 11th November 1997.

ADEFOPE-OKORIE J held thus: -

(1). that the duty placed on LSBIR is to respond to the objection and give notice of their response. Having done this, it is not mandatory to respond or enter into continuous correspondence because it discharged its obligation to the taxpayer pursuant to S.33 (1) PITA.

(2). that the intention of the legislature that the taxpayer should not be taken unawares by any government action[101] has been fulfilled by the revised assessment even though it did not specifically state it as a notice of refusal to amend. Since it stated however that they looked

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100 (2000) 1 LHCR 147 at 148-149

101 Ogualaji v. Attorney General Rivers State (1997) 6 NWLR (Pt. 508) 209 (SCNigeria)

into the objection of the taxpayer following its representation and explanation, they revised their computation and they complied with the provisions of S.33 (1) PITA as contemplated by the legislature, therefore the revised assessment is final and conclusive.

(3). that the LSBIR having received the particulars of objection, issued its own re-assessment, it is entitled to distain the goods, chattels, land or premises of the taxpayer without the order of the court by virtue[102] of S.50 (a)(1) PITA.

Criticisms – With the greatest respect to the learned trial Judge, though this case is technically right in respect to the principles of objection, hearing and its disposal but its applicability to the archaic remedy of distraint - sealing of the taxpayer's premises without the order of the court, is faulty as it promotes lawlessness and barbarism. The proper and legally justifiable position is that LSBIR to apply to court (now TAT) for the enforcement of the obligation to pay tax by the taxpayer. Invading the taxpayer's premises in a brute and obsolete manner could lead to bloodshed. This case was decided in the pre-2007 era. With the new reforms introduced in the post-2007 era, it is submitted that with the establishment of TAT since 2009/2010, the only legitimate process available would be for LSBIR to procure the order of the TAT for the payment of the tax assessed, in addition to the penalty and interests. When the judgment is obtained, it could be registered at Federal High Court and execution carried out through the instrumentality of the Deputy Sheriff, bailiffs, police and other law enforcement agencies through the writ of fieri facias and not to take the laws by its hands.

The point on the invasion of premises without the order of the court in the above case appears to have been overruled.

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102 (above) at 148-149. Italics supplied.

4. SEALING OF TAXPAYER'S PREMISES UNTIL TAXES ARE PAID MUST BE BY ORDER OF THE COURT AFTER HEARING OF THE APPEAL

This is the recurrent tax practice problem we encounter in many tax jurisdictions. In respect of the **power of RTAs to distrain** over breach of obligation to pay tax and seal-up the premises, we should be guided by the principles enunciated in *Independent Television/Radio v. Edo State BIRS*[103] where RTA applied and obtained exparte order to distrain land, premises, chattel, bond place of business, movable goods, securities and any kind of property belonging to the taxpayer, until the personal income tax liability of N12, 882, 596. 43 which were deducted from salaries of their employees which they failed to remit to RTA, is paid. **ACHA J** ordered it to be paid into the coffers of Edo State Government (EDSG) Treasury and that the premises should be unsealed upon the presentation of the receipt of such payment. Taxpayer filed motions on notice in which it prayed the court to discharge the order made against it and to unseal the premises and RTA filed counter-affidavit and further counter-affidavit, in reaction and opposition. **ACHA J** further ordered that the money so paid should be refunded to the taxpayer within 48 hours, should the application it filed through motion on notice to challenge and discharge the exparte order, succeeds. His Lordship adjourned the motion on notice, for hearing. Aggrieved, the taxpayer, appealed.

The **CA unanimously** affirming the **Ruling of EDO State High Court and dismissed the appeal** and held thus: -

Under PITA, the options and several opportunities are available to taxpayer who dispute tax, to be heard. They are: -

1. The service of the notice of assessment on taxpayer by RTA which allows him/her 30 days to scrutinize it and raise objections in writing addressed to RTA.
2. Upon failure to object within time, the taxpayer has option to proceed to Court (TAT, RC, SHC) to air his grieviances under S. 60 PITA,

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[103] (2015) 12 NWLR (2015) 12 NWLR (Pt. 1474) 442 at 446 – 450 (CA)

3. Upon information of an exparte motion pending before High Court, the taxpayer can apply to be put on notice thereby converting the motion exparte to motion on notice, upon ability to convince the Court of its need,
4. After the warrant of distrain has been issued, the taxpayer has 14 days to pay the tax and if he/she intends to contest the warrant, to appeal to CA.

If the CA upturns the appeal, the taxpayer still has the right to appeal to SC. **OGUNWUMIJU JCA denounced the taxpayer's attitude** thus: -

> *….'where taxpayer failed to utilize any of the above listed opportunities which the law affords him to be heard, such a person cannot run to the same law to cry foul. When a party is given the opportunity to be heard and such party fails to utilize it, he/she cannot hide under the umbrella of fair hearing rule. He will fail. In the instant, it was overwhelmingly beyond doubt that RTA, has exercised unreasonably patience with taxpayer/appellant who kept frustrating RTA;s invitation for tax review/audit, and thereafter claimed to have been deprived of fair hearing. RTA/Respondent followed the provisions of PITA and the distraining order given against them, was well deserved.*[104]

(ii) S.104 PITA 1993 as amended by PITAA 2011, where an assessment has become final and conclusive and a demand notice in accordance with the provisions of PITA, has been served on a taxable/chargeable person, then if payment of tax is not made within time limited by the demand notice, RTA may **resort to any** of the

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[104] (above) 446 at 491 – 482, applying Newswatch Communications Limited v. Atta (2006) 12 NWLR (Pt. 993) 144.

following, to recover the tax due: -distrain the taxpayer's goods, chattels, bonds or other securities

The distrain of the taxpayer's land, premises and other properties owned by him, for the recovery of amount of tax due, by the sale of anything so distrained[105] are now subject to the provisions of S. 104(3) PITA 1993 as amended in 2011 to recover.

As regards the prescribed way of the enforcement of the payment of tax **OGUNWUMIJU JCA went on and stated thus; -**

(iii) Under **S.104 (3) PITAA 2011**, the prescribed way of the enforcement of the payment of tax is a mere **application** to a **High Court Judge** sitting in Chambers (**exparte**). Such application is better supported with an affidavit which must be in writing and any application under S. 104 PITA, is a special procedure.[106]

(iv) By virtue of S. 44(2)(a) Nigerian Constitution 1999, nothing in S. 44(1) shall be interpreted as affecting any general law for the imposition or enforcement of any tax, rate or duty.[107]

COMMENTARY ON INDEPENDENT TELEVISION TAX CASE with its widest publicity attracted and public outcry. Renowned lawyers joined the case as amicus curiae. This case, no doubt, would command highest quality or ratio and greatest respect because so many of our experts[108]

In *Ikokas Limited & City Fair Consortium Limited v. Nigerian Bottling Company Limited*[109] the Claimants

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105 (above) 447 at 466 – 467

106 (above) 447 at 466 – 467

107 (above) 447 at 489.

108 Such as FA Orbih (SAN), Ade Ipaye (AG Lagos State), Olu Daramola (SAN), Dr Oladapo Olanipekun, B O Odigwe (Solicitor General Delta State) and Paul Usoro (SAN) (President Nigerian Bar Association) respectively filed briefs of arguments, appeared and adopted their briefs as the Amicus Curiae (friends of the Court).

109 (2009) 10 RSLR 135 at 136 138 at 156.

commenced action claiming N3.8m as debts owed by D for advertisements placed by D on Federal Highway bridges from 1999 – 2003. D alleged that it is only Federal High Court and not Rivers State High Court, that has jurisdiction over this case. **DIEPIRI J** held that the monies demanded does not constitute revenue of FGN which would qualify it to be within the jurisdiction of Federal High Court and the mere creation of a body by FGN does not make such body agent of FGN. His Lordship was emphatic that by the combined effect SS.1(1), 2(1) and Part III of the Taxes and Levies (Approved Lists for Collection) Act 1998, the sign board and advertisement permit fees, are the exclusive reserve of the LGA and the action was dismissed.

5. ADOPTION OF INTERNATIONAL BEST TAX PRACTICE OBTAINABLE FROM THE TANZANIAN JURISDICTION FOR RECOVERY OF TAXES BY DISTRAINTS FROM THE DEFAULTING TAXPAYER

The adoption of the **Tanzanian better** method of **recovery of tax by distraint** to cushion the hazard of injury and violence involved using this procedure[110]. The Commissioner of Taxation may file a suit in a court of competent jurisdiction to recover the tax as a debt due to government where the **Defaulting-Assessee**[111] owns substantial property. Under this procedure, the taxpayer is notified of the outstanding tax liability, interests thereon and be required to pay within 10 days[112]. Thereafter, bailiffs and distraint officers are appointed to value and take inventory of all the properties and assets of the defaulters. The RTA shall thereafter apply to the court through a motion on notice for the issuance of warrant of distraint against the defaulting taxpayer. The RTA need not adduce any evidence provided a certificate issued by COT of default of the payment, containing the name, address, amount of tax debt due and payable. This would be

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110 Luoga FDAM (Prof) – Sourcebook of Income Tax in Tanzania (1990) pp.194-195 (Dar es Salaam University Press)

111 SS.18 and 109 Income Tax Act (Tanzania).

112 Income Tax (Distraint) Regulations 1975

regarded as sufficient evidence[113] and in absence of rebutting evidence; the assets of the taxpayer shall be seized and sold. This is the most suitable method that ought to have been adopted[114]

Note that where the RTA has disallowed the objection to an assessment and issued Notice of Refusal to Amend (NORA), the taxes statutes confer on the taxpayer who is now aggrieved or dissatisfied, the right of appeal to the various hierarchies of the courts. If the taxes are the ones collectable by the any of 36 States including Abuja FCT and the Local Government Authorities (LGAs), the right of appeal exist and the Magistrates/Revenue Courts and States High Courts, shall have jurisdictions.

If the taxes are the ones collectable by the Federal Government of Nigeria (FGN), the right of appeal to the either Tax Appeal or Federal High Court, shall accrue to the taxpayer

Tax disputes between States' Boards of Internal Revenue (SBIR) and individual taxpayers, including corporates bodies over personal income taxes and other categories of taxes are resolved through the Magistrate/District Courts styled as Revenue Courts (RCs) established by the States. There are RCs at Uyo Akwa-Ibom, Port Harcourt Rivers, Calabar in Cross Rivers, Yenagoa in Bayelsa and other States of Nigeria. Its jurisdiction is to hear and determine taxation disputes at the first instance, prior to appeals to the States' High Courts, Court of Appeal and Supreme Court. They are basically staffed by presiding Chief Magistrates of 7-10 years' minimum post-call experience whose jurisdictions are regulated by the Statutes.[115]

By virtue of SS. **4 (1) (a) (b) (b) (c) (d) (f) (2) (3) (4) REVENUE COURT LAW 1989 AKWA-IBOM AND CROSS RIVERS STATES**[116]

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113 Luoga FDAM – op. cit. p. 94.

114 The case of Nigerian Bottling Co. Ltd. v Lagos BIR (above) does not represent good law but the case Independent Television/Radio v. Edo BIR must be followed because as all the procedures were followed.

115 Magistrate Courts' Law 1999 (Rivers), 2000 (Akwa-Ibom), 2004 (Cross Rivers) and 2006 (Bayelsa) and Revenue Court Law 1997 (Delta) States of Nigeria

116 Akwa-Ibom and Cross-Rivers States of Nigeria

> *…. ''the RC shall have original civil and criminal jurisdictions to hear and determine causes, matters relating to the Revenue of Government, or any person suing or being sued, on behalf of the government or any organ of government or Local Government in relation to;*

(i) personal income tax under PITA,
(ii) tenement rates under Rating and Valuation Law,
(iii) Levy under Economic Development Levy Law,
(iv) fees under Registration of Business Premises Law
(v) any fees, rates, levies and taxes imposed under any other law in the State
(vi) any fees, rates, levies and charges duly imposed by the Local Govt Council under its Bye Laws.

The **jurisdiction of the RCs,** strictly speaking, refers to the revenue matters within the powers of the States' and LGAs.[117] Appeals as right under questions of Law and with leave under mixed law and facts, shall lie on decisions of RCs to the States High Courts[118] and shall not operate as stay of execution of judgements conditionally or unconditionally.[119] In *Seaweld Engineering Limited v. Akwa-Ibom State BIR*[120] P applied to Federal High Court (FHC) for order of prohibition and certiorari to quash criminal action instituted against it, for not remitting to the AKSG, within 30 days under S.73, the Personal Income Tax deducted from its workers' salaries pursuant SS. 68, 69 and 70 PITA. It contended that RC has no jurisdiction, as the matter was civil rather than criminal. **ADENIJI J** dismissed the action and held; -

(i) under S.2 PITA 1993, a State government (AKSG) is empowered to impose tax on certain categories of individual workers while FGN can impose appropriate

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117 Schedules 11 and 111 Taxes and Levies (Approved Lists for Collection) Act 1998 and certainly not the Order 2016 made without authorization of the FPNA.
118 S. 8 (1) Revene Court Law 1989 (Akwa-Ibom and Cross Rivers States)
119 S. 8(2) Revene Court Law 1989 (Akwa-Ibom and Cross Rivers States)
120 (2002) 1 FHCLR 295 a 297-298

tax on itinerant workers, members of Nigerian Police and others specified in SS. 1(b), 2 PITA Individual workers' salaries, wages, allowances are taxable under S. 3 PITA as profits from employment defined to include service rendered in return for gains or profits.

(ii) PITA empowers the State to impose and collect taxes as agent of FGN. Under S.1(1) Taxes and Levies (Approved Lists for Collection) Act 1998, the States and LGA can constitute RTAs who are empowered under S.2(1) TLALFC Act, to assess and collect taxes on behalf of FGN.

(iii). S. 73 PITA includes civil and criminal proceedings and in view of the circumstances of P's conduct, it is up to RTA to decide whichever is appropri-ate. Since P is regarded as an agent of D and an agent who withholds amount deducted as tax incurs the wrath of it principal and can be dealth with appropriately.

(iv). The RC has jurisdiction and there is no challenge to the procedure it adopted is not strange and alien to all known legal principles to warrant certiorari or prohibition.

(v). FHC cannot be the appropriate venue as it has no jurisdiction where the issue of Tax of a State is involved. The RC is the appropriate forum and appeals from RC lies to the State High Court (SHC) and it would have been proper to seek all remedies and reliefs at SHC.

(vi). The RC has jurisdiction to try all civil and criminal matters summarily under S.4 (3) RC Law and the power of the court was limited to the imposition or award of the punishment not greater than that prescribed by Magistrate Court Law.

(vii). Under S. 4 RC Law, RC has jurisdiction to summarily hear and determine such Tax matters specified without exception or categorization – the Chief Magistrate who sits in RC, has all the powers enabling him, to take

All Revenue Cases regardless of the amount involved and there is no limit to the amount he can preside over.

COMMENTARIES – The above decision appears sound and faultless in reasoning and accords with the taxation separation of powers known to tax jurisprudence. With the creation of RCs, the role of Tax Appeal Commissioners in the States appears impliedly abrogated because all their functions have been transferred and to the RCs and subsumed thereat.

The similar validity and jurisdiction of RCs was further tested in *Ecodrill (Nigeria) Limited v. Akwa-Ibom State BIR*[121] where the Appellant (A) was arraigned at the Magistrate Court – Revenue Court Akwa-Ibom State on 3 (three) counts charge of failure to remit PAYE Tax under PITA, withholding tax and economic development levy. At the trial, the only witness to AKSBIR did not adduce evidence relating to the residence of A's employees and under cross-examination, admitted there was no document which showed AKSBIR requested such information from A. The evidence before the trial RC was that A had some expatriate employees working in two marine vessels ''Agbani and Taggart'' and it was not established that the boats were within Akwa-Ibom's territory. A's witnesses testified that none of its expatriate employees were resident in AKS and sought to tender document which showed lists of its Nigerian employees and their residential addresses but the trial RC rejected the document. At the close of evidence, the RC struct out counts 2 and 3 of the charge and relied on the concept of '**deemed residence'** and held A liable on two counts as its employees on the 2 marine boats were resident in AKS at the material time. The High Court dismissed the appeal, affirmed A's conviction and held RC's reliance on the concept of deemed residence, was right in respect of the expatriate employees. Dissatisfied with the judgement, on further appeal, it was contended that under **S. 10 (1) (a) PITA**, the gains or profits from employment shall be deemed to be derived from Nigeria, if the duties of the employment are wholly or partly performed in Nigeria, unless

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121 (2015) 11 NWLR (Pt. 1470) 303 at 307-315 (CA)

(i) the duties are performed on behalf of an employer who is in a country other than Nigeria and the remuneration of the employee is not borne by a fixed base of the employer in Nigeria and
(ii) the employee is not in Nigeria for period (s) amounting to 183 days (inclusive of annual leave or period of temporary absence) or more in any 12 months period commencing in a calendar year and ending either within that same year and ending either within that same year or the following year and
(iii) the remuneration of the employee is liable to tax in that country under the provisions of the **Avoidance of Double Taxation Treaty** with that other country.

The Court of Appeal unanimously set aside the decisions of both the Revenue Court and High Court Akwa-Ibom and held as follows;-

(a) the basis of imposition and/or collection of personal income tax in Nigeria are two folds – **residence and source**. One of the bases of tax liability on the part of taxpayer and appropriate RTA to collect personal income tax, is ''residence''. Here, the only issue involved is ''residence'' and by virtue of First Schedule PITA, the place of residence in relation to individual means **a place available to him for domestic use** in Nigeria on a relevant day but it does **not include hotel, rest-house or other place like his temporary lodging** unless no more permanent place is available for his use that day. As regards the definition of the place of residence, it is used to describe the residency status of taxpayer who has **only one residence**.

NWEZE JCA was emphatic that the principal factor is a place available to the taxpayer for his domestic use and temporary places of abode such as **residing in a vessel cannot serve as a place of residence** under PITA, except if there is no permanent place available for the taxpayer's domestic use in

Nigeria. In this limited instance, such temporal place(s) could serve as a place of residence. The definition intended by PITA is factual residence and does not cover deemed residence.[122]

ANYANWU JCA the residence of the expatriate workers of ECODRILL can only be in Port Harcourt where their headquarters is situate under S. 2 First Schedule of PITA and therefore RC and HC were **wrong to hold that expatriate workers were resident** in Akwa-Ibom State because the **vessels were moving and cannot be classified as a place of residence.**

(b) by virtue of PITA, **principal place of residence is used** to determine the residence of a taxpayer who claims he has **more than one place of residence.** This case was only concerned with the resident status of the expatriate workers on whose behalf A did not claim any other place of residence.

(c) the **principle of residence** in the imposition and collection of personal income tax, primarily relates to the existence of sufficient connection between RTA and a taxable person. By virtue of **S. 2(2) PITA**, if it is shown that a tax payer resides in a particular State in Nigeria, that State's BIR is the appropriate authority conferred with power to collect personal income tax from such taxpayer in that State.

(d) **factual residence** – an individual's residence is based on the person's link or connection with a country. Once the link or connection is strong, the court generally consider the nexus sufficient enough to hold that the individual is a resident of that country. However, the sufficiency of a connecting factor or nexus depends entirely on the facts and circumstances of each case. This type of residence is described as 'factual residence'.

(e) **factors determining or establishing factual residence** – the most important factor determine factual residence is whether or not a person leaving a particular tax

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122 (above) 309 at 333-344

jurisdiction maintains residential ties with that jurisdiction? In this connection, the residential ties considered very significant in establishing the factual residence of that person are **maintenance of a dwelling place, a spouse or common-law partner or dependant** in that jurisdiction

(f) determination of **residence of expatriate workers taxpayers** holding foreign employment in Nigeria – under **para. 2 First Schedule PITA**, an individual not being a person whom **S. 2 (1) (b) PITA** applies to, who holds **foreign employment** on the 1ST January in a year of assessment, or who first becomes liable to income tax in Nigeria for that year, shall be deemed to be resident for that year in the **territory in which the principal office of his employer is situated** on that day his foreign employment commences. Having regard to the definition of **foreign employment** and **Nigerian employment** in para. 1 First Schedule PITA, para. 2 applies to Nigerian residents' other those covered under S. 2 (1)(b) PITA who hold foreign employment on 1ST January in a year of assessment

(g) **deemed residence** – there is no specific provision under S. 2(2) PITA especially that expressly defines deemed residence or stipulate conditions to be fulfilled before a person is deemed resident of a State. However, by the combined effect of S. 10(1)(a)(ii) PITA, para. 4(3) 2ND Schedule, para. 6(2) 3RD Schedule PITA, a person is deemed a resident in Nigeria in the year of assessment, if he/she spends **183 days or more in a calendar year** (12 months period(s) – ending either on the same year or the following year. **183 days traditional rule to determine deemed residence**. **NWEZE JCA** summed up the position thus; - the question is whether the evidence presented to the RC show the points where the expatriates stayed in the vessels for the period(s) amounting to 183 days? Above all, did AKSBIR prove the points at high sea where the vessels were stationed, were within the

> Akwa-Ibom's boundary? From the records, we could not find such proofs and yet the lower court affirmed the conviction? It is a question of facts to be established by evidence as to whether the expatriates' employees, are resident in Akwa-Ibom. Here there is no such evidence and High Court was wrong when it affirmed that the expatriates were deemed resident of Akwa- Ibom State.[123]

The States' High Courts(SHCs) have jurisdiction for categories of taxes under parts II and III of the Taxes and Levies (Approved Lists for Collection) Act 1998 such as personal income tax under PITA, Withholding Taxes, States Development Levies[124], Land Use Charges**,**[125] tenement rates under Rating and Valuation Law, fees under Registration of Business Premises Law, fees, rates, levies charges and taxes imposed under any other law in the State and the Local Govt Council under its Bye Laws, especially where there are large financial claims and substantial questions of Law**.** The **SHCs** have **unlimited jurisdiction** under **S.236 Nigerian Constitution 1999** to entertain matters including those relating to the enforcement of payment of the taxes stated above, which are to State Government. In *Sky Bank Plc v. Kwara State BIRS.*[126] KSBIRS claimed the sum of N21,887, 970.81 being outstanding liabilities for 2008-2010 financial year arising from under-deductions taxes, levies, withholding tax and ones actually deducted but not remiied pursuant to SS. 2, 3 and 4 Personal Income Tax Act and Kwara State Tax Law. The State High Court granted the claim. **Court of Appeal** dismissed the contention that the State High Court has no jurisdiction and held thus;-

(i). That it is the State High Court and not the Federa High Court that has jurisdiction over the disputes arising over

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123 (above) 309 at 333-344

124 Nigerian Bottling Co. Limited v. LSBIR (2000) 2 Lagos State HCLR (Pt. 8) 147 at 148-149.

125 Shell PDC Limited v. Governor Lagos State & Etiosa LGA (2002) 3 Lagos State HCLR (Pts.28-29) 18, 19-21

126 (2021) 12 NWLR (Pt. 1789) 27

Revenue accruable to the State Government under Personal Income Tax Act[127] and Withholding tax.

(ii) TAT is an Administrative tax tribumal empowered under S. 59(2) FIRSE Act 2007, to primarily entertain disputes arising from the correctness of assessments to tax without fixation of formality, over taxes and levies due to FGN[128] collectible by FIRS.

(iii). That it is the Kwara SBIRS as the body that is empowered to ascertain – assess, impose and collect the taxes payable to the Kwara State Government by the taxpayer under Kwara State Tax Laws because FBIRS is only empowered to assess. Impose and collect Revenues accruable to Federal Government of Nigeria (FGN).

6. TAX APPEAL TRIBUNALS JURISDICTION OVER TAX MATTERS BETWEEN FEDERAL INLAND REVENUE SERVICE AND CORPORATE TAXPAYERS IN RESPECT OF FEDERALGOVERNMENT TAXES AND LEVIES

Tax Appeal Tribunal (TAT) was established in accordance with **S. 59 (1) of the Federal Inland Revenue Service (Establishment) Act 2007**. TAT is involved in the external review mechanism provided in tax disputes resolution processes. It may affirm, set aside, vary, remit or dismiss the objection and its decision thereof. It may also confirm or declare an assessment as incorrect in exercise of its jurisdiction. The tax legislations of British Commonwealth Countries recognized the specialist's nature of income tax and they established specialized courts[129] to handle them.[130]

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127 Under SS.2, 3 and 4 Personal Income Tax Act

128 Addax v. FIRS (2012) 7 TLRN 74

129 In UK and West Indian State of St. Lucia they are called Appeal Commissioners, Uganda; Tax Appeal Tribunal, Kenya, Trinidad and Tobago, Barbados -Tax Appeal Board, in Jamaica - Revenue Court, South Africa and Zimbabwe -Tax Court. In Malaysia, they are called Special Commissioners for Income Taxes and are appointed under S. 98 Income Tax Act 1967 (Malaysia) and in Kyros International Limited v. Negeri (2013) 2 MLJ 650 at 651 CA held that because of their specialized knowledge in the scope of the taxation adjudication processes, they SCIT were appointed and entrusted with this responsibility. They comprise Lawyers, accountants, businessmen, finance managers with

The TAT took off pursuant to Tax Appeal Tribunals Establishment Order 2009. By this enactment, TAT replaced the Body of Tax Appeal Commissioners (BTAC) and Value Added Tax Tribunals (VATT)**.** In spite of the change in the nomenclature, the BTAC now incorporated into TAT still retains the titles Tax Appeal[131] Commissioners[132] both in name and substance[133] comprising of people who are experienced and knowledgeable in tax matters and business environment outside the Federal Inland Revenue Service (FIRS). Although, they are appointed by the Minister of Finance on the recommendation of FIRS, there is a general assumption they will discharge their duties without fear or favour, will, or affection to anyone.[134] The TAT is basically an administrative review body but it performs quasi-judicial functions in relation to tax disputes emanating from all the various tax laws[135]. This offers the complainant an opportunity to explore flexible dispute resolution mechanism unlike the rigid processes obtainable from the regular courts. The Body of Tax Appeal Commissioners (BTAC) is now subsumed under TAT and shall

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specialist knowledge, experience and expertise in taxation – See also S. 850 Tax Consolidated Act 1997 (Ireland Republic).

130 The defunct Body of Tax Appeal Commissioners (BTAC) members were appointed by Federal Minister of Finance for the companies' taxation for FBIR while the Commissioner of Finance of a State appoints BTAC in relation to taxation of individual within the States, in the past.

131 In Preussag Drilling Engineering Co. Limited v. FBIR (1991) FHCLR 93 at 95 Belgore CJ held that a tribunal like the body of tax appeal commissioners is not bound by the technical rules of evidence but violation of the elementary procedure of drawing the attention of a party to a documentary evidence upon which the tribunal was going to base its finding against him, is a denial of natural justice.

132 Mobil Producing Limited v. FIRS (2013) 2 NRLR 1 at 3 (TAT case).

133 In Ola v. FBIR (1974) NCLR 85 at 86 (1973-1974) FHCLR 70 it was held that tax appeal commissioners are quasi-judicial body and it is the essence of justice that they do not rush themselves or allow themselves to be rushed when dealing with matters and should not dismiss matters summarily except those in which there is no merit whatsoever or which contains nothing at all worthy of careful consideration and it is advisable that they should deliver a well-prepared judgment.

134 S. 60 PITA 1993 as amended by Cap. 20 (2011).

135 Mobil Producing Ltd v. FIRS (2013) 2 NRLR 1 at 3 (TAT) case, where it was held that if it is a tax dispute, it falls within jurisdiction of TAT.

have powers to entertain cases arising[136] from tax disputes over FGN taxes and levies.[137] In *Sky Bank Plc v. Kwara State BIRS*[138] **t**he **court of Apeal** held TAT is merely an administrative tribunal set up to determine the correctness of assessments to tax without fixation of formality, TAT is not a court and therefore its jurisdiction can not oust the jurisdiction of courts.[139] The CA was emphatic that under S. 59 (1) of the Federal Inland Revenue Service (Establishment) Act 2007 and S. 60 Personal Income Tax Act, TAT's jurisdiction covers disputes arising from the FGN taxes and levies and strictly, **it has no jurisdiction over taxes and levies belonging to the 36 States' Government of Nigeria.**

a. Federal High Court's Jurisdiction over Revenue Matters of the Federation

Tax Appeal Tribunals, are subject to the appellate jurisdiction of the Federal High Court (FHC), which has jurisdiction over the taxation and revenue matters of the Federation of Nigeria. The Right of Appeal lies to Court of Appeal and Supreme court either as right or subject to leave (permission) of the appellate courts. In spite of its appellate jurisdiction, the FHC has exclusive jurisdiction over matters of the Revenue of the FGN[140] and matters connected with or pertaining to taxation.[141] In *Esso Exploration & Production (Nigeria) Limited v. FIRS*[142] the CA held that is the functions and powers of FIRS as the

136 S. 60 PITA 1993 as amended by Cap. 20 (2011).

137 Paragraph 11 (1) of the Fifth Schedule to the Federal Inland Revenue Service (Establishment) Act (FIRS) Act provides that TAT shall have power to adjudicate on disputes and controversies arising from companies Income Tax Act (CITA), Personal Income Tax Act (PITA), Petroleum Profits Tax Act (PPTA), Value Added Tax Act (VATA), Capital Gains Tax Act (CGTA) and any other Law contained or specified in the First Schedule to this Act or other Laws made or to be made from time to time by the National Assembly.

138 (2021) 12 NWLR (Pt. 1789) 27

139 FIRS v. General Telecom(2012) 7 TLRN 108

140 S.251(1) (b) Nigerian Constitution 1999

141 AG Bauchi State v. AG Federation (2021) 17 NWLR (Pt. 1648) 299 SC and MTN Communications Ltd (2016) 1 NWLR (Pt. 1494) 475 CA.

142 (2021) 8 NWLR (Pt. 1777) 43

body that is empowered to ascertain – assess and impose the taxes due to FGN payable by the Corporate taxpayers and by the Statute establishing FIRS, this includes the right of action to prevent exercise or infringement of the same powers by another bbody[143] In *Sky Bank Plc v. Kwara SBIRS*[144] **t**he **court of Apeal** held under S.251(1) (b) Nigerian Constitution 1999 and S. 59 (1) of the FIRS (Establishment) Act 2007, and S.7 Federal High Court Act 1973, only the Federal High Court has jurisdiction over the Revenue of the Federation and over the taxes and levies accruing to FGN.

b. Composition of the Six Branches Tax Appeal Tribunal and Appraisal of its Territorial Jurisdictions

There are presently eight Tax Appeal Tribunals (TAT) in Nigeria located in all the six geo-political zones including Abuja and Lagos. They are saddled with the responsibilities to adjudicate on all tax disputes arising from the operations of the tax laws. Their composition, qualifications of its members, tenure of office are outside the scope of this paper and details should be sought elsewhere[145] suffice it to state that members must have experience and capacity in taxation, commercial and financial matters[146]. TAT has the jurisdiction to hear and review cases emanating from decisions in respect of application properly made to it by the aggrieved tax payers and also from RTA desirous of enforcing tax legislation or aggrieved by the tax payer's refusal to pay the assessed tax. In doing so, it shall be independent and not subject to control or direction of any person or organ(s) of the State authorities. The jurisdiction of the TAT is not only governed by the

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143 S 25 FIRS (Establishment) Act 2007

144 (2021) 12 NWLR (Pt. 1789) 27

145 In the erudite works of distinguished Scholars - M.T. Abdulrasaq (Prof) -Tax Appeals (2003) CITN Tax Practice series No. 20 and Abiola Sanni (Prof) - Appeal Tribunal Procedure Rules in Nigeria - A Synoptic Evaluation CITN Tax Practice Series No. 29 (2010).

146 S. 89 (1) Income Tax Act (Tanzania), S. 98 Income Tax Act 1967 (Malaysia) and S. 850 Tax Consolidation Act 1997 (Ireland).

geographical[147] location of the headquarters or registered office of the taxpayer/company but in the zone-the district or location of the RTA that issued the tax assessment, took the action or made the decision appealed against[148] is located In *British American Tobacco Marketing Company (Nigeria) Limited v. FIRS*[149] the counsel for claimant taxpayer sought to transfer the case to the Abuja zone instead of Lagos zone where the suit was filed. The TAT held that the criteria for the determination of the appropriate zone which the appeal emanated from are governed by Order 4 Rules I and 2 of the Tax Appeals (Procedure) Rules 2010. The Tribunal was emphatic that the appropriate venue is determined by the following factors: the geographical root of the complaint comprised in the appeal? Which of the tax man issued the assessment or made the decision appealed against? In which zone of the Tax Appeal Tribunal, is the office of the tax payer's company located? The Tribunal further frowned at **forum shopping**" transferred the case to Abuja zone of TAP as the appropriate zone to determine the appeal because all the facts/events such as notice of assessment and notice of refusal to amend (NORA) all emanated from Abuja. The appropriate forum is called "the territorial jurisdiction" not necessarily the location of the corporate headquarters of the company/tax payer or forum convenience. In *AGIP Exploration Limited & Oando LTD v. FIRS*[150] the tribunal dismissed the application to transfer the case from Lagos to Abuja because under order 4 Rules 1 and 2 Tax Appeal Tribunal (Procedure) Rules 2010, the parties have no choice of forum on the ground of proximity and convenience and since all the events/facts occurred in Lagos, it is the Lagos zone of the tribunal that has jurisdiction. The Tribunal was emphatic that the cases decided by other zones of the Tribunal are not binding on others but merely persuasive.

147 Order 4 Rules 1 and 2 Tax Appeal Tribunal (Procedural) Rules 2010.

148 Nigerian Agip Exploration Co. Limited v. FIRS (Appeal No. TAT/Lagos/038/2010) and Chevron (Nigerian) Ltd v. FIRS (Appeal No. TAT/Abuja/013/2009).

149 (2011) 5 TLRN 54 at 56-57 (TAT case).

150 2011) 4 TLRN 141 at 142-143

In line with the above authorities, all companies whose fixed based is in Nigeria qualified as a company having residence or ordinary residence and therefore liable to company's Income Tax.[151]

c. Burden of proof in Taxation Matters

The burden of proof in tax disputes is strictly governed by fiscal legislations. Initially, it is on the taxpayer to prove that the assessment is excessive[152]. This is the position in the case of *Sandu v. Commissioner of Income Tax*[153] where the taxpayer complained that the figures allowed him for liabilities ought to be more. He submitted higher figure than he stated in his returns and explained that the differences were moneys put in by his brothers and the ones left in his custody by his employees. He called his brothers but none of his employees as witnesses. He did not produce books of daily sales and purchases or documents to support his testimony. **West African Court of Appeal** held (1) –taxpayer had not proved that the figure of liabilities adopted by the CIT was wrong and the Judge was right by accepting it but his evidence of the values of certain premises had been misunderstood by the judge and the relevant figure: reduced (2). The Judge erred in disturbing the figure of the commissioner for the furniture and fittings by accepting what the taxpayer said in evidence because he had tried to deceive the court in every aspect of the case and there was no evidence, whether documentary or otherwise to support the taxpayer's assertion. (3) As regards the stock in trade, the taxpayer failed to discharge the onus cast on him to prove that CIT figure was too high - he could not explain why in oral evidence he reduced the value he put in the

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151 Shell Petroleum Mattscgappi BV v. FIRS (2011) 5 TLRN 114 at 118 where court of Appeal held the company has a fixed base in Nigeria equivalent to ordinary residence, it is liable to tax under s. 8 CITA even though it was not incorporated in Nigeria but provides technical and management services to Shell, it acquires income in or derives income in Nigeria..

152 Dendow C.H. op.cit. pp.173-175 and Sandu v. Commissioner of Income Tax (below).

153 (1952-1955) 14 WACA 656 (West African Court of Appeal Law Reports).

affidavit and books of account. The refusal to allow him an adjournment with a view to produce such books was right as the taxpayer had notice of the day fixed for hearing and known from CIT's reply to the grounds of appeal.

The taxpayer can also prove that the assessment is wrong or unfounded - that the income being computed by virtue of RTA's assessment is not taxable and the reason supporting this contention. Although, the tax payer is obliged to begin but the evidential burden to adduce testimony which support its assessment would shift to RTA in order to rebut the assertion made by the taxpayer. This would further be tested by cross-examination of the tax payer as to the new information about the additional source of income obtained which the RTA based its tax assessment or additional assessment

In *Cosmos v. Board of Internal Revenue*[154] *Nwokedi J.* (as he then was) emphatically held that there is no obligation to pay tax on foreign income not brought into or received in Nigeria. His lordship has this to say: -

> *…. the question in the affidavit is whether the taxpayer confused his overseas assets with his actual income? Looking closely at notice of assessment under the heading source of income brought into or received in Nigeria; N6000 appeared therein.* ***There is nothing*** *anywhere to show that he either brought or received this amount of N6000 in Nigeria. There is also nothing in the reply by* ***BIR to show that he either brought or received this additional figure of N6000 in Nigeria nor they file counter affidavit in denial or*** *disproof of this allegation.* ***No doubt, Tax Assessment Authority (TAA) may make its deductions but in my own view such conclusions must be based on facts.*** *The counsel for TAA has stated in his reply that what operated in the mind of TAA was the form filled in support*

[154] (1973) 3 ECSLR 661 at 662-663.

> *of the application for the State plot but the taxpayer stated he made a mistake. In absence of* ***any evidence to the contrary, it was a genuine mistake*** *and therefore there is no valid basis for the acceptance of the allegation of N6000 by TAA and any assessment based on that figure in the form filled for the state land allocation would* ***be invalid and unacceptable.*** *The* ***additional assessment based*** *on the figure supplied in the form filled for the allocation of state land* ***is hereby set aside"[155].***

Similarly, the RTA may also allege that the taxpayer was under-assessed because he failed to disclose the totality of the income This is the **deficiency-payment** position in *Ihekwoaba v. Commissioner of Internal Revenue*[156] where the taxpayer who was a member of the Eastern Nigeria House of Assembly had an income which was small and ascertainable. The RTA produced additional source of income leading to additional assessment because he was a produce dealer on which he failed to furnish information about the substantial turnover of the business. The taxpayer appealed to High Court and Supreme Court alleging that the assessment was excessive. The Supreme Court held that he failed to discharge the arms of proof that the assessment was excessive. In view of the above, the RTA was justified by its refusal to accept the tax payer's returns and made additional assessment by adding the new sources of income.

Similarly, in **Cosmos case**, the RTA initially carried out assessment. It later rejected the returns, revisited and reviewed the assessment in view of fresh information it discovered. At the trial, no attempt was made to prove **the actual receipt of**

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155 Ibid at 662-663. Italics supplied

156 (1958) 3 FSC 67 (Federal Supreme Court) (1992) 1 NTC 60 (Nigeria Tax Cases). See also Okoli v. Commissioner of Internal Revenue (1992) 1 Nigerian Tax Cases 64 where the Supreme Court held that since the appellant did not give sufficient evidence of the income of the company on behalf of which he received; he had not discharged the onus of proof of the income.

income of N6000 by counter affidavit by RTA. In absence of such evidence, the court held it was bound to accept the evidence of the tax payer and it deleted the item of income of N6000 from his overseas asset in which there was no proof that it was brought into Nigeria from the assessment. This decision supports the view that RTA is not competent to make an assessment **based on a spurious, speculative or estimated, guess work income of the tax payer but it must thereafter disprove the assertion made by the taxpayer in accordance with the burden of proof imposed by tax statute. On the contrary, RTA has an evidential burden of adducing facts to support its additional assessment - that the income it exhumed or activated was actually received or brought into Nigeria. In order to discharge the evidential burden placed on it, the RTA must produce evidence in order to justify its refused to accept the tax payers' return and its decision to impute additional income to him**. Such evidence is normally derived from the **"findings of field audit",** which would support additional assessment or best of judgment which it raised on tax payer. In **COSMOS** case, RTA could not justify the findings of its field audit because of the absence of probative proof. Thus, in **IHEKWOABA'S** Case, Federal Supreme Court (now Court of Appeal) held that RTA had justified **its refusal to accept the returns presented by the tax payer and its assessment of unreported income when it relied on the evidence procured through the finding of its field audit which revealed discovery of substantial turnover of business proceeds as a produce dealer**.

There are circumstances where the taxpayer had to challenge expenses claimed as deductions which the RTA disallowed. In such circumstances, the statutory burden of proof rests on him/her to prove that the **expenses were deductible because they were actually incurred wholly, exclusively and necessarily in production of the income. He would convincingly do it by furnishing receipts, bills and vouchers** as satisfactory proof. The aim of this is to disallow expenses of personal nature or dual nature - partly personal and

partly business. In *Shell Petroleum Development Co. Ltd v. FBIR*[157] the taxpayer a corporate citizen of Nigeria offered scholarships to the students from the oil producing areas and those on national merit. Shell furnished particular vouchers and receipts for the payments. RTA disallowed them as partly personal but Shell contended it was part of its efforts to promote and foster **good public relation - to get on well with the citizens of Nigeria particularly the hosts oil producing communities**. The Supreme Court allowed the expenses to be deducted because they were wholly, exclusively, necessarily, solely, entirely and inevitably incurred.

Similarly, in *Western Soudan Exporters Limited v. FBIR*[158] the taxpayer challenged the RTA because it disallowed expenses wholly, exclusively and reasonably incurred in the production of the income. The company who **trades in groundnuts, hides and skins, made advances and commissions to middle men as agents who procured the goods for its loading purposes and claimed** it is entitled to write-off such advances made to such middlemen at the end of the year as expenses. **TAYLOR C.J**. held that they were expenses incurred wholly, exclusively and necessarily in the production of the company's profits and as such the amounts correctly written off as bad debts were deductible[159].

All items of expenses deductible in the computation of taxable profits such as office rents[160], the tax payer must justify

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157 (1996) 8 NWLR (Pt. 256) 294 at 295 (1996) 10 SCNJ 50, (1996) 1 NRLR 58.

158 (1973) 1 CCHCJ 12 (Certified Copy of High Court of Lagos Judgment Law Reports) (1973) NCLR 302. See also Gulf oil Co. (Nigeria) Limited v. FBIR (1985) FHCLR 1 at 4.

159 See also Commissioner of Income Tax v. Nigerian Properties Co. Limited (1940) 17 NLR 796 (1992) 1 NTC 15 at 17-18 where Lloyd J held annual allocations from the receipt of the mining right for amortization of expenditures of its purchaser, were allowable expenses because the mining rights in question should be regarded as floating or circulating and not fixed capital.

160 See also Williams v. Regional Tax Board (1992) 1 NTC 92 at 93 where Shomolu J held that S. 13 (1) Income Tax Law allows deductions for all outgoings and expenses in determining profits and a deductions of income allowable for rent by professional legal practitioner who used his house as office; is within the spirit of those words. The income Tax and Development Order 1962 made by the Administrator of the Western Region following the emergency of May 1962

them based on **business or accounting principles** as deductions statutorily allowed because prohibited allowances are not allowed even if it accords with commercial accountancy[161]. Also where the RTA disallowed deductions attributable to depreciating capital such as exhaustion, wear and tear of the property or where the RTA refused to allow deductions for capital allowance[162] in the estimation or the assessment of income tax during the stage of hearing of objection[163], the taxpayer can re-open these grounds of objection(s) and if the burden of proof is satisfactorily discharged, the TAT may either allow or disallow them. The attitude of the courts in Trinidad and Tobago and Australia is to strictly interpret the documents and the taxpayer is required to furnish the sufficient particulars such as receipts, bills and vouchers containing the expenses incurred; tendered or not tendered and determine whether they have probative value.

In the case of *Alleyne v. Board of Internal Revenue*[164] the appeal centered on the quantum of deductible expenses allowable to the taxpayer to arrive at his chargeable income. The taxpayer is a salesman. The RTA disallowed some of the expenses and demanded for the receipts and supply bills in support of them. The taxpayer's response that **he lost or misplaced them and the argument that these disbursements were the types normally incurred in the course of the employment as a salesman and the amounts were not**

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was ultra-vires and illegal as it purports to be effective during the periods when the Administrator was not competent to act.

161 Ola v. FBIR (1974) FHCLR 70 at 71, (1976) NCLR 85 at 86, (1992) 1 NTC 296 at 306 where Omo-Eboh J. held that capital allowances are deductionable for the purpose of ascertaining the income or loss of any individual for any period from any source chargeable with tax. See also Ogefere, APA - Income Tax and Revenue Law (2003) vols. 16 and 51 NLTC p. 124-129.

162 FBIR V. Azigbo Brothers Limited (1963) 2 ALL NLR 198 (All Nigerian Law Reports), (1963) NNLR 121 (1992) 1 NTC 88 at 91.

163 (1972) No. 17 Tax Appeal Board of Trinidad & Tobago cited in Denbow, C.H. op.cit pp. 175-176. Not binding but persuasive precedence to the Nigerian courts.

164 (1972) 17 Tax Appeal Board of Trinidad and Tobago Reports reproduced from and cited in Denbow, C.H. (Dr) - Income Tax Law of Caribbean (1998) pp.173-174.

unreasonable was rejected. Tax Appeal Board emphatically held that in order to discharge the burden of proof, the taxpayer must adduce detailed and precise and not vague and mere estimate. The relevant bills and receipts are required to substantiate the claims and expenses and failure to do so must resulted in the loss of the appeal. The strong advice is that tax payers must keep specific records of expenses and retain receipts. The strong proof required could be discharged by giving appropriate particulars in order to satisfy the requirement that the assessment made by the RTA **is excessive and wrong**. This is the position in an Australian High Court (equivalent to Nigerian Supreme Court) case of *Bailey v. Federal Commissioner of Taxation*[165] where it was held that in tax appeal cases, the courts have inherent jurisdiction to require the parties to give particulars as it **appears just for the purpose of assisting to define the issues. There is no reason why RTA should not give particulars where they are necessary for the court to under the basis** upon which the assessment was made and more particularly in the high of the statutory ounce on the taxpayer to prove that the assessment is excessive.

Fairness to the taxpayer demands that RTA should also be compelled to give particulars of its assessment so that the taxpayer is adequately informed as to the manner in which the assessment was arrived at. The facts on which the RTA based its calculations are matters not within the knowledge of the taxpayer but within the knowledge of RTA and the taxpayers are entitled to know those facts. There is really no policy reason emanating from tax statutes why RTA should be exempted from providing particulars just like taxpayers' litigants.

This is the position in **BAILEY'S CASE** where **MASON J** affirmed thus:

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165 (1977) 77 ATC 4096 (Australian Tax Cases).

> *…. "During the course of argument is was submitted that the Commissioner should be accorded some special immunity from particulars on the ground that to expose him to an order for particulars would in some undefined way prejudice or inhibit the collection of the revenue. It was suggested that public - spirited citizens who have hitherto zealously reported to the Commissioner instances of tax evasion by their fellow citizens would henceforth maintain a stem silence if the shroud of secrecy presently cloaking their* ***communication is swept aside by an obligation imposed upon the Commissioner to give particulars****.* ***The suggestion is completely misconceived****. An order for particulars does no more than require the Commissioner to* ***furnish in advance of the hearing particulars of the case which he intends to present in court.*** *Such an order does not require the Commissioner to disclose the evidence by which he proposes to support his case or the source of information which comes into his possession. As it is the function of particulars to indicate the nature of the case to be presented at the hearing, they cannot involve the Commissioner in the disclosure of information which would not be revealed in court at the hearing itself*[166]*".*

In *Chang v. Commissioner for Taxpayers Appeals*[167] the additional assessments of $12, 125, 393.75 and $8, 136, 090.94 given to the taxpayer as the value of **investment gains derived** from **business activities,** he conducted from a non-licensed investment club''. He could not discharge the burden of proof to substantiate his claim of making investment of funds on

166 Ibid at 4099
167 (2016) JMCA Civil 16

behalf of a foreign national friend of his. **Anderson J**[168] disbelieved him and held that the investments were his own and was not made on behalf of foreign nationals and dismissed his claim. The **Jamaican Court of Appeal upheld the dismissal** because the taxpayer's claims were not supported with documentary evidence[169] and it is therefore an additional income arising from trading gain from business activity conducted from two investment accounts from investment institution called ''Olims Investment Club''. CA upheld the appraisal of evidence in support of additional assessment, thus:-

> *It contains details of monthly analysis of earnings and the tax thereon. The taxpayer's evidence that the income were the proceeds he invested in the Lint account, were not his own but were instead invested on behalf of Andrew Stewart of 539 Northfield Avenue No. 21 West Orange New Jersey 07052 USA. Dismissing the claims of the taxpayer,*[170]

MORRISON JA affirmed the decision of both CTAA and the Revenue Court thus: -

> *....''we do not have* ***any proof of payment to Mr. Andrew Stewart*** *as no payments were requested by Mr. Stewart or made to him. There are no receipts for funds from Mr. Stewart as the initial investments were settlements of an outstanding obligation based on services performed for Mr. Chang by Mr. Stewart. Mr. Chang and Mr. Stewart are friends and all arrangements were informal without the traditional method of evidence – receipts, formal agreements etc. The appellant failed to provide credible evidence in support of his argument that funds were received from Mr.*

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168 Jamaican Revenue Court is the equivalent of High Court.
169 Unanimous decision of Dukharan, Sinclair-Haynes and Morrison JJA.
170 Chang v. CTA (above) at 5 – 6.

> *Andrew Stewart which he investment in his Olin Investment accounts. The appellant has also failed to provide proof in respect to funds paid out to the third-party investor during the time when the accounts were held at Oints Investment Club.*[171]

d. Conditions Precedent to the Hearing of Appeals in Taxation Matters

The payment of the court's filing fees is mandatory. Also the payment of the half of the amount of tax due/demanded is also condition precedent to the TAT assuming jurisdiction to hear the appeal[172]. The payment is now subject to discretion of the TAT. These two requirements shall be discussed below.

e. Proceedings at Tax Appeal Tribunal

A taxpayer who is dissatisfied or aggrieved by an assessment, demand notice non-agreed or amended assessment which translates to partial acceptance or where there is total refusal of objection (NORA) leading to the **confirmation of assessment or** where the RTA out rightly rejected late objection accompanied by a **motion for extension of time, he/she by way of written notice, may appeal to Tax Appeal Tribunal (TAT)**[173] within **30 days** after the date in which the disputed decision was sent to or received by the appellant[174]. Similarly, the RTA may also within 30 days of the disagreement with the taxpayer in respect of any provision of tax laws, appeal. The TAT may extend the time within which the notice of appeal may be filed where it seems just and equitable to so[175].

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171 Chang v. CTA (above) at 5 – 6.

172 Board of Internal Revenue v. Egole (1978) IMSLR 592

173 Order 5 Rules 1 and 2 TAT Procedure Rules 2010 (TATPR).

174 Order 5 Rule 6 TATPR

175 Order 8 Rule 1 TATPR has now statutorily overruled the decisions in the case of Archibong V. Commissioner For Internal Revenue (1958) 2 ENLR 35 where Palmer J held that since Finance Law made no provision for extension of time and therefore court had no power to extend the time. The decision in Anosike V. Tax Assessment Authority Abakaliki (1992) 1 NTC 71 that the court may invalidate notice is also overruled because the court or TAT would order the

In *Esso Standard v. Commissioner of Income Tax*[176] the Kenyan Court of Appeal held that extension of time to file notice of appeal would be allowed because the case involved points for decision which were on a matter of public importance such as the circumstances in which the investors have to pay income tax on loans procured from abroad for the purpose of economic development of Africa. However, in *M. v. Commissioner of Income Tax*[177] it was held that what constitutes "reasonable cause of delay" is a question of facts in each case or absence from the country and sickness are factors to be taken into consideration but certainly an error of an advocate (counsel) is a reasonable cause for extension of time because to decide otherwise would deprive a blameless appellant right to appeal. Sometimes the RTA may also seek for extension of time to appeal[178] The Tribunal may require the decision maker to furnish it with other documents under his/her control irrespective of whether they are privileged. The application should be accompanied by the prescribed fee[179].

The notice of Appeal shall be in a standard TAT form No. 1 or any other form acceptable[180] to the TAT and shall contain the following basic information such as: -

(i) Name(s) address (es) including e-mails, telephone numbers and others[181].

(ii) State in numbered paragraphs in clear, concise terms, each and every error(s) which the appellant alleges, which has been made in the issuing a notice of

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notice of appeal filed at the wrong forum to be transferred to the appropriate forum and correct all unintended clerical errors attributable to mistake of counsel. The court now has power to permit amendment as it thinks appropriate in the circumstances of any particular case.

176 (1960) 4 EATC (Pt.1) 89 (1 964) E.A.L.R. 484 (Kenyan) cases persuasive precedence only.

177 (1969) EA 671 (Kenyan High Court case).

178 Income Tax Commissioner V. R.M (1972) EALR 459 (East African Law Reports Kenyan case persuasive precedence only).

179 Order 5 Rule 7 TATPR. See also Board of Internal Revenue v. Egole (1978) IMSLR 592. Please note that the grounds of appeal shall no longer be limited to the grounds of appeal stated in the notice of objection earlier on filed.

180 Order 5 Rule 3 TATPR.

181 Order 5 Rule 4 TATPR

deficiency, denial or refusal of application for refund together with a statement of facts upon which the appellant believes would establish the said error(s) and the relief(s) sought by the appellant.

(iii) The reason(s) and grounds of appeal should be stated in the next or separate paragraph in form of written statement[182] the relief(s) sought from the TAT member and the persons directly affected by the appeal.

(iv) The appellant shall also file lists of the witnesses to be called to testify including the **"witnesses' depositions"- statement on oath of each of the witnesses** to be called by the appellant and shall attach copies of all the relevant documents[183].

(v) A copy of the disputed decisions,[184] the subject matter of the appeal should be filed together with the payment of filing fees[185].

(vi) The appellant or his/her representative shall sign notice stating that he/she shall be liable to be prosecuted in the event of willful misstatement. This is a restatement of the old rules as regards perjury. This would also include concealment of information, in *Opara v. Board of Internal Revenue*[186] the appellant was convicted by Magistrate for failure to pay tax as assessed and served on him. He appealed claiming he paid tax to the Plateau State Government. The Court dismissed the appeal and held that the two documents tax ticket and notice tendered on appeal constituted fresh evidence and these would be unacceptable to appellate court due to the fact that they were available during the trial at the magistrate

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182 Order 5 Rule 7 TATPR. Please note that the grounds shall not be limited to the grounds of appeal stated in the notice of objection earlier on filed.

183 Order 6 Rules 3 and 4 TATPR.

184 See the case of Ajayi V. FBIR (2012) 8 TLRN 99 at 105 Taylor J. (as he then was) held that no appeal can be properly heard without a certified true copy of the proceeding made by M the lower court being made available to the appellate court.

185 In Board of Internal Revenue v. Egole (1978) IMSLR592 Aguta J (as he then was) struck out the notice of appeal for the non-payment of filing fees.

186 (1977) 2 IMSLR 143 per Ikwechegh J. (as he then was).

court. What is more, the two affidavits deposed by the appellant were inconsistent with each other in some material particulars and in the circumstances; the appellate judge affirmed the conviction because he is unable[187] to place any credence on them[188].**Criticisms**; - This decision is harsh and unjust on the facts. If it is true that he paid his tax to PLSG, there is no justification why this piece of evidence should not have exonerated him. The tax documents may have been misplaced and after a diligent search it was discovered, it could still have been received on appeal on this ground as one of the militating circumstances; in fairness to the taxpayer.

In Nigerian, tax appeals constitute single suit to be listed for hearing regardless of the amount unlike US where there are categorization into small claims not below $25,000 and above. In UK, appeals base on their complexities are categorized into four tiers such as default papers, basic, standard and complex. The default papers are are usually decided without a hearing once the parties have submitted documents relevant to their case. The tribunal will base its decision on the documents submitted and inform the parties of its decision as soon as it completes its review[189]. Identical procedure is adopted for the basic category as the tribunal based on the documents submitted, would hold informal hearing for the parties to present their case. For the standard and complex cases, **front-loading** are used like Nigerian system. This represents the modern trend in litigation practice and it is obtainable not only in TAT but in other inferior and superior courts of records to aid quicker dispensation of justice. The both parties present their cases relying on the rules and procedures of the tribunals leading to the judgments by the chairman and members.

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187 Ibid at 146-148. .

188 See also Commissioner of Police V. Amadu (1992) 1 NTC 30 where the tax collector was convicted for withholding some portion of tax collected for his own use

189 Olujimi Adedokun – Tax Appeals (below)

In *Nigerian Agip Exploration Limited & Oando Limited v. FIRS*[190] the appellant instituted this action against the assessment of the Respondent prior to the operation of Tax Appeal Tribunal Civil Procedure Rules of 2010. The TAT Lagos Zone ordered all the parties to comply with the new Order 4 Rules 1 and 2 which require the **front loading** through written statement on oaths and attachment of the relevant documents and accordingly all the parties complied with the new rules. Front loading applies both to the statements of claim, defense and reply in order to fast tract justice delivery machineries[191]. This is a commendable process whereby all the documentary evidence and potentially oral evidence and the requirement of email addresses and mobile telephone numbers promote the communication with the parties and their counsel to conserve resources that may be wasted in the traveling expenses, hotel bills and journey risk because adjournments induced by the absence of judges on the grounds of illness and other militating circumstances are transmitted to the litigants and their counsel[192].

f. Representation of the Parties at the Tax Appeal Tribunal

The parties may appear by themselves or by a legal practitioner or Attorney or a Certified Public Accountant or partner of the firm or by an employee of the company[193]. It is not clear whether a legal practitioner could jointly appear with an accountant for a particular litigant. In the Australian jurisdiction, either a tax lawyer or an accountant can represent the taxpayer litigant in the court. An unenrolled agent may appear as a witness but not as a representative. It is submitted that there would be no impropriety for a litigant to choose these two professionals to represent him/her in a tax dispute contest.

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190 (2011) 4 TLRN 141 at 142-143.

191 Sanni, Abiola - Tax Appeal Tribunal Procedure Rules-a Synoptic Evaluation (2010) pp. 4-7.

192 Banire Dr. - Practical Approach to Lagos State Civil Procedure Rules (2004) P. 7.

193 Orders 9 and 76 TATPR.

In addition, a chartered tax practitioner[194] can represent the parties in tax litigation being the most accredited professional[195]. In *Chartered Institute of Taxation of Nigeria v. Institute of Chartered Accountants*[196] OKUNU J. held that taxation is legally recognized as a profession separate and distinct from accountancy, auditing and investigation and CITN is vested with the power to control and regulate the practice of taxation to the exclusion of all other professionals[197]. Consequently, it is illegal for non-CITN members to hold themselves out or practice as tax administrators or practitioners in expectation of reward. This was affirmed by the **Court of Appeal.**[198] Since occupational boundaries of tax practice had been defined by the CITN Act and the case Law are in favour of tax practitioners[199], there are justification for the economists, businesses and finances managers who qualified as chartered tax practitioners be granted the right of audience to appear to prosecute and defend tax cases for the litigants. In the Republic of Ireland[200] barristers, solicitors, attorney, accountants and members of Institute of Taxation have right of audience and my represent the tax payer in tax litigation[201].These groups tax experts are called "Chartered Tax[202] Advisors CTA" subject to independent professional regulations

194 Paragraph 18(2) of the fifth Schedule FIRS Act 2007.
195 By virtue of CITN Act 1992.
196 (2013) NRLR 1, (2013) 10 TLRN 19 (Lagos High Court).
197 Pursuant to SS. 1, 10, 11 (2), 16, 19(2) and 20(2) of the CITN Act 1992.
198 (2013) 2 NRLR 37, (2013) 10 TLRN 55, (2013) 1 ATLR 27.
199 Jack-Osimiri, U. etc.-Taxation as a profession (2012) vol. 11 (No. 2) pp. 22-31.
200 SS. 934, 942(4) Tax Consolidation Act 1997 (Part 40) (Republic of Ireland)
201 Orla Lenehan – Trolley's Taxation in Republic of Ireland pp.62-63 (2004) (Lexis Nexis)
202 They play similar roles in U.K, Netherlands, Germany, and Belgium - See Tax Payers' Protection by Walter Neddermemeyer – Comparative Review of Country Rules and Practice 1991 Intertax 388

g. Amendments, Interlocutory applications, Hearing, Evidence-in-Chief, Cross-Examination and Defence and the Judgments of Tax Appeal Tribunal

The proceedings at TAT are very much similar to that of the regular courts and the processes of appeal from the commissioner of taxes to the High Court is a complete re-hearing of the matter and new evidence is admissible in that court[203]. The TAT has discretionary powers to amend the processes, grant interlocutory application, hear the case and deliver judgment. The details are outside the preview of this paper and details should be sought elsewhere[204]. It is sufficient to state that TAT has latitude to hear and determine the case before it, admit evidence which might being admissible in the ordinary court[205] and can allow a party to rely on reasons not stated in the notice of appeal or rely on evidence not presented to FIRS before the action[206]. On conclusion, the TAT may affirm the decision under review, or vary it or dismiss or set it aside and substitute its own decision or outrightly remit the case back to TAT for reconsideration in accordance with its directions or recommendations[207]. The RTA would not be allowed to join many tax defaulters in one suit being a separate and unconnected cause of action[208] Strictly speaking, the court is not bound by the technical rules of evidence[209] and their decisions are not unfettered[210] but appealable to higher courts. The courts would interfere with the findings of the TAT where it misdirected itself in law or proceeded without sufficient

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203 Commissioner of Taxes v. Taxpayer (1982) 1 Botswanan L.R. 33 (Court of Appeal)

204 Sanni, Abiola op.cit pp. 7-14.

205 Order 73 Rule 4 TAT PR.

206 Order 73 Rules 5 TATPR.

207 Paragraph 13(8) of the Fifth Schedule FIRS Act 2007 - the TAT may after giving the parties an opportunity to be heard, confirm reduce, increase or annul the assessment or make such further order(s) as it deems appropriate.

208 Mohammadu v. Oturkpo LGA (1973-1975) NNLR 112 CA

209 Preussag Drilling Engineers Limited v. FBIR (1991) FHCLR 93 at 95 Where Belgore J. held that inspite of the flexibility, tax appeal commissioners must not violate the elementary procedure – they must draw the attention of the taxpayer to a document upon which the tribunal was going to base its finding as this constitute a denial of natural justice

210 Negeri v. Kim Thye & Co Limited (1992) 2 MLJ 708 (Supreme Court Malaysia)

evidence to justify their conclusion but the higher courts are slow to disturb findings of facts where there are ample evidence to support its findings[211].

h. Further Appeals to Federal High Court, Court of Appeal and Supreme Court

If any of the parties is dissatisfied with the decision of the TAT and the processes of appeal from TAT to the High Court is a complete re-hearing of the matter and new evidence is admissible in that court.[212] There are provisions of further appeal to Federal High Court[213], Court of Appeal and Supreme Court. The appeal at these stages are basically not by way of re-hearings because the appellate courts would not disturb the findings of facts unless it was reached without evidence.[214] Tax disputes are ultimately resolved through judicial interpretation of tax laws. The pronouncement of the higher courts as superior and final arbiters on substantive tax disputes, constitute the precedents which would guide future interpretations by RTA for the purpose of carrying out their duties – preliminary administrative decisions through interpretations via assessments of income tax - at the first instance on the taxpayer[215]. Infact tax administrators seek clarity from courts through some tests cases.

The appeal processes to superior courts of records involve both the final and interlocutory decisions and the TAT shall be in error if it refuses the taxpayer leave to file disputed documents out of time or refusal to issue new evidence/call witnesses such as financial controller of the taxpayer now resident abroad.[216] The appeal is as of right whether

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211 Negeri v. Aneka Jasaramai Express Limited (2004) 5 MLJ 188 (Kuala Lumpur High Court Malaysia)

212 Commissioner of Taxes v. Taxpayer (1982) 1 Botswanan L.R. 33 (CA).

213 Paragraph 17 of the 5th Schedule FIRS Act 2007.

214 Mistry v. Commissioner of Taxes (1971) Zambia L.R. 104 at 105

215 Andrew Marples – Resolving Small Tax Disputes in New Zealand – Is There a Better Way? (2011) 6(1) Journal of the Australasian Tax Teachers Association 96, 126-128

216 Uganda Revenue Authority v. Toro & Mityana Tea Company Limited (2007) Kampala LR 523 at 524.

memorandum of appeal is filed or not provided the notice of appeal is filed setting out the grounds of appeal.[217]

In *Uganda Revenue Authority v. Toro & Mityana Tea Company Limited*[218] the taxpayer disputed the assessment. During the proceedings, the taxpayer brought application for leave to file objection out of time and to call and cross-examine RTA's former financial controller who was living abroad under retirement, on a document listed but not filed together with the notice of the decision. The TAT refused extension of time for lodgment of the disputed document reasoning that under S. 17(1) Tax Appeal Tribunal Act, it had no power to extend time beyond 30 days fixed by the statute and also refused the application on the ground that the evidence sought from the witness abroad was not material. The taxpayer filed this appeal at the High Court against the decision of TAT. When the appeal came for hearing, there were preliminary objections that the interlocutory decision of TAT could not be appealed against as of right and there was no memorandum of appeal filed. **MUKASA J** partly overruled the objection and held appeal lies as of right in both final and interlocutory decisions but refused to call financial controller as a witness. His Lordship was emphatic that S. 17(2) Tax Appeal Tribunal Act empowers TAT to require lodgment of a document which in its opinion is necessary for the review of a decision, this power may be exercised any time within 30 days, extension of time is allowable and thereafter TAT erred by its refusal to extend time. His Lordship further emphasized the TAT has discretion under S. 21 (4) to exercise judiciously, its discretion to call witnesses outside jurisdiction, consider whether the evidence sought to be adduced is so material, the application must bona fidely be made without delay and here the application was brought after one year and taking into account of the grounds and circumstances which a court or TAT should take into account in calling a witness outside jurisdiction, TAT exercised

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217 Uganda Revenue Authority v. Toro & Mityana Tea Company Limited (above).

218 (2007) Kampala LR 523 at 524.

its discretion judiciously when it refused to issue witness summon.[219]

7. FURTER APPRAISALS OF THE CONDITIONS PRECEDENT TO HEARING OF TAX APPEALS - COMPARATIVE MATERIALS FROM THE COMMONWEALTH AND COMMON LAW JURISDICTIONS OF UGANDA, MALAYSIA, TANZANIA, USA, WEST INDIAN STATE OF GUYANA ETC

The right of appeal is a creature of the statute and consequently, there are statutory conditions precedents. These must be satisfied before the taxpayer can exercise his/her right of appeal. One of the most obnoxious is one which compels the taxpayer to deposit the amount of tax adjudged to be in dispute and not withstanding that an appeal is pending, the tax assessed shall be paid in accordance with the decision of the tax appeal commissioners within one month[220] of the notification of the amount of tax chargeable as determined and served on the company[221]. The general rule is **pay first and dispute latter through an appeal**. This obnoxious rule is a way of maximizing revenue by RTA at all cost, is prevalent in Malaysian jurisdiction[222] and many other parts of former British colonies. It does not exist in some[223] unless the developing countries with weak tax administration which oftentimes require payment of tax pending appeal so as to prevent abuse of the system via frivolous appeals[224].

Previously in Nigeria **S. 24(5) Finance Law 1963 (Eastern Nigeria)** provided that; -

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219 (above) at 530 -537.

220 S. 6(1) (4) CITA now repealed by FIRS Act 2007.

221 S. 24(5) Finance Law 1963 (Eastern Nigeria) and Board of Internal Revenue v. Egole (1978) IMLRS 592 at 599.

222 Dr Choong Kwai Fatt – Appeal Procedure under Malaysia Self-Assessment Regime http://www.kwaifatt.com/kf/tai_sub/page3.html accessed 29/09/2014.

223 Collection of tax pending appeal is not suspended in Italy and Turkey. In most OECD countries, it is suspended under certain conditions especially in Australia, Austria, Greece, Norway Portugal, Spain, and Sweden. It is suspended in Belgium, Canada, Finland, Japan, Netherlands and New Zealand. In France it can be delayed subject to satisfactory guarantee given by the taxpayer and his/her surety.

224 Victor Thuronyi – Comparative Tax Law (2003 Kluwer Law International) p. 218.

> *…" a taxpayer appealing shall pay to the tax collector the sum or…half of the amount*[225] *of tax which is in dispute*[226]*".*

The above was interpreted in the case of *Board of Internal Revenue v. EGOLE*[227] where **t**he taxpayer's deposit of N170 into the court registry was held not a sufficient compliance as shown in the receipt showing deposit of the money into the Court and not in the name of Board. The court emphasized this was fatal and amounts to non-compliance, because it contravened S. 24(5) which is mandatory and stipulates the payment of the sum or half of it to the tax collector and not into the court registry. **AGUTA J** (as he then was) emphatically held thus: -

> *…. "I do not think the issue is what the tax collector or court is of higher authority. By paying into court not only has he (taxpayer) contravened the provisions of S. 24(5) Finance law which…is mandatory*

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225 Under S. 105(1) (2) Income Tax Act (Tanzania) the taxpayer may be asked to provide acceptable security in lieu of immediate payment of tax pending appeal and the guarantor is obliged to pay the tax in default in terms of the security involved in the dispute – See S.91(3) Income Tax Act (Tanzania). The payment of tax which is not in dispute pending appeal is the most sensible approach.

226 Payment of one-half of the tax in dispute is required in USA – See OECD (1990) p. 99. In New Zealand, under SS. 3 (1), 7(A), 120 (E) (T), and 138 Tax Administration Act 1994 (New Zealand), where the taxpayer has lodged a competent objection or challenged an assessment, there is no obligation or requirement to pay the deferrable tax. Payment of the tax may be required if the Commissioner of Taxation considers there is a significant risk that the tax in dispute may not be paid if the appeal is unsuccessful and, in this case, he may be required to provide substantial surety – See also Master Tax Guide pp. 195-196 (2005) CCH (New Zealand) Limited Auckland. Possibly, reasonable surety to cover the sum and interests thereon if the challenge to the assessment is unsuccessful – See SS. 128(2) (4) 1381(1) Tax Administration Act 1994 and under SS.128 (3) and 1381(3) Tax Administration Act 1994 (New Zealand) overpaid tax or refundable tax attracts similar interests. The position in Tanzania is that under S. 12 (2) (6) Tax Revenue Appeals Act, cap. 408 (2002), taxpayer shall pay the amount of tax which is not in dispute or one third of the assessed tax, whichever is greater. The COT is also vested with discretionary power to allow no payment of tax or allow a lesser tax to be paid where the taxpayer is unable to pay due to hardship or there is uncertainty on a question of law or fact

227 (1978) IMLR 592 at 593

> *but has also constituted the court; without the prior knowledge and consent of the tax collector, as his agent. Suppose the appeal was heard and the taxpayer lost, could he say to the tax collector: "go and collect your money from the court?" and if the count refused to pay out to the tax collector, could the later insist as against the court; on being paid? The appellant (taxpayer) is a lawyer and why he preferred to pay into court rather than comply with the law; is difficult to understand. The court made no order for payment into court. I think there is merit in each of the grounds relied on for this application (preliminary objection) …the defects pin-pointed in the purported appeal are outside the competence of the court to rectify and …there is in effect no appeal pending and the purported appeal is therefore struck out*[228].

In the Ugandan case of *Ugandan Projects Implentation & Management Centre v. Ugandan Revenue Authority*[229] the Ugandan Constitutional Court of Appeal held that the deposit of 30 percent of the tax assessed before the taxpayer files an appeal at the Tax Appeal tribunal is to furnish security for due performance and for the fact that the service delivery by government is dependent on the prompt payment of tax due and this does not contravene the provisions of the constitution. The Malaysian jurisdiction also operates this obnoxious rule which coaxes the taxpayer to pay first and complain later.[230]

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[228] Ibid at 599. Italics supplied.

[229] (2013) 1 ATLR 65 at 68 – 69 (African Tax Law Reports).

[230] Chong Kwai Fatt –Appeal Procedure under Malaysian Self-Assessment Regime-http;//www.kwaifatt/kf/html/tai_sub/page3.html down 29/09/2015.

Similarly, In the West Indian case of *Bata Shoe Company (Guyana) Limited v. Inland Revenue Commissioner & Attorney Genral*,[231] the tax statute of Guyana provided that "no appeal shall lie…unless the person aggrieved by an assessment…had paid to the commissioner tax equal to two-thirds of the tax which is in dispute. It was contended on behalf of the taxpayer that such provision was in violation of his constitutional right to the protection of the Law because it fettered his right to appeal. The Guyana Court of Appeal held that there was no question of violation of the taxpayer's constitutional right because the right of appeal was merely procedural and the taxpayer did not have a vested right in it. The provision in question merely laid down the conditions' precedent to the vesting of the right of appeal and the vesting of the right was delayed until the condition's precedent were performed. If the Parliament altered the mode of the procedure for appeal, the taxpayer had no other right but to proceed according to the altered mode in order to give effect to his right of appeal[232].

Criticisms: -This case, on its appraisal is technically right because an appeal does not basically translate into a stay of execution because the attitude of the courts is not to deprive a successful party the fruit of his/her success unless special circumstances warrants doing so.[233] But the fulfillment of the condition precedent constitutes hardship and oppression against the taxpayer. The deposit of the money is unfair and condemnable because even if the judgment debt not payable immediately, it attracts yearly interests at 21 percent and penalty of 10 percent.[234] This means the FIRS can be compensated monetarily for the number of years on the appeal

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231 (1976) 24 WILR 172 (West Indian Law Reports).

232 Ibid at 183.

233 Halliburton (West Africa) Limited v. FBIR (2012) 7 TLRN 16 at 17-18 per Mustapha J. (Federal High Court Lagos).

234 See the case of the Queen Ex parte Odje v. Western Urhoboh Rating Authority (1961) 1 ALL NLR 79 (1992) 1 NTC 76 where the court held that the grant of stay of action on tax collection pending appeal is discretionary and if it was found that too much tax had been paid, the amount overpaid (excess) shall be refunded with interest.

when the taxes remain unpaid, if they are eventually successful on appeal.

Secondly, the insistence on the deposit as a condition precedent to appeal will definitely stifle litigation on tax disputes - a process which would generate precedents of case which would shed lights to guide future conduct of tax affairs. In so doing the taxation profession would be deprived of the benefit of superior courts of records pronouncement on a set of facts which would guide future operations and decision-making responsibilities of the tax administrators and practitioners. The implication and impact on establishing precedence for tax cases was summed up thus:

> *… "In developed economies, litigation is an integral part of resolving tax disputes. Judgments from litigations provide precedents for cases that are similar in material respect to a decided case.* ***Litigation also serves as a check to ensure that taxpayers are not subject to the whims of the revenue authorities****. In this way, taxpayers are able to challenge the RTA's interpretations of the various provisions of the tax laws and* ***obtain clarifications from the courts regarding tax statutes****. Therefore, in addition to making tax system more robust, prudent, reduce the incidence of disagreement and the attendant cost of prosecuting appeals of similar cases. It is obvious that where taxpayers are dissuaded from challenging the position of the RTA's due to cost considerations, they would be constrained to abide by their decisions.* ***Practice had shown that the views of the RTA's may not always be consistent from cases to cases, depending on the position that yields the maximum tax revenue****.* ***This is consistent with the attitude of the RTA's towards maximizing tax revenue****.* ***This type of kink in the tax administration does not provide***

> ***the certainty that business owners' desire in making investment decisions.*** *As tax costs comprise an increasing aspect of cash flow,* ***the current and potential investors are likely to view this lope sidedness of the tax system as a source of funds leakage[235].***

Thirdly, the taxpayers would be coerced to submit to often time irregular demands and unwholesome assessments of tax liabilities by the RTA. Fourthly, since the tax/judgment debts must be paid with interests and penalties, if the taxpayer(s) loses the appeal, the requirement of prior deposit of the tax sum, is a surplusage that should be repealed by the law makers and expunged from the statute book to foster appeals that have prospects of success as opposed to frivolous ones. It is suggested the tax sums like other judgment debts be deposited (if at all it is found expedient by the judge of the particular case) in the interests yielding accounts under the supervision of the Chief Registrar of the Federal High Court and not with RTA such as FIRS/SBIR because such monies are quickly transferred into Federation account whose funds are shared amongst the three tiers of the Federal, States and Local governments and thereby making FIRS/SBIR unable to refund excess taxes paid. In the case of *Halliburton (West Africa) Limited v. FBIR*[236] even though the taxpayer was successful in appeal and FIRS was ordered to refund the excess tax, the execution was stayed and Halliburton was merely given "**tax credit**" for the excess tax due for refund but FIRS was unable to pay because the monies paid into Federation account had been shared It is submitted that the excess tax of $6,686,381 which was due for refund but unable to be recovered will lead to loss of future investments potentials which will eventually stifle the economy and destroy jobs creation opportunities.

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235 Adedotun, Olujimi - Tax Appeal Tribunals – Slow Pace of Justice (2013) This Day Newspaper 8th August p 17 (http:www.thisdaylive.com/articles/155777 down loaded 6/28/2015)

236 (2012) 7 TLRN 16 at 18.

The modification of the old law under S. 24(5) Finance Law 1963 (Eastern Nigeria) subsisted until PITA 1993. It is a very bad law capable of discouraging litigation in the taxation. How can the jurisprudence of the tax law develop when litigations which are capable of clarifying tax problems and chart new principles, are stifled and almost rendered impossible to fulfill?

8. THE PRINCIPLE OF PAY FIRST AND DISPUTE LATER HAD BEEN DILLUTED AND MODIFIED BY LEGISLATIVE REFORMS.

Although, the provision in the Finance Law appears to have been repealed, it appears to have been re-enacted in a slightly modified and diluted form by **Schedule 15 (7) (C) FEDERAL INLAND REVENUE SERVICE (ESTABLISHMENT) ACT 2007** which provides that: -

> *… "At the hearing of the appeal if the representative of the FIRS proves that it is expedient to require that the appellant to pay an amount as security for prosecuting the appeal, the TAT may adjourn the hearing of the appeal to any subsequent day and order the appellant to deposit with FIRS … an amount of the tax charged by the assessment under appeal, equal to the tax charged…or one half of the tax charged by the assessment under appeal whichever is lesser plus a sum equal to 10 percent of the said deposit and if the appellant fails to comply with the order, the assessment against which he has appealed, shall be confirmed and the appellant shall have further right of appeal with respect to that assessments.*[237]

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[237] See also the case - Queen V. Port Harcourt Tax Collection Authority Exparte X (1956) 1 ENLR 37 (1992)1 NTC 45 where it was held that the tax chargeable upon disputed portion of income is different between the tax chargeable upon

It is unlikely the Nigerian courts of the present era would insist on that obnoxious revenue maximization rule of pay first and dispute latter through an appeal. In *Emenite Limited v. FIRS*[238] at the hearing of the case before TAT, FIRS raised preliminary objection that D is mandated to comply - did not comply by paying 50 percent (half of the tax assessed and charged, plus 10 percent of the interest on the said deposit) of the disputed amount into a designated Bank account as security for prosecuting the appeal. FIRS contended that the taxpayer is mandated under S. 77 Company Income Tax Act, as amended by S.13 Finance Act 2021. The **Tax Appeal Tribunal Lagos Division** held that under Order 3 Rule 6(a) of TAT (Procedure Rule) 2021 and Paragraph 15 (7) (C) of the 5TH Schedule the FIRS (Establishment) Act 2007 (as amended), TAT has the discretion to order security charge or deposit before an appeal can be heard and entertained.

Tax Tribunal declined to order the security deposit and **further held** thus; -

1. While Order 3 Rule 6 (a) of TAT (Procedure Rule) 2021 creates a condition precedent before an appeal can be entertained by TAT, Paragraph 15 (7) (C) of the 5TH Schedule the FIRS (Establishment) Act 2007 (as amended) provides the conditions upon which TAT may at its discretion order the payment of security deposit before an appeal can be heard. The Rules are evidently different from the statutory provisions of FIRSEA 2007. The rules are different and did not compliment FIRSE Act.
2. The provisions in the Rules of Procedure in Order 3 Rule 6(a) of TAT (Procedure Rule) 2021 cannot override the statutory provisions of an Act - Paragraph 15 (7) (C) of the 5TH Schedule the FIRS (Establishment) Act 2007 (as amended).

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the-assessed figure of £3,177,15s 5p viz- £318 and the tax chargeable on the declared figure of 1,925 i.e., £168. Therefore, the correct deposit is £150.

238 (2022) 67 TLRN 1 at

3. The provisions in S. 68 and Paragraph 15 (7) (C) of the 5TH Schedule FIRS (Establishment) Act 2007 specifically override the provisions in Order 3 Rule 6 (a) of TAT (Procedure Rule) 2021, in case of inconsistency – on the issues relating to security deposit
4. The provisions in Paragraph 15 (7) (C) of the 5TH Schedule FIRS (Establishment) Act 2007 specifically did not make the payment of security deposit, a condition precedent to the prosecution of all appeals.
5. The provisions in Paragraph 15 (7) (C) of the 5TH Schedule FIRS (Establishment) Act 2007 can specifically be invoked subject to three conditions such as: -
   (a) Through the service and tendering documentary evidence
   (b) By evidence adduced in the TAT through evidence in-chief, in course of the trials.
   (c) By evidence adduced in the TAT through evidence under cross-examination, in course of the trials.

Here, the failure and inability of FIRS to prove the existences of the above three circumstances enumerated under 15 (7) of the 5TH Schedule FIRS (Establishment) Act 2007, has prevented TAT from TAT to grant the order for security deposit. The **Tax Tribunal** will not grant such order for security deposit on mere assertion without satisfactory proof of evidence by FIRS and such evidence shall only be obtained during the trial and not from the arguments of the counsel.

6. The **Tax Tribunal** granted accelerated hearing of the case instead, as it cannot grant the interlocutory application without veering into substantive matters and reliefs.[239]

a. Pre-Action Notice

Sometimes, the tax statute imposes pre-action notice being given by the taxpayer to the RTA prior to the institution

[239] Relying on CA case of Haladu v. Access Bank (2021) 13 NWLR (Pt. 1794) 434

of action in the TAT or, a court of law. This is fundamental to the exercise of jurisdiction by the court and once it is validly raised as objection, the non-compliance would lead to the case being struck out for failure to comply with the condition precedent to the exercise of the right to appeal[240].

b. Remedies such as Judicial review and Public Purpose Litigation

The duties of TAT are basically quasi-judicial in nature and must be exercised impartially. They are classified as inferior tribunal subject to the supervisory jurisdiction[241] of the High Court[242] and Federal High Court, for the order of certiorari prohibition and declaration that their assessments are ultra-vires[243] for infringements of Law[244]. The superior courts may entertain application for judicial review on the grounds that an action by TAT is ultra –vires, irrational, procedurally

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240 Adedotun v. FIRS Akure Integrated Tax Office (2011) 4 TLRN 88 at 91 per Okeke J. (Federal High Court Akure).Here the case was struck out for failure to comply.

241 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).

242 Nizaba International Trading Company Limited v. Kenya Revenue Authority (2000) Kenya L.R. 587 at 588.

243 In the Malaysian High Court case of Metacorp Development v. Negeri (2011) 5 MLJ 447 at 448 it was held that judicial review of assessment is available to the taxpayer where RTA acted in excess of authority, error of law or abuse of power that goes to the legality of the conduct of the decision-making authority. Here the taxpayer had demonstrated illegality and unlawful treatment and it would be wrong to insist that it should exhaust its statutory right of appeal because it is settled law that the availability of an alternative remedy in form of appeal process would not bar application for judicial review.

244 In Keroche Industries Limited v. Kenya Revenue Authority (2007) 2 Kenya L.R. 240 at 241-242 where Nairobi High Court granted certiorari that quashed assessment based on illegal consideration, error of law, irrational, unreasonable tainted with procedural improprieties, mala-fide, arbitrary, oppressive, biased, discriminatory and abuse of power and also granted further assessments. In Australia and New Zealand, it is called conscious maladministration which produced assessments which were classified as abuse of process, unlawful and liable to judicial review – See Commissioner of Taxation v. Futuris Corporation Limited (2008) 247 ALR 605 Westpac Banking Corporation v. Commissioner of Inland Revenue (2009) NXCA 43.

deficient and unfair[245]. The second class of remedy is the public purpose litigation. Public interests' litigation should be encouraged amongst lawyers, accountants, economists and business men/women who are versed in the interpretation of tax laws and other fiscal legislation particularly members of CITN in their personal capacity.

In *Nizaba International Trading Company Limited v. Kenya Revenue Authority*[246] the taxpayer filed motion on notice under the provisions of Order 53 Rule 3 Civil Procedure Law and SS.52-, 76-, 85(3)- and 92-Income Tax Act seeking judicial review of the actions and inactions of the Commissioner of Income Tax. The grounds were that the additional assessment levied was arbitrary, lacking factual basis, wrong in principles, bad for disclosing fatal errors on the face and CIT had abused his discretion in making it. The High Court allowed the application and held that CIT as a creature of the statute can only do what an Act allows and if he gets outside the powers granted by the Act or fails to perform his duties, he is amenable to be supervised by the court

Similarly, the court could also use the concept of judicial review to quash legislation promulgated irregularly by State legislature without jurisdiction and made in breach of the principles of prohibition against double taxation. In **INSTITUTE OF HUMAN[247] RIGHTS & HUMAN LAW**[248] **v. ATTORNEY GENERAL RIVERS STATE HOUSE OF ASSEMBLY & BOARD OF INTERNAL REVENUE [249]** a

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245 Ian Saunders – Taxation Judicial Review and other Remedies (1996) pp 122-332. See also Ireland's case of CG v. Tax Appeal Commissioners (2005) 2 IR where Georghegan J. granted certiorari to quash administrative decisions because TAC failed to act judicially. In Government of Malaysian v. Singh (1987) 2 MLJ 185 the Supreme Court held that the courts have discretion to grant judicial review where a clear case of lack of jurisdiction, blatant failure to perform statutory duty or breach of the principles of natural justice are proved.

246 Nizaba International Trading Company Limited v. Kenya Revenue Authority (2000) Kenya L.R. 587 at 588.

247 Under its Executive Director, the courageous and indefatigable Nsirimovu Anyakwe – an influential human rights lawyer.

248 See (2011) 17-23 June Beacon Newspaper p.12 decision of Opara J. Port Harcourt High Court dated 25 July 2013 suit No.PHC/2667/2010.

249 (2014) 14 TLRN 9 at 14-18

Non-Governmental Organization resorted to this type of public interests' litigation when it successfully challenged the **Rivers State Government Social Services Contributory Levy Law 2011** at the Port Harcourt High Court. **OPARA J** declared the purported law as double taxation and therefore ultra-vires, null, void and of no effect whatsoever because it contravened the provisions of Personal Income Tax Act 1993 as amended. Her Ladyship affirmed that the 2nd Defendant has no legislative competence to enact the SSCLL 2010 and the 3rd Defendant has no right to collect taxes pursuant to the law which contravened the provisions of Nigerian[250] Constitution 1999. Curiously the Counsel for the claimant over sighted the possibility to ask the Honourable Court for the refund of Social Services Contributory Levy Taxes which the 3rd Defendant unlawfully deducted from the salaries of the civil servants and other categories of employees in Rivers State pursuant to the invalidated law enacted without legislative jurisdiction?

c. Through the Process of Judicial Review-Lagos State High Court set aside the Executive-made Tax Law–it nullified the Taxes and Levies (approved lists for collection) order 2015, as it went beyond Delegated Legislation and Constitutes an Encroachment on the Powers of National Assembly to Promugate Tax Laws.

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? 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

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250 Curiously the Counsel for the claimant over sighted to ask the Honourable Court for the refund of Social Services Contributory Levy Taxes which the 3rd Defendant unlawfully deducted from the salaries of the civil servants and other categories of employees in Rivers State pursuant to the invalidated law enacted without legislative jurisdiction. It is submitted that the Rivers State Board of Internal Revenue should grant them tax credits in arrears to off-set subsequent future tax liabilities. This is the most logical conclusion.

ministerial/executive fiat rather than the act of the legislature whose duty is to make laws including that of taxation.

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.[251] Fiscal legislations which impose financial burden must receive the approval of the Parliament. In *Williams v. Lagos State Development And Property Corporation*[252] 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

[251] Williams v. Lagos State Development & Property Corporation (below)
[252] (1978) 3 SC 11 at 1719

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.*

d. Executive-fiat-made Tax Laws' lists, would at best Constitute Mere Proposals for Legislative Reforms by the National Assembly and States Houses of Assembly?

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.

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 reveals 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*[253] whereby the

[253] (above)

arbitrary charges of N5, 650, 0000. Those styled as Urban Development Taxes which failed in *Attorney General Cross Rivers State v. Ojua***,**[254] 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 tax laws 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*[255], 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 (double taxation) prior to its being reintroduction into our statute book, through the back-door?

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.

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254 (above)
255 (above)

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 Federation & Minister of Finance*[256] 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

256 (2020) 52 TLRN 1 at 5-10

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.

e. Refund and Recovery of Taxes, though Lawfully collected Pursuant to Tax Laws that were nullified by the Courts. International best practices obtainable from Ireland, Zimbabwe, South Africa, Malaysia, USA

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) and IHRL v. AG Rivers State (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 improper and made without legislative jurisdiction**?**

Curiously the Counsel for the claimant over-sighted the possibility to ask the Court for the refund[257] of Social Services Contributory Taxes which the 3rd Defendant unlawfully deducted from the salaries of the civil servants ETC and other categories of employees in Rivers State pursuant to the invalidated law enacted without legislative jurisdiction? It is submitted that the **Rivers State Board of Internal Revenue should grant them tax-credits in arrears to off-set subsequent future tax liabilities.** This is the most logical conclusion.

[257] JM Jaleel & Co Limited v. Guyana (below),

In *Harris v. Inspector of Taxes*[258] the Supreme Court of Ireland held that tax overpaid taxes pending appeal should be refunded because the taxpayer is entitled to a refund of excessive tax and it is obligatory that it should be repaid pending final determination of appeal.[259]

The taxes unlawfully collected are recoverable through time consuming and very difficult refund processes.[260] Strictly speaking, overpayment of taxes is recoverable[261] with interests and could be used as a set-off against future liabilities and **tax-credits** could be granted on this basis.[262]. Strictly speaking, interests are also claimable.

This is the position in *FBIR v. Integrated Data Services Limited*[263] 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[264]. If interests are claimable by the Relevant tax Authority for late payment of taxes[265], there is no justification why the taxpayers could not be entitled to claim interests for taxes unlawfully collected pursuant to unlawful, illegitimate legislation. This equivalent to overpaid taxes.

In the **Zimbabwean** jurisdiction, this view is supported by the case of *Ellis v. Commissioner of Taxes*[266] the COT assessed the taxpayer for Capital Gains Tax on expropriated

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258 (2006) 1 I.R 165 at 166-167

259 Under equitable principle of unjust enrichment and See also SS. 933(4), (6) 934 (6) and 941(9) Tax Consolidation Act 1997 (Ireland).

260 S. 21 (2) (3) (3) Board of Internal Revenue Law No.12 (2012 Rivers State)

261 JM Jaleel & Co Limited v. Guyana (below),

262 S. 21 (2) (3) (3) Board of Internal Revenue Law No.12 (2012 Rivers State).

263 (2009) 8 NWLR (Pt. 1144) 615.

264 Ibid at 620 - 624

265 Lagos State BIR v. Mobotson Ventures (Nigeria) Limited (2012) 6 TLRN 141 per Adebiyi J

266 (1994) 1 Zimbabwe L.R. 422 at 435

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 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*[267] *of the payer".*

This jurisprudential line of thinking also draws support from the **Malaysian** jurisdiction. In the case of *Pelangi Limited v. Ketua Negeri*[268] 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[269]. **YUSUF J** was emphatic that since the tax was unlawful, the IR must refund it with interests and the S. 111 Income Tax 1967 relied upon by IR concerns overpayment but the case here was unlawful payment. The same line of reasoning similarly stated in the case of *Power Root (Malaysia) Limited v. Director General Customs*[270] where the applicants manufacture 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

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267 Ibid at 435. See also COT v. F. Kristiansten Limited 57 SATC 238, BAT v. COT 57 SATC 238 (Zimbabwean cases) and KNA Insurance & Investment Brookers Limited (In Liquidation) v. South Africa Revenue Service 71 SATC 155, Commissioner for Inland Revenue v. First National Industrial Bank Limited 52 SATC 224, Sage Life Limited v. Minister of Finance 66 SATC 181 (South African cases) which support the proposition that interests should be paid to taxpayers for overpayment of taxes.

268 (2012) 1 MLJ 825 at 826

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

270 (2014) 2 MLJ 271 at 252

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"*[271]

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. Where the government funds are being misused or channeled into wrong expenditures, a tax payer can initiate litigation against the particular government department, ministries etc. The tax payers' right to challenge irregular

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[271] Ibid at 26, 29-30 italics supplied.

expenditure of public funds was recognized in the case of *Gani Fawehinmi v. President of Nigeria*[272] 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 **Court of Appeal** held that the taxpayer has locus standi to sue because it will definitely be a source of concern to any taxpayer who watchers the funds he contributed or is contributing 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 of coming to court to enforce the law and ensure his tax money is utilized prudently[273].

f. Appraisal of Tax Appeal Tribunals

The TAT is advantageous because of its flexibility as it admits evidence which may not necessarily be received in the ordinary courts[274] and consequently its informal procedure has provided easier and speedier access court[275]. Its establishment seems to have reduced the incidence of tax evasion, ensured fairness and transparency in the tax system. It has minimized the delays and bottlenecks in the adjudication of tax matters in the traditional courts system, improve the taxpayers' confidence, provided opportunity for expertise in tax disputes resolution with a focus on facts rather than technicalities and promote early and speedy determination of matters without

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272 (2007) 14 NWLR (Pt.1054) 275 at 299.

273 Ibid at 299.

274 Order 73 Rule 5 TATPR.

275 Comparable to Tax Court of Canada – See Andre Gallant - The Tax Court of Canada Informal Procedure…Problems and Solutions (2005) 53 Canadian Tax Journal 333

compromising the principle of fairness and equity[276]. Instead of the Federal and individual States having separate tax appeal commissioners, all of them have been amalgamated which would eventually promote uniformity of the principles of the tax enforcement system. When hearing of an income tax appeal, it should take the form of a trial at which witnesses are heard on both sides, the appellants would be allowed to make their own case (unless they choose not to do so which fact ought to be recorded) and to cross examine witnesses on the other side. Previously, it is the duty of the party to bring forward their whole case at once before the tax appeal commissioners and not to do it piecemeal. If they found objections in their way, they have to furnish such by further evidence. If they failed to do so at once, they would not be allowed to do so on appeals because such request would be regarded with caution as it may be prompted or coloured by knowledge of what happened previously during the objection processes**.** Such request to adduce further evidence on appeal was unusual and must be refused[277].

Consequently, this principle of Law earlier-on enunciated, no longer represents the law. Now the taxpayer will no longer be bound by the grounds of objection he/she stated because the TAT could rely on many other reasons including the reception of new or fresh evidence not stated in the notice of appeal or not previously presented/argued at the hearing of objections to the assessments and additional made by FIRS before the action.[278] The rigidity inherent in the procedures of the regular courts and the strict rules of evidence has been diluted in favour of informal and less rigorous procedures recently introduced by the TAT.

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276 Objectives towards the establishment of tax appeal tribunal.

277 Mobil Oil (Nigeria) Limited. v. FBIR (1973) NCLR 407 per Lambo J. See also Olowofoyekwu A.A (Prof) – The Nigerian Tax Appeals System – A Peculiar Mess? (1989) Vol.2 (No.8) GRBPL pp.30-35 Gravitas Review of Business and Property Law Journal)

278 Order 73 Rule 6 TATPR.

9. CONCLUSIONS AND RECOMMENDATIONS

The efficacy and desirability of the TAT is not in doubt.[279] What is required is the necessary constitutional amendment to bring it in conformity with what is obtainable in USA, India, Australia and China. The better time to give the TAT the constitutional legitimacy is the present time what the National Assembly is in the process of amending the Nigerian Constitution of 1999. When this is done, the TAT would enjoy the constitutional status comparable to the superior court of record Comparable to the National Industrial court[280]. In spite the nomenclature of the TAT, its chairmen and members are still known and enjoy the status of Tax Appeal Commissioners individually even though they collectively constitute the TAT. It is suggested that the reform should take structure of transforming the TAT into "**NATIONAL TAX COURT OF NIGERIA**" (NTCN). This argument is plausible because the National Industrial Court of Nigeria (NICN) initially started as an employment dispute tribunal before it metamorphosed into NICN now enjoying the status of superior court of records equivalent to the High Courts. There is no impropriety if the legislative amendment of the constitution is sought so as to give the TAT the status of National Tax Court comparable to NIC. This is the only way litigants can continue to enjoy the innovations and reforms introduced into the conduct of tax litigations proceeding by the TAT. This is comparable to **Tax Court of Canada (TCC)** which the Canadian Government converted and replaced her former Tax Review Board (TRB)[281]. TCC is a superior Court of record[282] in Canada. Tax appeals in Canada are heard by the TCC with subsequent appeals to Federal Court of Appeal and Supreme Court of Canada (SCC) [283] where the question involved is considered to

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279 TSKJ 11 V. FIRS (2014) 13 TLRN 1 at 6.

280 See the Constitutional Amendment (third Alteration) Cap. 3 (2010)

281 SS. 158 Tax Court of Canada Act 1983. TCC has the jurisdiction to hear appeals on tax or revenue matters

282 David Jacyk the Dividing line Between Jurisdiction of Tax Court of Canada and Other Superior courts (2008) vol.52 (No. 3) 661-707 Canadian Tax Journal.

283 Brian Arnold – Canada in Ault et al. (1997) pp.30-31

be of public importance. Cases in TCC may be conducted with either flexible informal procedure way if the total tax (excluding interests) is $25,000 but less than $50,000 or through the General way involving exchange of pleadings and documents, discoveries, contentious examination and cross-examination of the evidence of the witnesses and other complex proof on balance of probabilities before a judge who may order reassessment wholly or partially. On conclusion, modest tariff costs and disbursements reasonably incurred (including cost of hiring expert witnesses) are recoverable by successful party to the litigation[284]. In the United State of America (USA), there exists similar specialized "**US Tax Court"[285] staffed with experts in taxation** where litigants can dispute tax deficiencies, review of certain collection actions determined by RTA and other incidental matters[286] Victor Thuronyi summed up the position thus: -

> *…. The judges understood the tax well. They are not faced by complex facts patterns and they are not impressed by taxpayer arguments seeking to justify tax avoidance efforts. The tax courts judges tend to try to uphold the integrity of the tax system; therefore, they are sympathetic to the government's economic substance attack on tax shelters. At the same time they will reject the government's arguments that they see as inconsistence with the law and they do so with confidence in their understanding of the law[287]*

There are also other superior tax courts of records equivalent to the one being advocating such as the Tax Court

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284 Tax Court of Canada http;/ www.tcc-cci.gc..ca/ downloaded 29 November 2014.

285 S.8 Revenue Act 1942 and Tax Reform Act 1969 (USA).

286 Richard Levine, Theodora Peyser and David Weintraub – Tax Litigation, Tax Management Portifolio (2012) Vol. 630 Bloomberg BNA 4th Edition

287 Victor Thuronyi - Comparative Tax Law (2004) pp. 215-220 (Kluwer Law International)

of South Africa (TCSA)[288] and Revenue Court in Jamaica[289]. The courts should be accessible to the litigants and its location is an essential factor. Nigeria is a nation built on tripod stand comprising the defunct Eastern, Northern, and Western regions. Even though, the six geo-political zones have emerged but its former geographical characters are still retained. Although, Benin is a beautiful city originally was in Western Region. It later metamorphosed into Mid-West, later Bendel and presently it is in Edo State. Compelling taxpayer litigants based in the Eastern Nigerian cities of Ugep Ogoja, Calabar, Uyo, Ikot-Ekperne, Eket, Port Harcourt, Degema, Bonny, Yenagoa to attend the TAT at Benin City Edo State is not costs-effective. Port Harcourt takes a minimum of 4-5 hours' drive to travel to Enugu and it is closer than Benin City which is a distance of 6 to 7 hours' drive. The litigants at Sokoto, Kebbi Zamfara States suffer the same fate of two to three days journeys to and fro Kaduna. So also those residents at the remotest part of Borno, Yobe, Adamawa, Plateau traveling to Bauchi zone of the TAT, encounter two to three days to and fro journeys. These coupled with hotel bills and the attendant journeys risks are matters associated with the zones of the TAT handling tax cases. The soaring costs would discourage tax litigation. If the costs benefits analysis are evaluated, the taxpayers may be intimidated, frightened to embark on litigation or possibly subdued into out of court settlement whose terms are dictated by the mercy, whims or oftentimes caprice of the RTAs' in spite of the facts that most of the objections/appeal cases may have greater chances of success.

Furthermore, TAT have minimum sitting of once, twice or thrice per quarter. Sometimes the tenures of the TAT chairman and tax appeal commissioners may expire without renewal. These cause delays, disruption and occasion hardship

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288 Luke Connell -Trial by Ambush in the Tax Court (2003) vol. 120 pp.558-579 South African Law Journal JUTA publications.

289 S. 16 Income Tax Act 1985 (Jamaica).

to litigants in urgent case[290]. Instead of part time or adjunct members, we advocate the appointments of career processionals and tenured judges as judicial officers such as the proposed National Tax Courts of Nigeria (NTCN).

It is advocated that the proposed National Industrial Court be cited in all the 36 States of the Federation of Nigeria including Abuja Federal Capital territory like the National Industrial Courts to save costs and journey risks. Tax Court of Court currently sits in 68 cities of Canada[291].

It is further suggested that the payment of the judgment debt or two thirds of it, as a condition of appeal should be abrogated. The most sensible approach is for the taxpayer to pay the undisputed portion of the tax assessed like the system in Tanzania. Compelling the appellant taxpayer to pay all or part of the judgment debt is 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. The appeal court should be given the discretion whether to grant a stay of execution pending appeal or not following the well-defined principles of law enunciated in our legal system.

In *FIRS v. TSKJ Construcoes Internationals Sociadade Unipessoallda*[292] the Federal High Court held that in application for stay of execution pending appeal, the court must exercise its discretion judicially, judiciously taking into account the competing rights of the parties and the requirement of justice and the court would do so if it is satisfied that there are special and substantial reasons to deprive the successful party of the fruit of his judgment. Here **Ademola J** refused the stay of execution for the judgment debt because there were neither exceptional circumstance nor arguable grounds and recondite points of law raised by the applicant/Counsel. His

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290 Jack-Osimiri, U; and O'Sullivan, M - Dynamics of Tax Appeal in Nigeria (2014) Vol. 13(No.1) Journal of Taxation and Economic Development pp.1-37

291 Tax Court of Canada 20 Anniversary Symposium (2005) 53 Canadian Tax Journal 135 – 175.

292 (2014)14 TLRN 159 at 161

Lordship nevertheless granted the order for the stay of execution of costs of N400, 000 provide the appellant provides security undertaking to pay the sums to the Respondent should the appeal fails. This case is technically correct because in *Harris v. Inspector of Taxes*[293] **t**he Supreme Court of Ireland held that tax overpaid taxes pending appeal should be refunded because the taxpayer is entitled to a refund of excessive tax and it is obligatory that it should be repaid pending final determination of appeal.[294]

The problems of the congestion of cases and snail-pace of cases at the TAT have been stresses.[295] The engagements of tenured career judges would alleviate this problem. The amendments of taxation laws may take lengthy period and in the interim, it is suggested that TAT should be pro-active and **move their sittings intermittently from one State capital to the other in all the zones**. This is comparable to **National Tax Appeals Board of Tanzania (NTAB**) whose itinerant responsibility mandated it to move from one region to another in order to discharge its onerous adjudicatory responsibilities[296].

It is suggested that there should be a reversal of the burden of proof on the taxpayer and through legislative changes. The onus should be on RTA to prove its assessment is correct[297] rather than stifling the taxpayer to bear the burden to establish that the assessment is excessive. The internal review of objection department of the RTA should be strengthened. It is suggested some external members should be appointed from the professional bodies like CITN into RTA internal review committee. This would help improve its effectiveness in the quicker dispensation of its duty to review assessment

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293 (2006) 1 I.R 165 at 166-167

294 Under equitable principle of unjust enrichment and See also SS. 933(4), (6) 934 (6) and 941(9) Tax Consolidation Act 1997 (Ireland).

295 Adedokun, Olujimi – Slow Pace of Tax Appeal Tribunal (2013) 8 August This Day p.74

296 Income Tax (Appeal Board) Rules 1975 (Tanzania).

297 Binh-Tran-Nam & Michael Walpole (above) at 478 and Melinda Jones – Evaluating Australia's Tax Disputes System: A Dispute System (above) at 563

expeditiously to reduce delay and attendant costs. We suggest the adoption of the best practice identified from the Australian system whereby the internal review would be carried out by an officer different from the officers who carried the assessment. We also advocate the adoption and adaptation in Nigeria, the United States model in the Internal Revenue Service (IRS) styled the National Taxpayers Advocate (NTA).[298] Under this system, the Head of NTA is directly appointed by the US federal government and he is a member of the senior management team in the IRS with high level of information flow. The NTA independently of IRS in that it is not directly accountable to it but rather reports to the Congress. NTA operates Low Income Taxpayers' Clinic which provides professional representation to individuals who need to resolve tax related problems with IRS thereby making tax disputes resolution processes accessible to Americans with low income.

[298] Internal Revenue Service, United States Department of the Treasury, The Taxpayers Advocate I Your Voice at IRS (12 June 20112) <http://www.irs.gov/advocate/article/o.id=212313,00.html>