TAX APPEAL TRIBUNAL'S JURISDICTION UNDER ENABLING ACT NOT IN CONFLICT WITH JURISDICTION OF THE FEDERAL HIGH COURT OVER TAX DISPUTES

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Introduction

The Court of Appeal has on 10 March 2017 confirmed that the jurisdiction of the Tax Appeal Tribunal, which is an administrative appellate body over tax disputes as set out in the Federal Inland Revenue Service (Establishment) Act, 2007, is not in conflict with the exclusive jurisdiction of the Federal High Court over Federal Government revenue.

Historical Background of Federal High Court's Jurisdiction

The military government of Nigerian sometime in 1973, promulgated the Federal Revenue Court Decree,[2] which established the Federal Revenue Court. Section 7 of the Federal Revenue Court Decree set out the matters and causes over which the Federal Revenue Court had jurisdiction. These matters included those connected with or pertaining to the taxation of companies and of other bodies established or carrying on business in Nigeria and all other person subject to federal taxation.[3] However, with the enactment of the Constitution of the Federal Republic of Nigeria of October 1979, under civilian rule, by section 228(1) and 230(2), the Federal Revenue Court was renamed Federal High Court with exclusive jurisdiction over certain causes including Federal Government revenue. The causes over which the Federal High Court would have jurisdiction were further set out in the amendment to the Federal High Court Decree (Amendment) of 1991, wherein section 7 of the Federal High Court Decree was amended to confer exclusive jurisdiction in matters set out in the section.

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[2] Decree No. 13 of 1973

[3] Ibid, section 7(1)

When the military government in 1999 promulgated the Constitution of the Federal Republic of Nigeria[4], it included in section 251(1) of the schedule thereof, causes and matters wherein the Federal High Court shall exercise exclusive jurisdiction. These causes include matters that relate to the revenue of the Government or any organ or person suing or being sued on behalf of the Government,[5] matters connected with or pertaining to the taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal taxation,[6] customs and excise duties and export duties.[7] Whilst the Federal High Court Decree has become an Act of the National Assembly by reason of section 315 of the Constitution of the Federal Republic of Nigeria, 1999, section 251 of the Constitution which came into force on 29 May 1999,[8] set out the exclusive jurisdiction of the Federal High Court.

Establishment of the Tax Appeal Tribunal

In spite of the Federal High Court's exclusive jurisdiction over tax disputes, several tax statutes earlier provided for administrative tribunals to deal with tax disputes. For example, the Companies Income Tax Act[9] and the Personal Income Tax Act in 1961 established the Federal Board of Inland Revenue (FBIR), as well as established the Body of Appeal Commissioners. The Federal military government passed the Value Added Tax Decree[10] and subsequently established the Value Added Tax Tribunal. These legislations respectively provided that a taxable person who was aggrieved by an assessment by the Federal Board of Inland Revenue could appeal to the Body of Appeal Commissioners[11] or the Value Added Tax Tribunal[12]. The VAT Act further provided that an appeal from the VAT Tribunal should be made to the Federal Court of Appeal.[13] Clearly, the VAT Tribunal was equated with the Federal

[4] Constitution of the Federal Republic of Nigeria (Promulgation)Decree No. 24 of 1999
[5] Section 251(1)(a) of the Constitution
[6] Section 251(1)(b) of the Constitution
[7] Section 251(1)(c) of the Constitution
[8] Section 320 of the Constitution
[9] No. 22 of 1961
[10] Value Added Tax Decree No. 102 of 24 August 1993
[11] For companies income tax and personal income tax disputes
[12] For Value Added Tax disputes
[13] Section 20(2) of the Value Added Tax Decree

High Court, since an appeal leapfrogged to the Court of Appeal instead of first to the Federal High Court, before the Court of Appeal.

Disputes relating to the jurisdiction of the VAT Tribunal and the Body of Appeal Commissioners came to the fore where it was contended that the jurisdiction vested in the Body of Appeal Commissioners as well as the VAT Tribunal conflicted with the exclusive jurisdiction of the Federal High Court over tax matters. In *Stabilini v. FBIR*,[14] the Respondent instituted an action against the Appellant at the Value Added Tax Tribunal claiming that the Appellant failed to render appropriate VAT returns. The Appellant entered appearance and challenged the jurisdiction of the VAT Tribunal in view of section 251 of the Constitution which vests exclusive jurisdiction over tax matters on the Federal High Court. In its judgment, the Court of Appeal held that section 20 of the VAT Act is inconsistent with the Constitution and cannot therefore stand, as the VAT Tribunal had no jurisdiction to entertain the action.

The Court of Appeal which heard an appeal directly from the VAT Tribunal in *Cadbury Nig. Plc v. FBIR*[15] affirmed this position on the jurisdiction of the VAT Tribunal under the VAT Act vis-à-vis that of the Federal High Court, and held that section 20(1) of the VAT Act is invalid, and a nullity in view of its inconsistency with section 251 of the Constitution, 1999.

In 2007, the National Assembly enacted the Federal Inland Revenue Service (Establishment) Act, 2007. Section 59 of the Act, established the Tax Appeal Tribunal, with powers to settle disputes arising from the operations of the Act and other legislations administered by the Federal Inland Revenue Service (FIRS) as set out in the First Schedule to the Act. The disputes within the powers of the Tax Appeal Tribunal include companies income tax, petroleum profits tax, personal income tax, capital gains tax, value added tax, stamp duties and other taxes and levies provided in the Taxes and Levies (Approved List for Collection) Act, as well as regulations, proclamations and notices issue by government as they relate to the relevant legislations.[16] Consequent upon the creation of the Tax Appeal Tribunal,

[14] (2009) 13 NWLR (Pt. 1157) 200
[15] (2010) 2 NWLR (Pt. 1179) 561
[16] See First Schedule to the FIRS Act as well as Sections 1 & 11 of the Fifth Schedule to the FIRS Act

the VAT Tribunal and the Body of Appeal Commissioners ceased to exist, as the Tax Appeal Tribunal subsumes their powers.

In exercise of the powers vested on the Minister of Finance by Section 1(2) of the Fifth Schedule to the FIRS Act, the then Minister of Finance in 2009 set up the Tax Appeal Tribunal in various zones.

The Tax Appeal Tribunal under section 20(1) & (3) of the Fifth Schedule to the Act is empowered to make rules regulating its procedures, and "*any proceeding before [it] shall be deemed to be a judicial proceedings*" and the Tax Appeal Tribunal "*shall be deemed to be a civil court for all purposes.*"

Unlike the Value Added Tax Tribunal's decisions which could be subject of appeal to the Federal Court of Appeal, appeals from the Tax Appeal Tribunal go to the Federal High Court,[17] albeit on points of law.[18]

In spite of the provisions of the Fifth Schedule to the FIRS Act, particularly sections 17 and 20 thereof, the impasse relating to the jurisdiction of the TAT powers vis-à-vis that of the Federal High Court continued, as there were conflicting decisions from the Federal High Court on this issue. These conflicting decisions were however put to test recently in two sister cases of *CNOOC Exploration and Production Nigeria Limited & South Atlantic Petroleum Limited v. Nigerian National Petroleum Corporation & Federal Inland Revenue Service* [CNOOC & Sapetro v. NNPC & FIRS][19]

Background Facts of CNOOC v. NNPC

CNOOC Exploration and Production Nigeria Limited and South Atlantic Petroleum Limited (the Contractors) and the Nigerian National Petroleum Corporation ("the Corporation" or "NNPC") are partners to OML 130 Production Sharing Contract [PSC] aimed at conducting petroleum operations in the contract area.

Under the PSC, the Contractors bear the full cost of operations, prepare the petroleum profits tax returns on behalf of the PSC parties and determine the lifting

[17] Section 17 of the Fifth Schedule to the FIRS Act
[18] Ibid, s. 17(1)
[19] CA/L/1144/2015 and CA/L/1145/2015

allocation of available crude oil between the parties. The Corporation is required to file the petroleum profits tax (PPT) returns prepared by the Contractors with the FIRS, and lift the amount of available crude oil in accordance with the lifting allocation prepared by the Contractors.

NNPC however failed to file the returns prepared by the operator for the 2010 accounting period and rather unilaterally prepared and filed a different one.

On assessing the content Area for Tertiary Education Tax (EDT) and PPT, the FIRS served Notice of Assessment Nos. PPTBA/ED 34 and PPTBA 37 respectively dated 2 August 2011.

The operator objected to the FIRS' assessments and in response, the FIRS informed the operator that it has received the objection which had been noted for memorandum purposes only. Consequently, the Appellants filed Appeal Nos. TAT/LZ/003/2012 and TAT/LZ/004/2012 at the Tax Appeal Tribunal on the ground that FIRS' computation in its Notices of Assessment were wrong in law. In its reply, the FIRS challenged the appeal on the ground, amongst others, that the Appellants lacked the locus standi to appeal before the TAT, and as the returns were not filed by the appellants but by NNPC, that the Appellants' objection was incompetent for non-joinder of NNPC as a proper/necessary party to the appeal at the TAT. FIRS further urged the TAT to find that the tax assessments had become final and conclusive and could not be reviewed.

The TAT on 8 June 2012 dismissed FIRS' objection which challenged the appeal and made an order joining NNPC as a desirable and necessary party to the appeal.

Upon being joined, the NNPC filed Notices of Preliminary Objection dated 27 August 2012 and challenged the jurisdiction of the TAT to hear claims connected with or pertaining to the taxation of companies carrying on business in the Federal Republic of Nigeria. It argued that jurisdiction lies exclusively with the Federal High Court and that the TAT was devoid of jurisdiction over the NNPC in respect of the tax appeals.

In its ruling on 8 February 2013, the TAT confirmed that it had jurisdiction to hear and determine the Appellants' tax appeals; and made an order striking out the NNPC as a party to the appeal.

Aggrieved by the decisions of the TAT, the NNPC appealed to the Federal High Court, Lagos Division. In addition to the question on the TAT's jurisdiction, the Contractors (Appellants) added that the NNPC had no locus standi to file the appeal at the Federal High Court. But the Federal High Court, per Justice Idris decided on 22 May 2015 that the NNPC had the locus standi to initiate the appeal, particularly as the TAT itself recognised that the NNPC was a desirable and necessary party to the tax appeal; and that TAT by exercising jurisdiction in matters that relate to the revenue of the Federal Government of Nigeria had encroached upon the exclusive jurisdiction of the Federal High Court.

The Appellants appealed the decision of the Federal High Court to the Court of Appeal[20] where the Court of Appeal had to deal with the following issues:

1. Whether it was a prerequisite for NNPC to be a party in the appeal filed by the Appellants at the Tax Appeal Tribunal for the Tax Appeal Tribunal to exercise jurisdiction over the dispute;
2. Whether the NNPC had the locus standi to initiate the appeal at the Federal High Court having elected not to be a party to the Tax Appeal Tribunal appeals; and
3. Whether the jurisdiction of the Tax Appeal Tribunal to entertain that Appellants' appeals as provided under Paragraph 20(3) of the Fifth Schedule to the FIRS Act infringes on the exclusive jurisdiction of the Federal High Court to hear tax disputes as stipulated under section 251 of the Constitution of the FRN, 1999.

On the first issue, both counsel to the NNPC and the Appellants recognised that the parties aggrieved by the tax assessments issued by the FIRS are the Appellants. This is irrespective of the fact that the NNPC filed the tax returns that is subject of the tax appeal.

[20] Paragraph 23 of the 5th Schedule to the FIRS Act

Irrespective of the NNPC's further arguments that it would be impossible to resolve the dispute without joining the NNPC because the Appellants are assessed over tax assessments made by the NNPC based on returns submitted by NNPC and TAT's recognition of NNPC as a necessary party, the Court of Appeal held that a necessary party is one whose presence is necessary for the effectual and complete determination of the issue in a suit, who is not only interest in the subject matter, but who in its absence, the proceedings cannot be fairly dealt with.

According to the Court of Appeal, the central area of dispute between the Appellants and the FIRS revolved around the notices of assessments which made the Appellants liable to pay the assessed tax. So the disputes were about who was aggrieved by the assessment and not on any rights or obligations of the NNPC. Consequently, the NNPC was declared not to be a necessary party.

On the second issue, the Court of Appeal noted that the NNPC had indeed exhibited a lack of interest in the action at the Tax Appeal Tribunal. The NNPC's participation is akin to a busy-body particularly since it was unable to show prima facie that the action of the defendant had adverse effect on its rights or interest. Noting that the NNPC had by its application of 27 August 2012 informed the Tax Appeal Tribunal that the Tribunal had no jurisdiction over it but only on the FIRS and a person aggrieved by the tax assessments, the NNPC had no locus standi to initiate the appeal at the Federal High Court.

Appellants' **Submission on** jurisdiction

On the third issue relating to the jurisdiction of the TAT vis-à-vis that of the Federal High Court, the Appellants argued that the TAT's jurisdiction as set out in the FIRS Act does not encroach upon the exclusive jurisdiction of the Federal High Court as stipulated in the section 251(1) of 1999 Constitution of the Federal Republic of Nigeria. They added that the TAT is only an administrative appellate body and the proceedings before it are condition precedent to the assumption of jurisdiction by the Federal High Court. That the FIRS Act does not intend that the TAT be a court. Rather, it is only deemed a civil court and the processes before it are also only deemed judicial proceedings, not indeed a court or judicial proceedings respectively.

It was further argued that unlike that of the extinct VAT Tribunal, appeals from the TAT goes to the Federal High Court, thus giving the Federal High Court the power to exercise its exclusive jurisdiction over tax disputes. The Appellants further referred the Court of Appeal to its earlier judgments in Esso Exploration and Production Nig. Ltd & SNEPCO v. NNPC[21] and SNEPCO & 3 Others v. NNPC[22], which acknowledged the tax assessment appeal procedure that commences with the appeal of the taxpayer to the FIRS, and the TAT, then to the Federal High Court through to the Court of Appeal and then the Supreme Court.

Corporation's Submission on jurisdiction

The Corporation submitted that by virtue of section 251 of the 1999 Constitution (as amended), the Federal High Court is to exercise original jurisdiction over the matters to the exclusion of other courts. That by deeming the Tax Appeal Tribunal to be a civil court for all purposes, the National Assembly had introduced a fiction and all adjudicatory bodies are enjoined to proceed on the presumption that such a state of affairs exists from the date of the legislation took effect.

Consequently, the FIRS Act cannot override the provisions of the Constitution which donates exclusive jurisdiction to the Federal High Court. Therefore section 59 of the FIRS Act is inconsistent with section 251 of the Constitution and is void to the extent of its inconsistency

The Court of Appeal's Decision on TAT's Jurisdiction

The Court of Appeal observed that it had, in two earlier appeals, set out the procedure for an aggrieved taxpayer to appeal assessments issued by the FIRS under FIRS Act. These are the Esso Exploration and Production Nig. Ltd & SNEPCO v. NNPC and SNEPCO v. NNPC cases. In respect of SNEPCO v. FIRS, the Court of Appeal restated the procedure where it said:

> "*The procedure for resolving claims and objections such as in the instant matter, are spelt out. When an assessment is made and the party is not satisfied, it can serve a Notice of Objection with the FIRS. It can also file a Notice of refusal to amend the assessment as desired where it disagrees with FIRS. The party may*

[21] CA/A/507/2012 delivered on 22 July 2016
[22] CA/A/208/2012 delivered on 31 August 2016

also then appeal against the assessment to the Tax Appeal Tribunal. If the party is still dissatisfied with the decision of the Tax Appeal Tribunal, then it can approach the Federal High Court, The Court of Appeal and the Supreme Court" [23]

The Court of Appeal noted that its earlier recognition of the Tax Appeal Tribunal as a vital step to the resolution of the tax related disputes shows that the TAT has jurisdiction over such matters.

It reiterated the position with reference to its earlier decision in Esso Exploration and Production Nig. Ltd & SNEPCO v. NNPC, which facts are in *pari materia* with the facts in the present case by stating that:

"*It must also be stated that Section 251 (1) (b) of the Constitution of Nigeria 1999 as amended gives exclusive jurisdiction to the Federal High Court in civil causes and matters connected with or pertaining to the taxation of companies and other bodies establishment or carrying on business in Nigeria and all other persons subject to Federal taxation. It may be added that in respect of the Petroleum Profits Tax Act, it is after the exhaustion of remedies or the process set out in (i) (ii) and (iii) above that a person may approach the Federal High Court.*"

In the Esso Exploration and Production Nig. Ltd & SNEPCO v. NNPC' case, the Court of Appeal in setting out the procedure for the appeal said:

"*The Petroleum Profits Tax Act provides for the procedure for the resolving of any claim, objection, appeal, representation or the like made by any person under the provisions of the Act or of any subsidiary legislation made thereunder. The procedure includes:*

i. Notice of objection to review and revise assessment made of the objector/applicant (section 38(2);

[23] The Federal Inland Revenue Service (Establishment) Act does not state that appeals from the Court of Appeal shall go to the Supreme Court. In particular Paragraph 23 of the 5th Schedule provides that "an appeal against the decision of the Federal High Court at the instance of either party shall lie to the Court of Appeal." In spite of this provision, the paragraph does not state that the Court of Appeal shall be the last appellate court on tax disputes. Consequently, the provisions of section 233 of the 1999 Constitution (as amended) will come in aid to show that a party that is aggrieved with the decisions of the Court of Appeal may further appeal to the Supreme Court.

ii. *Notice of refusal to amend the assessment as desired by applicant where the applicant where the applicant fails to agree with the Federal Board of Inland Revenue (Section 38(6);*

iii. *Appeal against the assessment to the appropriate Appeal Commissioners (now the Tax Appeal Tribunal established pursuant to section 50(1) of the Federal Inland Revenue Service (Establishment) Act, 2007, (Section 41);*

iv. *Appeal to the Federal High Court where the party is aggrieved by the decision of the Appeal Commissioners or the Tax Appeal Tribunal (Section 42(i) and (ii).*

v. *An appeal to the Court of Appeal. (Section 42(14)*"

The Court of Appeal found that the appeals were meritorious, and concluded that "*the combined effect of the aforementioned decisions is that the Tax Appeal Tribunal has jurisdiction to entertain tax matters such as in the instant case.*" In essence, while the TAT is just an administrative appeal body, the first judicial body to adjudicate on tax matters and causes in Nigeria is the Federal High Court.

Thoughts

There is always a need for the law to be clear, certain and easily applicable to every given circumstance. With the decision of the Court of Appeal giving credence to the Tax Appeal Tribunal and indeed its enabling legislation, the Federal Inland Revenue Service (Establishment) Act, 2007, the process of appeals against tax assessment has now got a roadmap. It is needless to state that the decisions of the Court of Appeal caused an avoidance of potential catastrophe in the revenue laws of this country, as a different decision could have seen an explosion of unquantifiable litigations on tax appeals that had been determined and settled by the Tax Appeal Tribunal.

Having given credence to the jurisdiction of the Tax Appeal Tribunal as set out in the FIRS Act, perhaps the next call is for the court to determine whether appeals to the Federal High Court from the Tax Appeal Tribunal should indeed be limited to

points of law alone. This is more so, as the Tax Appeal Tribunal is not indeed a judicial body, but serves only as the first point of call for an aggrieved person to ventilate his tax assessment issues. More so, being that the Tribunals are constituted of human beings, they could be prone to human errors in respect of factual evidence, and an aggrieved party should be at liberty to require the Federal High Court to ascertain factual errors, just at it has over points of law, albeit under the circumscribed circumstances which permit an appellate body to interfere with the factual findings of a lower tribunal or court.

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