A CRITICAL ANALYSIS OF THE POWERS OF THE TAX APPEAL TRIBUNAL UNDER THE FEDERAL INLAND REVENUE SERVICE ACT, 2007 IN THE SETTLEMENT OF TAX DISPUTES IN NIGERIA.

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A DISSERTATION SUBMITTED TO SCHOOL OF POSTGRADUATE STUDIES, AHMADU BELLO UNIVERSITY, ZARIA IN PARTIAL FULFILLMENT OF THE REQUIRMENTS FOR THE AWARD OF MASTER OF LAWS DEGREE-LLM

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DECLARATION

I declare that the work in this Dissertation entitled **"A CRITICAL ANALYSIS OF THE POWERS OF THE TAX APPEAL TRIBUNAL UNDER THE FEDERAL INLAND REVENUE SERVICE (FIRS) ACT, 2007 IN THE SETTLEMENT OF TAX DISPUTES IN NIGERIA"** has been researched by me in the Department of Commercial Law. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this thesis was previously presented for another degree or diploma at this or any order institution.

Ejiro Milton EJEMEYOVWI ---------- ----------

LL.M/LAW/09742/2008-09 **Signature** **Date**

CERTIFICATION

This dissertation, entitled: **"A CRITICAL ANALYSIS OF THE POWERS OFTHE TAX APPEAL TRIBUNAL UNDER THE FEDERAL INLAND REVENUE SERVICE (FIRS) ACT, 2007 IN THE SETTLEMENT OF TAX DISPUTES IN NIGERIA"** by Ejiro Milton EJEMEYOVWImeets the regulations governing the award of the degree of Master of Laws degree (LLM) of Ahmadu Bello University, is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This Dissertation is dedicated to the **Almighty God** the creator of the Universe, who has been my source of inspiration and knowledge. I also dedicate this work to my late mother, Mrs. Rose O. Ejemeyovwi who was instrumental to my upbringing in the Lord.

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LIST OF ABBREVIATIONS

ANLR	All Nigeria Law Report
BAC	Body of Appeal Commissioners
CA	Court of Appeal
CAP	Chapters
CFRN	Constitution of the Federal Republic of Nigeria
EST	Establishment.
FBIR	Federal Board of Inland Revenue
FIRS	Federal Inland Revenue Service
LFN	Laws of the Federation of Nigeria
NO	Number
NWLR	Nigerian Weekly Law Report
PT	Part
SC	Supreme Court
SCNLR	Supreme Court of Nigeria Law Report
TAT	Tax Appeal Tribunal
VAT-T	Value Added Tax Tribunal

ABSTRACT

A critical appraisal of the powers of the Tax Appeal Tribunal (TAT) in the settlement of Tax disputes in Nigeria stems from the fact that taxation is fast becoming the pivot and bane of Nigeria's Development. This research examined the legal frame work that established and clothed this tribunal with powers, functions and jurisdiction of the TAT.The limitations which possess as challenge to the operation of the TAT was highlighted. These are the jurisdictional conflict between the TAT and the Federal High Court, composition of the members of the TAT in the light of Section 36(1) of the 1999 Constitution (As amended), the insertion of an ouster clause preventing one from challenging the propriety or otherwise of the appointment of a Tax Commissioner and the limited right of Appeal to the Federal High Court on points of Law.The Research also examined laws on the defunct Body of Appeal Commissioners (BAC) and Value Added Tax Tribunal (VAT-T) the predecessor bodies to the TAT with a view to distinguishing them from the TAT, the application of the legal frame work on the operation of the TAT, establish findings and make recommendation on problems and challenges. Also discussed was the reason for examining the powers, functions and jurisdiction of the TAT. This is so because of the fact that this body has a lot to contribute in enhancing the revenue profile of the government in amicable settlement of tax disputes. Therefore, this research x-rayed the problems and challenges facing the TAT and proffer suggestions in tackling these problems which will better place the tribunal as a mechanism of tax compliance. The Research is doctrinal in nature using primary and secondary authorities. This study made some findings which pose as serious challenges to the smooth operation of the TAT. These are: the constitutional conflicts between the TAT and the Federal High Court over taxing and revenue matters of the Federal government in the light of the exclusive jurisdiction of the Federal High Court as seen in Section 251 of the 1999 Constitution(As amended), constitionality of the composition of the TAT, the insertion of an ouster clause which ousts the jurisdiction of the court of law from entertaining any question with regards the validity or otherwise of the appointment of a TAT Commissioner and Appeal from the TAT to the Federal High Court on points of Law. These challenges have continued to elicit legal actions before the various courts in Nigeria. Recommendations have also been proffered such as an amendment to the Federal Inland Revenue Service (Establishment) Act, 2007 and the Federal High Court Act, 2005 to make the TAT a division of the Federal High Court with the both judges and non-judges who will sit as Assessors in the tribunal, hence an amendment to paragraph 2(1) of the Fifth Schedule to the FIRS (Est.) Act removing the appointment from the Minister of Finance to a committee from Ministries of Finance and Justice. The removal of the ouster clause in paragraph 8 of the Fifth Schedule and making appeal lie directly from the TAT to the Court of Appeal.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1. Background to the Dissertation

The importance of taxationto any Nation of the World cannot be overemphasized. It is a fact that there is a paradigm shift among the developed and developing economies from reliance on oil revenue to taxation due to the uncertainty of sale in the International market.[1] In Nigeria today, the federal government is trying to open all other sectors of the economy especially the Manufacturing and the Agricultural sectors in other to boost the revenue profile of the economy. It is worthy of note that taxation remains a veritable instrument for National Development. It has been the major source of revenue for government in providing socio-amenities and infrastructuresuch as roads, pipe borne water, schools, rail way, electricity to mention a few.The government has also used taxation as an instrument of fiscal policy in the redistribution of wealth and stimulation of economic growth by creating jobs[2].

Historically, after the Nigerian civil war, indigenous and foreign businesses began tothrive, disputes arising from taxationbegan to increase, thus prompting the Federal government to create the Federal Revenue Court[3]as a specialized court to address issues bothering on the Revenue of the Federation. Shortly thereafter, the court was restyled as Federal High Court by Section 230(2) of the Constitution of the Federal Republic of Nigeria,1979.The enlargement of the

[1]Okonjo-Iweala, N (2012),Reforming the Unreformable Lessons from Nigeria, The MIT Press, Cambridge, Massachusetts London,England,p3-"The surge in oil production in the 1970s,in conjunction with the oil shock, had profound effects on the shape and structure of Nigeria's economy and also on its politics .A diversifying economy before 1970,Nigeria quickly turned into a monoculture economy based on oil".

[2] Musgrave, R.A & Musgrave, P.B (1976),Public Finance In Theory And Practice(2nd Edition),McGraw-Hill Kogakusha Ltd, United States,p.210-"Requirement for a 'Good" Tax Structure. Among them, following are of major importance, although they are not meant to be all-inclusive:. . .The tax structure should facilitate the use of fiscal policy for stabilization and growth objective . . ."

[3]No.13 of 1973

jurisdiction of this court to accommodate other subject matters though within the exclusive list stalled the quick resettlement of tax dispute.As a result, this work appraises the Tax Appeal Tribunal(TAT) as a child of necessity which seeks to complement the efforts of the Federal High Court.

Considering the enlarged jurisdiction of the court as provided by Section 251 of the Constitution of the Federal Republic of Nigeria,1999 (As amended) in entertaining and adjudicating on both civil and criminal matters, the court has continued to suffer congestion of caseswhich has slowed down the wheel of justice with respect to quick disposal of tax cases. Therefore, the Tax Appeal Tribunal(TAT) has been established to fill the vacuum created by the Federal High Court which has led to the loss of government revenue.

Moreover, with the formulation of the National Tax Policy of Nigeria, emphasis is now placed on an efficient tax system that encourages a formidable tax dispute resolution system. Mindful of the economic importance of taxation, the Federal government, created the Tax Appeal Tribunal (TAT) through the Act of the National Assembly to entertain tax disputes and resolve them amicably using practice directives similar to that used by the court of law in other to ensure fairness and equity.For this reason, the Tax Appeal Tribunal (TAT) came into existence through the Federal Inland Revenue Service (FIRS) Establishment Act,2007 and the Tax Appeal Tribunal (Establishment) Order,2009.Section 59 (1) of the FIRS(Establishment)Act, 2007 provides for the establishment of the Tax Appeal Tribunal (TAT) as a dispute resolution Agency for all tax matters within the jurisdiction of the Federal Government with respect to taxes collected by the Federal Government as contained in the exclusive list of the Constitution of the Federal Republic of Nigeria, 1999(As amended). These taxes are assessed, collected and accounted for by the

Federal Inland Revenue Service (FIRS), in who's amended Act contains the Tax Appeal Tribunal (TAT).

The relevant statutory provisions the Tax Appeal Tribunal (TAT) is meant toresolve disputes with respect to the following:[4]

i) Federal Inland Revenue Service (Establishment) Act,[5]

ii) Companies Income Tax Act,[6]

iii) Petroleum Profit Tax Act,[7]

iv) Personal Income Tax(Amendment) Act (as it applies to the armed forces, police, foreign affairs, residents of the FCT & Non-residents).[8]

v) Value Added Tax Act,[9]

vi) Stamp Duties Act,[10]

vii) Taxes and Levies(Approved List for Collection)Act,

viii) Capital Gains Tax[11]; and

ix) Regulations, government notices or rules issued in terms of these legislations.

In addition, Withholding tax, Education Tax (Now Tertiary Education Trust Fund Act),Deep Offshore and Inland Basin Production Sharing Contracts Act, the National Technological Development Levy, Oil Exploration License, Oil Mining license, Oil Production License,

[4] First Schedule to the Federal Inland Revenue Service (Establishment) Act, 2007.
[5] Ibid.
[6] CAP. C21 Laws of the Federation , 2004
[7] CAP. P10 Laws of the Federation, 2004
[8]CAP.P 8,Laws of the Federation of Nigeria,2004 (As Amended in No.20 of 2011)
[9] CAP. V1 Laws of the Federation, 2004
[10] CAP. S8 Laws of the Federation, 2004
[11] CAP.C 1Laws of the Federation,2004

royalties and rents are also to be collected by FIRS.[12]It is no historical accident that the first Federal Court of first instance to exercise original jurisdiction over matters relating to taxation within the federal jurisdiction was the Federal Revenue Court[13].

The Federal High Court had a chequered existence since its establishment as a court.[14] The Court by Section 230(2) of the Constitution[15] was vested with more powers to exercise jurisdiction to the exclusion of any other Court in civil and criminal causes, and matters arising from the exclusive list. However, the powers of the Federal High Court was no longer limited to taxation, customs and excise duties, banking, currency and fiscal measures but to other issues as listed in the exclusive list.

After the oil boom of the 1970s, disputes in tax matters doubled and since the Federal High Court had more additional matters to revenue issues, the court could no longer adequately attend to tax and revenue issues, hence, the delay and never ending of disputes. To ameliorate the judicial inadequacies in prompt adjudication and settlement of tax disputes and other related matters, the Personal Income TaxAct,[16] the Companies Income Tax Act[17]and the Petroleum Profit Tax Act[18] established the Body of Appeal Commissioners (BAC) to entertain and resolve disputes arising from Companies Income Tax, Petroleum Profit Tax, Capital Gains Tax and Personal Income Tax matters within the country while the Value Added Tax Act[19] was no exception as it created the Value Added Tax Tribunal (VAT-T).

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[12] See Okauru, I.O (2012),A Comprehensive Tax History of Nigeria, Safari Books Limited,Ibadan,Nigeria,p.124

[13]This was promulgated by Decree No.13 of 1973.

[14]Ojukwu, E. &Ojukwu, C.N. (2005), Introduction to Civil Procedure,(2nd Edition);Helen-Roberts Ltd,Abuja,Nigeria,pg.35. "According to its enabling law (Decree No.13 of 1973) the court "shall have original jurisdiction in certain specific matters including taxation of companies, customs and excise duties, banking, foreign exchange ,currency and fiscal measures of the Federal government. . ." and "admiralty jurisdiction".

[15] Constitution of the Federal Republic of Nigeria, 1979.

[16] No.104 of 1993 (Now amended by Act 20 of 2012)

[17]CAP.60,Laws of the Federation of Nigeria,1990

[18]CAP.354,Laws of the Federation of Nigeria,1990

[19]No.102 of 1993.

ThisResearchwill appraisethe Tax Appeal Tribunal (TAT) as a child of circumstances which seeks to complement the efforts of the Federal High Court. Considering the enlarged jurisdiction of the court as provided by the Section 251 of the Constitution of the Federal Republic of Nigeria, 1999 (As amended) in entertaining and adjudicating on both civil and criminal matters within the exclusive list, the court has continued to suffer from congestion which has slowed down the wheel of justice with respect to disposing off tax disputes. The Tax Appeal Tribunal(TAT) has been established to bridge the gap exposed by the inadequacies of the Federal High Court which has led to the loss of government revenue. The incessant delay in court proceedings has made the government unable to timeously recover accumulated tax arrears and prosecute tax defaulters. Official statistics have revealed that lots of tax payers both in private and in public especially, Ministries, Departments and Agencies(MDAs) are owing billions of naira in government revenue due to non-remittance. This in turn has affected government's provision of basic socio-amenities and infrastructure.

The government's robust anddynamic approach to the resolution of tax disputes in Nigeria is the establishment of the Tax Appeal Tribunal (TAT)as provided in the FIRS (Establishment) Act,2007 which to a large extent has been able to settle tax disputes amicably and recover tax arrears for the government.

This research will examine what tax appeal entails as a tool in the hand of the tax payer in triggering the process of resolving tax issues from the filing of an objection to assessments raised by the tax authority before the Tax Appeal Tribunal (TAT) through to the Supreme Court of Nigeria.

More also, an examination into the dispute mechanisms provided for in the various tax regimes such as the Body of Appeal Commissioners (BAC) and Value Added Tax Tribunal (VAT-T)

which hitherto were thrown into oblivion would be discussed. A comparative analysis of the Appeal process under the Tax Appeal Tribunal (TAT) on the one hand and the Body of Appeal Commissioners (BAC) and the Value Added Tax Tribunal (VAT-T) on the other hand would be succinctly treated.

Finally, this Research will examine the composition, jurisdiction, powers and function, authority and procedure of the Tax Appeal Tribunal (TAT) viz-a-viz those of the Federal High Court in entertaining tax matters as a court of first instance.

1.2Statement of the Problem.

In critically appraising the powers of the Tax Appeal Tribunal (TAT) in the settlement of tax disputes in Nigeria under the present legal frame work,[20] allusion has been drawn from the abrogated tax tribunals-Body of Appeal Commissioners(BAC) and the Value Added Tax Tribunal (VAT-T) which hitherto were in operation prior to the creation of the TAT. Nevertheless, these tribunals could not achieve their objectives due to poor legal frame work establishing them. The likely issues which posed `as limitations to the powers, functions, jurisdiction and operation of the defunct tribunals as stated earlier also pose as serious threat to the Tax Appeal Tribunal which is presently in operation in Nigeria.

In view of the foregoing, this research has formulated the following research questions:

a. Whether there is conflict of jurisdiction over tax matters and revenue of the federal government between the Tax Appeal Tribunal and the Federal High Court?
b. Is there a Conflict in the composition of the Tax Appeal Tribunal in the light of Section 36(1) of the Constitution of the Federal Republic of Nigeria,1999(As amended)?
c. Whether the insertion of the Ouster Clause which seeks to prevent legal action against the propriety or otherwise in the appointment of a Commissioner of the Tax Tribunal is

[20].Federal Inland Revenue Service (Establishment) Act,2007

contrary to the provisions of the Constitution of the Federal Republic of Nigeria,1999(As amended)?

d. Whether the restriction of Appeal from the Tax Appeal Tribunal to the Federal High Court on point of Law is constitutional?

1.3 Objectives of the Dissertation

1. One of the objective of this dissertation is to show that there is a conflict of jurisdiction over tax matters and the revenue of the federal government between the Tax Appeal Tribunal and the Federal High Court.
2. Another objective of this dissertation is to highlight the conflict in the composition of the TAT in the light of Section 36(1) of the Constitution of the Federal Republic of Nigeria.
3. To x-ray and show that the insertion of the *ouster clause* which seeks to prevent legal action against the propriety or otherwise in the appointment of a member of the tribunal is contrary to the words and spirit of the 1999 constitutions (As amended).
4. This dissertation will discuss the restriction of Appeal from the TAT on points of law to the Federal High Court which hitherto is unconstitutional.
5. Finally, the dissertation will provide recommendation to address the aforementioned constitutional limitations as they relate to the jurisdiction and functions of the said tribunal.

1.4 Justification of the Dissertation

(a) The reason for the study of the Powers of the Tax Appeal Tribunal (TAT) under the Act in the settlement of Tax disputes in Nigeria is to establish the fact that this tribunal has enhanced

the revenue profile of the Federal government by its speedy adjudication and disposal of tax cases that has been brought to it.

There are plethora of cases between tax payers and tax authorities which have been amicably resolved through rulings that have added to enrich our tax jurisprudence. Forexample,in the case of **Oando Supply and Trading Ltd v FIRS**[21] where the main issue before the tribunal was:*Whether the Appellant, a taxpayer, can commence an appeal at the Tax Appeal Tribunal against a tax assessment while the objection to the assessment has not been resolved by the tax authority.*The tribunal held that the Respondent(FIRS) must issue the Notice of Objection to Amend within a reasonable time-90 days failure within reasonable time would amount to "deemed decision".

(b)Another reason for this dissertation is to establish the fact that the TAT in settlement of disputes has become a tool for tax compliance.[22] The tribunal which has been empowered by law to resolve disputes arising from the Personal Income Tax, Companies Income Tax, Capital Gains Tax, Stamp Duties, Petroleum Profit Tax, Value Added Tax and other regulations has in many respect exercised jurisdiction over these matters.This has in turn boosted our revenue yield for Nigeria.

(c)Another justification for this dissertation is to showcase the conflict ofthe powers of this tribunal in exercising jurisdiction over taxing matters with that of the Federal High Court. The constitution[23] has given exclusive jurisdiction to the Federal High Court to exercise judicial

[21](2011)4 Tax Law Report of Nigeria, p. 141 (Held at TAT, Lagos Zone).

[22] See; Two cases where the TAT has been instrumental to the recovery of taxes. Firstly,**Kellog Brown & Root vs. FIRS (Unreported) Suit No: TAT/LAG/APP/25/2012.** Before the TAT, the taxpayer paid the sum of Three Million Six Thousand dollars ($3,006,000) as full and final settlement of their tax liability to government., See also the case of **FIRS vs. Industrial General Insurance Co. Ltd.(Unreported) Suit No: TAT/LAG/APP/10/2011,** where through the intervention of the TAT, Lagos the Respondent has paid the sum of Two Hundred & Five Million (N205,000, 000. 00) to the Federal Government.

[23] Constitution of the Federal Republic of Nigeria, 1999 (As amended in 2011-2012).See the decision of the Federal High Court in TSKJ**Construces Internationals Sociadade LDA vs. FIRS**

powers of adjudicating on the subject matter of taxation. Against this back drop, the study shall make its findings and recommendation.

1.5 Scope of the Dissertation

This dissertation is limited to the establishment, jurisdiction, composition, powers and functions of the TAT in adjudicating on disputes arising from taxation within the Federal Administrative System in Nigeria.

Secondly, though violations of the various tax legislations may be classified into civil and criminal, this study will only focus on the civil aspect since the TAT can only exercise jurisdiction over civil matters.

Thirdly, the study reviewed the operations of the defunct tribunals - the Value Added Tax Tribunal and the Body of Appeal Commissioners where were dissolved to pave way for the TAT.

Finally, the FIRS (Establishment) Act[24], TAT (Procedure) Rules[25], TAT (Establishment) Order[26] which provides for the subject matter jurisdiction and guidelines for the operation of tribunal was used in this work.

1.6 Research Methodology

(Unreported)SuitNo:FHC/ABJ/TA/8/12 delivered on the 30th October,2013 where the court construed the operations of TAT as being in conflict with the exclusive jurisdiction of the Federal High Court and declared the TAT's establishment and operation as a nullity.

[24] 2007.

[25] 2010

[26] 2009

The research is based on doctrinal method. Both primary authorities (such as case laws and statutes) and secondary authority (such as articles, journals, and textbooksetc.) were used. Conference and Seminars papers were also used.

1.7 Literature Review

There are many writings on it. One of the writers,Arogundade, J.A,[27]In his book wrote on Appeal Process and Nigerian Income Taxation where he discussed on how appeals are triggered by the tax payer to the BAC and the VAT-T by the tax payer and the tax authority. Also, he discussed the establishment, jurisdiction, composition and structure of the TAT in this book. Nonetheless, this work did make some reservation to the author's statement in page 363 of his book under the sub head of Jurisdiction of the TAT where he states as follows: '*The inclusion of the PIT among the taxes to be determined by the TAT is not very clear yet.'* On this point, it should be emphasized that the amended Personal Income Tax Act has clearly provided that the TAT has jurisdiction to entertain all issues arising from Personal Income Tax whether it emanates from FCT or the States Internal Revenue even though they are being administered by the States, the Personal Income Act is still a Federal law.

Moreover, Arogundade in his book only mentioned one of many *lacunae* in the operation of TAT which has to do with Appeal against the tribunal on points of law to the Federal High Court. On the other hand, this research discussed several issues which bothered on the Exclusive jurisdiction of the Federal High Court on issues of Revenue and Taxation and the issue of appointment of the TAT commissioners which is in conflict with the Constitution[28].

[27](2010).Nigerian Income Tax & Its International Dimension, 2nd Edition (Spectrum Books Limited, Ibadan, Nigeria) p.353.

[28] Constitution of the Federal Republic of Nigeria, 1999 (as amended in 2011 – 2012).

Another writer is Amucheazi, O .D[29] who in his seminar paper highlighted the jurisdictional issues in TAT disputes succinctly analyzed the powers, composition and jurisdiction of the TAT as legally defective and unconstitutional as usurping the powers of the Federal High Court which has exclusive jurisdiction over and above any court or tribunal with regards to issues relating to taxation. The author delved into salient issues of the composition of the tribunal, unconstitutionality of the ouster clause as embedded in the establishment provision of the TAT.

This dissertation however, will examine the Body of Appeal Commissioners(BAC) which was provided by the various tax statutes[30]and the Value Added Tax Tribunal (VAT-T)[31] by discussing the establishment, powers, functions and jurisdiction of these tribunals. The jurisdictional limitation to these dispute resolution tribunals would be highlighted in order to do a comparative study between the TAT on one hand and the BAC and the VAT-T on the other hand.

Another legal luminary, Ibegbu, N.[32] in his Paper, had a contrary view of the establishment of the TAT, stating that Section 251 of the Constitution[33] though excludes other courts from hearing and determining matters arising from taxation, it did not exclude tribunals, and hence the TAT is constitutional. On the other hand this work tried to interrogate the above learned author's position by citing the disparity in the TAT Establishment provision where it describes the

[29](2011),Jurisdictional Issues in Tax Appeal Tribunal Disputes, Being a paper presented at a 5 Day Training Workshop on the Practices & Procedure of the Tax Appeal Tribunal at Hawthorn Suites, Area 11, Garki, Abuja,28th February -4th March,2011.

[30] Personal Income Tax Act No.104,1993;Companies Income Tax Act, CAP C21,Laws of the Federation,2004 & Petroleum Profit Tax Act, CAP P10,Laws of the Federation of Nigeria,2004

[31] CAP.V1 Laws of the Federation of Nigeria,2004

[32](2011), Tax Appeal Tribunal Practice & Procedure; Being a paper presented at a 5 Day Training Workshop on the Practices & Procedure of the Tax Appeal Tribunal at Hawthorn Suites, Area 11 Garki, Abuja,28th February -4th March,2011.

[33] Constitution of the Federal Republic of Nigeria,1999 (As amended).

tribunal as Court. See paragraph 20(3) of the Act[34] which states that all proceedings before the TAT shall be deemed to be a civil court.

In his Seminar paper, Idornigie, P.O [35], observed thus:

> The question that emerges from the above provisions is whether the jurisdiction of the TAT is not in conflict with the exclusive original jurisdiction of the Federal High Court pursuant to Section 251(1) of the Constitution of the Federal Republic of Nigeria,1999(As Amended)?Again, going by the provisions of Section 59 of the Act and the Fifth Schedule, whether the TAT is not constituted to usurp the original jurisdiction of the Federal High Court?
>
> As shown above, the TAT has repeatedly declared itself to be administrative body performing quasi-judicial functions. Upon examination of the functions of the TAT and the effect of the provisions of the Act which has made the Federal High Court to sit as an appellate court on tax matters(rather than as a court of original jurisdiction),one might be tempted to argue that there is a conflict….

From the above, the learned professor argues that there is conflict of jurisdiction between the Tribunal and the court because the Federal High Court is expected to sit as an appellate court.

The Researchers in this area, though agree to an extent as regards the conflict with the Federal High Court with regards to Section 251 but disagrees with the assertion of the learned Professor that the conflict Centre on the TAT exercising original jurisdiction. The TAT Establishment Act provided that parties may proceed to the Federal High Court to hear and determine any dispute relating to tax matters without first coming before the TAT. Therefore the Federal High Court could also exercise both original and appellate jurisdiction.

The Act[36] is the main legal frame work on which the study examined the establishment, structure, jurisdiction, powers and functions of the TAT in the First and Fifth schedule of the

[34] The Fifth schedule to the FIRS(Establishment)Act,2007

[35]Idornigie,P.O(2012),The Role of the Tax Appeal Tribunal(TAT) in Nigeria's Tax Jurisprudence; A Paper presented at the 2 Day Capacity Building Interactive Workshop on Tax Laws, Ethics and Judicial Interpretation for Superior Court Judges and Senior Tax Legal Officers organized by the Federal Inland Revenue Service in collaboration with the Nigerian Institute of Advanced Studies and JUK Igwe's Chambers on at the Kano Hall, Transcorp Hilton, Abuja, Nigeria, Tuesday 18th December.

Act[37].Furthermore, the TAT Procedure Rules [38] were cited throughout the work as it supports the legal frame work. Nevertheless, this work critiqued the aforementioned Act in not providing for a proper organizational structure within the administrative operations of the TAT.The various tax legislations such as the Companies Income Tax Act, Personal Income Tax Act, Value Added Tax Act and Petroleum Profit Tax Act were examined for making comparisons between the TAT and the defunct BAC and VAT-T.

This study also took a closer look into the judicial authority of **Stabilini Visononi v. FBIR**[39] at the Court of Appeal which brought a turning point in the history of dispute resolution in the tax system. One of four salient issues raised before the Court of Appeal was: *Whether the VAT tribunal was right to have assumed jurisdiction to hear the matter in view of Section 1 of the Constitution*[40].

The court stated that the VAT-T did not have the jurisdiction to entertain any matter concerning the revenue or taxation of the Federation since the Federal High Court has been vested with such powers by the constitution-"*where the constitution .. has vested jurisdiction in a court of law, it cannot be lightly diverted…*". The court went further to state that unless there is a constitutional amendment to Section 251 of the constitution, taking away the exclusive power of the Federal High Court, the VAT tribunal jurisdiction is an infringement on the constitution. There is no doubt that this decision and many others led to the abolition of both the VAT tribunal and the BAC and eventually the creation of the TAT.

[36] Federal Inland Revenue Service (Establishment) Act,2007
[37] Ibid.
[38] 2010
[39](2009)13 NWLR(Pt.117)p.9
[40] Constitution of the Federal Republic of Nigeria. 1999(As amended in 2011 - 2012).

Also on the decision of the TAT in **Federal Inland Revenue Service v. General Telecom Plc.**[41], the TAT in over ruling the preliminary objection raised by the Respondent, the tribunal held in paragraph 9 in interpreting Section 251(1)(a)(b) on the exclusive jurisdiction of the Federal High Court, that it only excluded COURTS and so it does not affect the powers of a tribunal. The tribunal further stated in paragraph 14 that the exclusion is limited to only superior courts of jurisdiction as listed in the Constitution.

However, this dissertation disagrees with this position because where a tribunal exercises judicial powers of the Federal High Court on the same subject matter then it is venturing into the exclusive ambit of the Federal High Court. This in **StabiliniVisononi v.FBIR**[42]the court declared the powers of the VAT –T as *ultra vires* as usurping the powers of the Federal High Court. This study will therefore recommend an amendment to Section 251 of the Constitution[43]by expunging the qualifier "exclusive" from jurisdiction to enable the TAT operate constitutionally.

This dissertation would also suggest an amendment to paragraph 2(1) of the Fifth schedule to theEstablishmentAct[44] which gives unilateral powers to the Minister of Finance to appoint and remove any member of the TAT. It therefore suggests that advertisement be made to the public and shortlisted candidates appear before the National Assembly for confirmation. In addition to its findings, is the removal of the *Ouster Clause* in paragraph 8 of the Fifth schedule to the Actwhich prevents any legal action challenging the validity or otherwise of the appointment of any member of the tribunal. This Research criticized this provision as not only

[41] (2009) 13 NWLR (Pt.117) p.9 See also (2012)7Tax Law Reports of Nigeria,108.
[42] Supra at page 11.
[43] Constitution of the Federal Republic of Nigeria,1999(As amended)
[44]2007

draconian but also offends Section 6(6) of the Constitution[45] as it impedes on the rights of parties to fairness and justice.The study therefore suggests an amendment by the National Assembly in deleting paragraph 8 of the Fifth schedule[46].

This study also suggested an amendment to Paragraph 17 of the Fifth[47] Schedule with regards to Appeal on points of Law and Fact. This provision in the Act implies that where a tax payer is dissatisfied with the ruling of the TAT, a person may appeal to the Federal High Court which has to be on point of law. This is so because the TAT adjudicating on tax disputes, ascertains the facts and draws its conclusion from the tax laws.However,this dissertation asserts that there is a thin line of distinction between facts and law,and therefore for the Federal High Court to be restricted on points of law in entertaining appeal from the tribunal would be a misnomer that would do little or no justice to the tax payer or authority. Another *reason dicta* forstudy advocating foran amendment to this provision is the fact that the Federal High Court being a superior court of records and also having the power to exercise original jurisdiction over tax disputes cannot have its powers limited to hearing appeals from the TAT on point of law.

Considerably, this work would be guided by the statutory provisions of the Act[48], beginning with the establishment provision of Section 59 which created the TAT. References were made to the First and Fifth schedule, the former enumerating the extant tax laws and regulations the FIRS is empowered to administer while the latter is the establishment and jurisdiction of the TAT which is created to exercise jurisdiction to resolve disputes in civil matters.

1.8Organizational Layout.

The dissertation is divided into five chapters, these are as follows:

[45] Op. cit.
[46] FIRS (Establishment) Act, 2007.
[47] Ibid.
[48] Op. cit.at page 14

Chapter One: This chapter began with an introduction to the dissertation. It provided for an Introduction which gives an insight into the topic of the Research work and a summary of each chapter. This chapter looked at the Background to the dissertation which gave rise to establishment of the TAT due to the failure of the regular courts to address tax related matters with dispatch which had hitherto given rise to back log of cases resulting to loss in revenue.This chapter also discussed the Statement of the Problem inherent in the judicial system that led to the establishment of the defunct Body of Appeal Commissioners and the Value Added Tax Tribunal.Also discussed was the establishment of the Tax Appeal Tribunal via theEstablishment Act,[49]and its attendant constitutional challenges where highlighted.

In this chapter, the Objective of the Dissertationwould be discussed. The objective would examine the fact that there is a conflict of jurisdiction over tax matters and revenue of the federal government between the TAT and the Federal High Court, that there is conflict in the composition of members of the TAT, that the ouster clause contained in the Act creating the tribunal which tends to prevent any person from challenging its composition and the restriction of the right to appeal to the Federal High Court would be x-rayed.

The chapter would be taken a look into the Justification of the Dissertation which entails the fact that the TAT has successfully resolved lots of tax disputes speedily, hence increasing revenue for government and a tool for tax enforcement. Research Methodology would also form part of this chapter elucidating on the doctrinal method of research. Literature Review in this chapter will outline the various writers on the subject matter of discussand Organizational layout would be presented in this chapter.

Chapter Two: This chapter will examine the establishment, powers, functions, composition and operations of the TAT. Also, an examinationinto the establishment of the tribunal's legal frame

[49] Ibid.

work which is the Establishment Act[50] would be undertaken. In addition, the jurisdiction of the TAT covering disputes arising from all taxes which is also guided by the TAT(Procedure)Rules,[51] will be discussed.

Chapter Three: This chapter will examinethe limitations to the jurisdiction, powers and functions of the defunct BAC and VAT-T which gave rise to the formation of the TAT. A critical analysiswill be done by comparing the TAT and its structure as well as its jurisdiction, powers, functions with decided cases and the BAC and VAT-T on the other hand.

Chapter Four: This chapterwill be dealing with the constitutional limitations to the powers and functions of the TAT as a dispute settlement mechanism in Nigeria. The case of **Stabilini Visononi v.FBIR**[52]will be brought to bear as this decision affected the legality and constitutionality of the VAT-T. More also, this chapter will be looking at: Tax Appeal Tribunal, A Tool for Tax Compliance and Enforcement cases.

Chapter Five: This chapter, is the conclusion providing the summary of findings, recommendation/suggestions and concluding remarks

[50] Supra at page 14.
[51] 2010
[52] Supra.at page 13

CHAPTER TWO

THE POWERS, FUNCTIONS AND COMPOSITION OF THE TAX APPEAL TRIBUNAL (TAT)

In this chapter, the study shall critically discuss the Establishment, Powers and Functions, Jurisdiction and Operations of the Tax Appeal Tribunal in the fifth schedule to the FIRS (Establishment) Act, 2007. The creation of the TAT as provided in the Act,[53] outlines the composition of the tribunal, qualification as a member of the tribunal, term of office and the conditions of service. An attempt would be made to discuss the administrative control of the tribunal. The jurisdiction of the tribunal over issues on Appeal from both the tax authority and the tax payer, the Practice and Procedure before the TAT which are also provided in the TAT (Procedure) Rules, 2010 and the TAT Establishment Order, 2009 will be discussed in this chapter.

2.1The Establishment of the Tax Appeal Tribunal

[53] FIRS(Establishment)Act,2007

Section 59(1) and (2) of the FIRS (Establishment) Act,[54] provides for the establishment of the TAT and prescribes its powers to settle disputes arising from the operation of the Act and those under the first schedule which deals with legislations administered and enforced by the Federal Inland Revenue Service. The TAT is an independent administrative body which is to exercise quasi- judicial powers and functions in making decisions on tax appeals brought to it by an aggrieved tax payer or tax authority.

It should be noted that appeals form part of taxation, since tax is an imposition; the law has provided a channel through which such an individual or corporate body may seek redress. This is also to sustain the confidence of the taxpayer in the tax system and foster compliance. An astute tax expert, Arogundade, J.A rightly opined in his book on the merit of new Tax Appeal procedure[55]

> . . . long delays in concluding appeal cases. Tax appeal cases used to last for a very long time –sometimes for as long as five or more years-and by which time the ruling had little or no value to the appellant as circumstances might have changed The new provisions on appeals procedure signal a positive development for taxation in Nigeria, especially for many taxpayers who feel reluctant to challenge any arbitrary decisions of tax authorities because of the cost of litigation resulting from long delays in concluding appeal cases.

Therefore, the TAT is just one of many dispute resolution mechanisms put in place to ensure speedy and effective disposition of tax disputes. Though before now, there existed the VAT-T which was established by the Second Schedule to the VAT-T,[56] and the BAC established by the relevant tax laws of the Petroleum Profit Tax[57] Companies Income Tax Act[58] and the Personal Income Tax Act[59] provisions. Both of which heard Appeals on the relevant tax issues but were

[54] Ibid.
[55]Arogundade J.A.(2010), Nigerian Income Tax &Its International Dimension, Spectrum Books Limited,Ibadan,Nigeria,p.362
[56]No.102 0f 1993 (Now amended as Cap.V1,Laws of the Federation of Nigeria,2004)
[57] Cap.354, LFN; 1990 (Now amended as Cap. P 10,Laws of the Federation of Nigeria,2004)
[58] Cap.60, LFN; 1990 (Now amended as Cap. C 21,Laws of the Federation of Nigeria,2004)
[59] No.104, 1993 (Now amended as Cap.P8, Laws of the Federation of Nigeria,2004 As Amended in No.20 of 2011).

abrogated by the Act,[60] which created the TAT and clothed it with the powers and the functions of the defunct bodies.

Paragraph 1(2) of the Fifth Schedule to the Act[61] states that the Minister through a notice in the Federal Gazette shall specify the number of zones, matters and places in relation to which the Tribunal may exercise jurisdiction.[62]Also, the TAT (Procedure) Rules which was drafted by a committee of all eight chairmen and four commissioners; which contains the form and commencement of an Appeal, the place of instituting Appeals, Parties and Representation, Abatement of proceedings, Service of processes, mode of entering Appearance, hearing, determination of Appeal, Enforcement of decision, Appeals among others would in no doubt be a fulcrum upon which this chapter would be built.[63] .

> The Minister further inaugurated the Tribunal on February 5,2010.The membership of the Tribunal,40 in all, comprises of retired jurists, legal practitioners, accountants and tax professionals. Each zone is composed of a chairman and four commissioners. In order to enhance competence in the operations of the Tribunal, the eight Tribunal Chairmen were sent to India after inauguration to under study the practice and Procedure of tax appeals with the aim of drawing on best practices to be replicated in the country. The Tribunal Chairmen, upon their return, inaugurated a committee comprising of all eight Chairmen and four commissioners to draft rules of procedure for the tribunal. The Tax Appeal Tribunal(Procedure)Rules,2010(hereinafter refer to as the TAT Rules) were gazzatted by the Minister of Finance pursuant to the provisions of Paragraph 21 of the Fifth Schedule to FIRSEA with effect from 1september,2010."

The composition of the TAT is enumerated in the Fifth Schedule to the Act[64].The tribunal consists of five members referred to as *Tax Appeal Commissioners* to be appointed by the

[60] Op.cit.at page 18
[61] Ibid.
[62] See. also,Tax Appeal Tribunal (Establishment) Order,2009
[63]Okauru,I.O.(2012),Federal Inland Revenue Service & Taxation Reforms in Democratic Nigeria, Safari Books Ltd, Ibadan,Nigeria,p139
[64] FIRS(Establishment)Act,2007

Minister. Moreover, the tribunal is headed by a Chairman who shall be a legal practitioner of not less than 15year standing at the Nigerian bar with cognate experience in tax legislation and matters. The Act went further to state that the Chairman will preside at all sittings of the tribunal and that in his absence the members shall appoint one of themselves as the presiding Chairman. Also the quorum at any sitting of the Tribunal shall be three members. Flowing from the Act, it can be seen that each tribunal comprises of five members, one (1) being the Chairman and four (4) Commissioners.

Furthermore, Paragraph 3 of the Fifth Schedule to the Act[65], provides for *the Qualifications for appointment as a Tax Appeal Commissioner*. At this point it should be noted that the qualification for appointment is fundamental to the composition of the tribunal. It provides thus:

> A person shall not be qualified for appointment as a Tax Appeal Commissioner unless he is knowledgeable about the laws, regulations, norms, practices and operations of taxation in Nigeria as well as persons that have shown capacity in the Management of trade or business or a retired public servant in tax administration.

It presupposes that a properly, constituted tribunal is that one where all members of the tribunal are well qualified to discharge their functions and duties.

With regards to the term of office of a Tax Appeal Commissioner, the establishment provision of the TAT[66] provides that such an individual shall hold office for a term of three years renewable for another term of three years from the date on which he assumes his office or until he the attains the age of 70years whichever is earlier. The FIRS (Establishment) Act,2007 also provides that the office of an Appeal Commissioner could be declared vacant where he has absented himself from two consecutive meetings without approval from the Chairman; or where he is confirmed to be of unsound mind; or where he has been convicted for a criminal offence or

[65] Ibid.
[66] Paragraph 4, Op.cit.

felony related to tax matters; or where he has attended a meeting concerning a taxpayer in which he has interest without informing the other Commissioners[67].

The Minister is empowered to set up and designate various zones for the operation of the tribunal[68]. The reason for empowering the tribunal to sit in various zones is for administrative convenience. Therefore, the Act[69] establishes a single TAT but with different panels sitting at the same time in different zones as provided by the Minister. There is also the Secretariat to the tribunal to be headed by a Secretary for each zone of the tribunal[70]. The Secretary is responsible for keeping records of proceedings, carry out day to day administration and supervision of employees of the tribunal.

Finally, one striking and controversial provision inserted into the Act[71] is the *order constituting a tribunalto be final*[72].This have generated a lot of criticism as it portends to be an *ouster clause*which inadvertently precludes any person from challenging the this validly or otherwise of the appointment of any person as a Tax Appeal Commissioner;

> The question as to the validity of the appointment of any person as a Tax Appeal Commissioner shall not be the cause of any litigation in any court or tribunal and no act or proceedings before the Tribunal shall be called into question on any manner on the ground merely of any defect in the constitution of the Tribunal.

It is the observation of the writer that the intention of this provision has not been proven to serve any purpose. Though the work will touch on this provision in the latter chapter of this work.

2.2 Jurisdiction of the Tax Appeal Tribunal

[67]See also Seyi,O (2009), Fundamental Principles of Nigerian Tax, Sagribra Tax Publications,Lagos,Nigeria.p.29.
[68] Paragraph 1(2), op. cit. See also the Tax Appeal Tribunal(Establishment) Order,2009
[69] FIRS(Establishment)Act,2007
[70] Paragraph 9 ibid.
[71] Paragraph 8 Ibid.
[72] Paragraph 8 Ibid.

Section 59(2) of the Act[73] creating the TAT provides that. *"The tribunal shall have power to settle disputes arising from the operation of this Act and under the First Schedule"* .Also under the Fifthschedule to the Act[74] in Paragraph 11(1) provides for the jurisdiction of the Tribunal to have power to adjudicate on disputes, and controversies arising from the following tax laws.

(i) Companies Income Tax[75]

(ii) Personal Income Tax [76]

(iii) Petroleum Profits Tax[77]

(iv) Value Added Tax[78]

(v) Capital Gains Tax[79]

(vi) Stamp Duties[80]

(vii) Educational Tax Act; and[81]

(viii) Taxes & Levies (Approved list for Collection)[82]

Moreover, the First schedule to the Act[83] which deals with legislation to be administered by the FIRS extends not only to laws but also to regulations, proclamation, government notices or rules issued in terms of tax legislation. It is also the jurisdiction of the tribunal to adjudicate on any tax made from time to time by the National Assembly.It should be noted that jurisdiction is so fundamental because it is the power of any tribunal or court to exercise its judicial or quasi -

[73] FIRS(Establishment)Act,2007
[74] Ibid.
[75] Cap.C21,Laws of the Federation of Nigeria,2004
[76]No.20. of 2011

[77] Cap.P10, Laws of the Federation of Nigeria, 2004.
[78]Cap.V1, Laws of the Federation of Nigeria, 2004.
[79]Cap.C1, Laws of the Federation of Nigeria, 2004.
[80] Cap.S8,Laws of the Federation of Nigeria,2004
[81] Cap.E4,Laws of the Federation of Nigeria,2004
[82] Cap.T2,Laws of the Federation of Nigeria,2004

judicial powers. Therefore, we can agree that jurisdiction of the tribunal is conferred by the Actcreating it and its jurisdiction is limited to the taxes administrated by the FIRS.

Moreover, the FIRS (Establishment) Act, 2007 limited the jurisdiction of the tribunal to hearing only civil matters emanating from the listed tax areas. This means that where the tribunal in the course of exercising its functions and powers by way of adjudication, it discovers evidence of possible criminality; the tribunal is bound to give such information to the Attorney-General of the federation or to that of the State or to the relevant enforcement agency.

2.3Functions and Powers of the Tax Appeal Tribunal.

Before delving into the functions and powers of the tribunal, it is important we acquaint ourselves with some provisions of the Tax Appeal Tribunal (Procedure) Rules, 2010 which provide for the successful operation of the tribunal viz-a-viz with the provisions of the Establishment Act creating it. By Section 59(2) of the Act[84], which is establishment provision provides.*"The Tribunal shall have power to settle disputes arising from the operations of this Act and under the first schedule".* The above section provides for the jurisdiction, powers and functions of the tribunal. See also Paragraph 11(1) and (11) of the fifth schedule to the Act[85], listed the various taxes and laws both in existence and those to be enacted by the National Assembly in future.

It is right to say that the tribunal is created to function and exercise its powers based on the rules the Minister (of Finance) have made. Therefore issues, matters and disputes arising from:

(1) Company Income Tax

(2) Personal Income Tax (as it applies to the urged force and the police, foreign attain officers, residents of FCT and the non-residents

[84] FIRS(Establishment)Act,2007
[85] Ibid.

(3) Petroleum profit Tax

(4) Value Added Tax

(5) Capital Gains Tax

(6) Stamp duty

(7) Taxes and levies (Approved list for collection)

(8) All regulations proclamation government notices or rules issues in terms of their legislation.

From the Establishment Act[86], the first provision that provides for the functions and powers of the tribunal is in paragraph 13(1)[87] and it is headed "Appeals from Decisions of the service, "thus:

> A person aggrieved by an assessment or demand notice made upon him by the service or aggrieved by any action or decision of the service under the provisions of the tax laws referred in paragraph II, may appeal against such decision or assessment or demand notice within the period stipulated under this schedule to the tribunal.

This provision empowers the tribunal to hear and determine Appeals from any action, decision, assessment or demand notice within the time from stipulated by the Act or Rules. See, Order 3 Rule 1[88]. Paragraph 13(2) of the Fifth Schedule to the Act[89] stipulates the time within which to file an appeal. This is succinctly stated by the Tribunal's Rules in Order 3 Rule 2 thus:

> An appeal under these rules shall be filed within a period of 30days from the date on which the action, decision, assessment or demand notice which is being appealed against was made by the service.
>
> Provided that the tribunal may entertain an appeal after the expiration of the said period of 30 days if it is satisfied that there was sufficient cause for the delay.

[86] Fifth schedule to the FIRS(Establishment)Act,2007
[87] Ibid.
[88] Tax Appeal Tribunal (Procedure) Rules 2010
[89] Op. cit.at page 24

Paragraph 14[90] provides for Appeals by the service. Where the FIRS is aggrieved by any tax payer in relation to non-compliance to the provisions of the tax laws, it may file an appeal to the appropriate zone of the tribunal. See Order 3 Rule 3.[91]

In filing any Appeal by either the Appellant or the Respondent, such Appeal must be made in form TAT 1, this is contained in the first schedule to the Rules which have to be accompanied with the prescribed fees.

Note, the Establishment provision to the Act excludes or limits the powers and functions of the tribunal to civil actions. In other words, actions that have any criminalelements such as tax fraud, falsification of tax clearance certificate, tax evasion among others cannot be entertained by the tribunal.[92]The provision states as follows:

> Where in the course of its adjudication, the Tribunal discovers evidence of possible criminality the Tribunal shall be obliged to pass such information to the appropriate criminal prosecuting authorities such as the office of the Attorney-General of the Federation or the Attorney General of any state of the Federation or any relevant law enforcement agency.

Moreover, in the exercise of the tribunal's powers and functions in conducting proceedings in the tribunal, it has power to conduct its proceeding in a manner it deems fit to ensure speedy dispensation of justice.[93]The hearing of the appeal is to be commenced by the appellant presenting documents and statements being relied upon including witnesses to be called[94]. While the respondent or his representative may also present any document or statement he intends to rely upon as well as any witness he so desires to call[95].

[90] Ibid.
[91] Ibid.
[92] Paragraph 13, Fifth Schedule to the FIRS (Establishment)Act,2007.
[93] Order 15 Rule 1, op. cit. at page 25.
[94]Order 15 Rule 2.Ibid.
[95] Order 15 Rule 3 Ibid.

On Admission of evidence at the hearing of an appeal, the tribunal is empowered to admit all relevant evidence, oral or document, adduced by the appellant or the respondent or by any person appearing for them[96].Moreover on the examination of witness, oral examination of a witness during evidence in-chief would only be limited to his written deposition and tendering in evidence all documents or exhibits referred to in his deposition[97], while subsection (2) ensures that there would be cross-examination from the other party and re-examination to ensure fair hearing and justice.On production of additional evidence,[98] states that where the tribunal deems it necessary, it may permit any party to produce additional document or call additional witnesses or file any affidavit to enable it issue proper directions, orders, decisions or ruling.

Another power and function of the tribunal is the grant of application to any party who applies that the tribunals summon any person to give evidence, or tender any document. The tribunal also has the power to order the deposit of such amount of money before the issue of a summons;[99] states that where a witness does not appear to a summons, the tribunal with proof of service of the summons, and entry made on the tribunals record book, may issue a warrant as in Form TAT 7 in the First schedule to the Rules. Looking at the powers and procedures of the tribunal, Paragraph 20(1)[100]provides as follows:

(1) The Tribunal may make rules regulating its procedures.

(2) The tribunal shall, for the purpose of discharging its functions under this schedule, have power to:

I. Summon and enforce the attendance of any person and examine home on oath;

II. Require the discovery and production of documents;

[96] Order 15 Rule 4, Op .cit.
[97] Order 15 Rule1, Ibid.
[98] Order 15 Rule 6 ,Ibid.
[99] Order 7 Rule 2,Ibid.
[100] FIRS (Establishment) Act, 2007.

III. Receive evidence on affidavits;

IV. Call for the exam if witnesses or documents;

V. Review its decisions;

VI. Dismiss on application for default or deciding matters expiate;.

VII. Set aside any order or dismissal of any application for default or any order passes by it expertise; and

VIII. Do anything which in the option of the tribunal is incidental or ancillary to its functions under this schedules

Sub-paragraph 3, goes further to describe the tribunal in the light of its powers and functions in exercising its judicial authority:

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

This in other words, it implies that the tribunal can only exercise civil jurisdiction over tax matters and nothing more. It should be noted also that the rules of the tribunal is similar to that of the Federal High Court (Civil procedure) Rules,2010[101] which provides that written addresses should be filed by parties or their representatives at the close of evidence as may be ordered by the tribunal. Order 18 Rule 2[102] provides that parties or their representatives shall rely upon and adopt their written addresses before a decision. Order 18 Rule 3[103] provides for the tribunal to give 15 minutes to parties to make oral argument to emphasize and clarify their written address except otherwise directed by Court.

[101] Order 18 Rule 1.
[102] Tax Appeal Tribunal (Procedure) Rule, 2010.
[103] Ibid.

Before the tribunal, the Rules make provision of representation by parties or their Representatives. Order 5 Rule 1[104] provides that an Appellant may appear for himself in proceedings before the tribunal, while in a partnership, one partner may appear for it and for a corporate entity, a director, an officer or employee. Order 5 Rule 2[105] allows for persons claiming jointly, severally or in the alterative may be appellants.

> All persons may be joined in an appeal as appellant in whom any right to relief (in respect of or arising out of the same transaction or is in a series of transaction) is alleged to exist whether jointly, severally, or in the alternative, where, if such persons brought separate appeals, any common question of law or fact would arise and judgment may be given for such one or more of the appellants as may be entitled to without any amendment.

Order 5 Rule 3[106], provides that all persons may be joined jointly, severally or in the alternative and judgment may be given against such one or more of the respondents as may be found to be liable according to their respective liabilities without any amendment.

[104] Ibid.
[105] Ibid.
[106] Ibid.

Order 5 Rule 4[107] deals with Non- Joinder,

> where it appears to the Tribunal, at or before the hearing of an appeal that all persons who may be entitled to or who claim some share or interest in the subject matter of the appeal, or who may be likely to be affected by the result, have not been made parties, the tribunal may adjourn the hearing of the appeal to a future day, to be fixed by the Tribunal and direct that such persons be made either appellants or respondents in the appeal.

Order 5 Rule 5[108] provides for representation at all stages of the proceedings before the tribunal by a Legal Practitioner or a Chartered Accountant or an Adviser.The above, presupposes the fact that the tribunal is not a regular court of law where lawyers are the sole ministers in the temple of justice, it includes Chartered Accountants and Tax Practitioners who are assumed to have professional knowledge in Rules and Practice of taxation.

Looking at the powers and functions of the tribunal to determine Appeal, Order 19 Rule 1[109] states that the decision of the tribunal shall be given after the hearing of all evidence and adoption of written addresses by the parties. Order 19 Rule 2[110] states that the decision of the Tribunal may be taken by a majority and the decision has to be recorded whether it was a unanimous or majority decision subject to the fact that where there is a tie, the chairman or presiding member will have to cast his vote.

Moreover, the decision of the tribunal must be recorded in a document except in the case of a consent decision, and such statement would have to contain reasons for the decision. Such decision must also be signed by the chairman. Order 20,[111] provides for the *enforcement of the decisions* of the Tribunal in accordance with the provisions of the fifth schedule to the Act[112].

[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] Ibid.
[111] Ibid.
[112] Ibid.

Finally, on Appeals, Order 24[113] provides as follows:

> "Any party dissatisfied with a decision of the tribunal may appeal against such decision on point of law to the Federal High Court upon giving notice in writing to the Secretary within 30days from the date on which such decision was given".

This provision has attracted lots of criticism as it tends to limit the right of personsin accessing justice even on appeal to the Federal High Court which has the constitutional powers to entertain questions on both points of facts and law. Though, this will be discussed extensively in chapter 3 when discussing the limitations to the powers of the tribunal.

Therefore this dissertation has provided an overview of the powers, functions and composition of the tribunal. Also, there was an examination of the extant legislation that established this tribunal which is the FIRS (Establishment) Act, 2007 especially in Section 59 and the Fifth schedule to the Act. This Act has been made to be the supervising tax legislation over the others. Therefore it is this Act that empowers the TAT to entertain appeals arising from the disputes and conflicts as a result of the operation of not only the Act itself but also to all tax legislations.

The study also examined how the TAT carries out its judicial functions vie its rules, procedure and practice by x-raying significant aspects of the Fifth Schedule, TAT (Procedure) Rules[114] and the TAT (Establishment)Order[115].All these provided the structural, operational and administrative frame-work that enables the TAT to exercise its jurisdiction in the spirit of natural justice, equity and fairness. Lastly, the procedure for appeal against its decision at the Federal High Court which is on point of law was highlighted.

[113] Ibid.
[114] 2010
[115] 2009

CHAPTER THREE

A COMPARATIVE STUDY OF THE JURISDICTION, POWERS AND FUNCTIONS OF THE DEFUNCT BODY OF APPEAL COMMISSIONERS (BAC)&VALUE ADDED TAX TRIBUNAL (VAT-T) AND THE TAX APPEAL TRIBUNAL(TAT).

This chapter would be looking at the BAC and the VAT tribunal which were the predecessors to the TAT. The importance of reviewing the rules of procedure, practice and operations of these tribunals is to help in understanding the limited successes and challenges encountered by these tribunals which led to their proscription andto remind scholars, tax practitioners, legal minds and all stakeholders of the need for a reform in the management of tax disputes and appeals.

This dissertation will look at the various tax legislations that provided for both the BAC (the Personal IncomeTax Act[116], the Companies Income Act[117] and the Petroleum Profit Tax Act[118]) and the VAT tribunal (Value Added Tax Act).[119]Interestingly, these provisions that established these tribunals also provided for their jurisdiction, powers, functions, composition, administrative structure, rules of practice and procedure; and above all their operations.

Very importantly the study shall undertake to provide the limitations to the establishment and operations of the BAC and the VAT tribunal and juxtapose them with the operations of the TAT by doing a comparative analysis. The limitations associated with the operation in jurisdiction, practice and procedure of the BAC and the VAT tribunal led to the abolition of the tribunals as they fell short of the present realities on ground in our tax system.

3.1Establishment of the Body of Appeal Commissioners (BAC)

[116]No.104, 1993(Now No.20 of 2011).
[117] Cap.60, Laws of the Federation of Nigeria, 1990 (Now amended as CAP.C21, L.F.N, 2004).
[118] CAP.354, Laws of the Federation of Nigeria, 2004 (Now amended as CAP.P10, L.F.N, 2004).
[119] No.102 of 1993 (Now CAP. V1, Laws of the Federation of Nigeria, 2004).

The BAC was established as an indoor mechanism to resolve and settle tax disputes between the tax authority and the tax payer. It should be noted that the BAC was established by the various tax law regimes. Therefore in examining the limitation of the BAC, it would be analyzed alongside the various tax laws. Section 59 of the Personal Income Tax Act [120] empowers the State Commissioner of Finance to establish the BAC from among persons which have experience in management of trade or business or in the profession of law, accountancy or taxation on Nigeria, who shall hold office for 3 years. This was also similar to the abrogated provisions of the Companies Income Tax Act, which also empowered the Minister of Finance to establish the Federal Body of AppealCommissioners.

At this juncture, it should be noted that the BAC established by the Minister of Finance at the federal level had jurisdiction and powers to determine issues and matters arising from Companies Income Tax, Petroleum Profit Tax, Personal Income Tax (with respect to members of the Armed Forces, Foreign Affairs, residents of Abuja, the Police and Non-residents),[121]Education Tax and Capital Gains Tax(with respect to Non Individuals).While the BAC at the State level, was to have jurisdiction over the Personal Income Tax, Capital Gains Tax, and Stamp Duties with respect to Individuals).

3.1.1 Procedure for Appeal to the Body of Appeal Commissioners

The Section 60[122] provides that where a taxable person aggrieved by an assessment to income tax made to him, failed to agree with the tax authority as provided under subsection (3) of Section 57 of this Act,[123] such a person may appeal against the Assessment giving notice of 30 days after the date of service of Notice of Refusal of the relevant tax authority to amend the assessment. That is

[120] Op.cit.at page 31
[121] Section 2(b)(i)-(iv) Ibid.
[122]Ibid.
[123]Ibid.

to say that the condition precedent for any tax payer to appeal to the BAC was to follow the provisions of Section 57(2) of the Act[124], by applying to the tax authority through filing a Notice of Objection in writing, to review and revise the assessment, stating the precise grounds of objection to the assessment. This should be made within 30days from the date of service of the Notice of the Assessment. While, subsection (4) of Section 57[125] also provides for the tax authority to appeal to the BAC also giving 30days notice to the taxpayer. It should be noted that Section 62(8)[126] States that the onus of proving that the assessment is excessive is the taxpayer and not the tax authority.

On the powers of the BAC, Section 62(11)[127] states that the Appeal Commissioners may confirm, reduce, increase or annual the assessment or make such order as they seem fit. Therefore, an Appeal against the decision of the BAC, as seen in Section 64 of the Act[128] provides that appeal may be made to the High Court of the State for tax payers within the State tax net, while those within the federal tax net such as individuals within Section 2(b) (i) to (iv) of the Act[129] and Corporate tax payers are to appeal before the Federal High Court. See, Section 39 of the Act.[130]Section 64(11)[131] provides for the Chief Judge of the High Court to make rules for the tendering of evidence, procedure and conduct of Appeals before the High Court. See also Section 39 of the Petroleum Profit Tax Act.[132]

[124]Ibid.
[125]Ibid.
[126]Ibid.
[127]Ibid.
[128]Ibid.
[129]Ibid.
[130]CAP. 60,Laws of the Federation of Nigeria,1990 (Now, CAP.C21,L.F.N,2004)
[131]Ibid.
[132]CAP 354,Laws of the Federation of Nigeria,1990 (Now ,CAP,P10,LFN,2004)

Finally, the BAC's role with regards to Companies Income Tax[133] provides that the constitution, function and operation of the BAC in entertaining appeal under it shall be similar to Companies except for certain modifications. Likewise, Section 38[134] provides for the jurisdiction of the BAC over Petroleum Profit Tax assessment.

At this juncture, it is important to *note* emphatically that the Personal Income Tax Act of No.104[135], has just been amended to reflect the present tax reforms going on in the tax system. The new Amended Personal Income Tax as cited earlier on brought to bear the importance and relevance of the TAT. The newly amended Act substituted the appeal to BAC to TAT. Sections 61 to 67 are deleted from the Principal Act to allow for the smooth operation of the TAT.

3.1.2 Limitations to the Operation of the Body of Appeal Commissioners.

First, the limitation to the BAC in hearing and determining appeals on Companies Income Tax Act and Personal Income Tax Act is the fact that the Latter's provision does not preclude a taxpayer from appealing to the State High Court on issues other than point of law. The implication of the silence of the law on this important issue is that the State High Court may look into issues on point of fact. This implies that the area from which the Federal High Court is precluded under Companies Income Tax may be visited by the State High Court.This is with particular reference to the power of confirmation, reduction, increase or annulment of an assessment by the BAC established by the State Commissioner of Finance.

[133]Op. cit.
[134]Op. cit.at page 33.
[135] 1993

Secondly, the BAC was generally vested with powers *to "confirm, reduce increase or annual the assessment or make such order thereon as they seem fit*".[136] Nevertheless, it could not adequately address tax treaties, review of tax audit, investigations.

Thirdly, there was also a general perception that the BAC was an appendage to the tax authority because of its inauguration by the Minister of Finance, administrative and financial control by the FIRS. This made the tribunal lose its credibility in the eyes of the taxpayer.

The fourth was that proceedings in the BAC were held in camera[137].This gave the impression to tax payers that proceedings may not be fair.

The fifth other limitation the BAC had was that, appeals must be triggered by failure of the tax payer and the tax authority to reach a consensus as to the "amounts of the assessable, total, or chargeable income and the tax charged thereby". The Federal Board of Inland Revenue could not initiate an action against a defaulting tax payer at the BAC but could only file action at the Federal High Court. Only aggrieved tax payers could initiate action against the FBIR at the BAC. The FBIR could only respond to appeals lodged against them at the BAC. This was a serious disparity.

The sixth limitation the BAC had was that the FIRS' Notice of Refusal to Amend was a prelude for a tax payer to file an appeal before the BAC. Failure to get this notice tied down the hands of tax payers. The decision of the newly constituted Tax Appeal Tribunal of recent, have interpreted the Fifth Schedule to the FIRS (Est.) Act,2007 as giving unfettered access to the TAT especially where the tax authority refuses to reasonably issue it within a reasonable time.[138]

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[136] Section 62(11) op.cit.at page 33. See also, Section 55(9) of the repealed Companies Income Tax Act, Cap.C21,Laws of the Federation of Nigeria,2004.See.Arogundade,J.A.(2010),Nigerian Income Tax & Its International Dimension, Spectrum Books,Ibadan, Nigeria, p.364

[137]See Section 62(6) Personal Income Tax Act Cap. P 8; Laws of the Federation of Nigeria, 2004. See also, Section 38(6) of the Petroleum Profit Tax Act, Cap. P. 10; Laws of the Federation of Nigeria,2004.

[138]**See Oando Supply &Trading Ltd v.FIRS (2011) 4TLRN, page 141.**

The limitations associated with the operation in jurisdiction, practice and procedure of the BAC led to the abolition of the tribunal as it fell short of the present realities on ground in our tax system.

3.2Establishment of the Value Added Tax Tribunal

The Value Added Tax Act[139] imposes and charges Value Added Tax on certain goods and services, and provides for the FIRS as the body to administer the assessment and the collection of this type of tax for the federal government. The Second Schedule to the Value Added Tax Act[140] is the provision that provided for the Value Added Tax Tribunal which was created in each zone and called and Zonal VAT Tribunal.

3.2.1Procedure for Appeal to the Value Added Tax Tribunal

The VAT-T was specially created for tax payers who were aggrieved on issues relating to Value Added Tax assessment or demand notice. Such a tax payer may appeal to the tribunal through the Secretary to the tribunal within fifteen days of the service of the assessment, see paragraph 9.[141] Remarkably, the Federal Board of Inland Revenue Service is also empowered by Paragraph 10[142] to also lodge appeal before the VAT-T against any defaulting tax payer. Note that this is a sharp contrast to appeal system of the BAC where only tax payers can file actions before the tribunal while the FBIR may only reply on defense to the appeal.

[139]Cap.V1; Laws of the Federation of Nigeria, 2004 (As amended).
[140]Ibid.
[141]Ibid.
[142]Ibid.

On the powers and functions of the Zonal VAT-T, paragraph 20[143] states that upon hearing of the appeal, it may confirm, reduce, increase or amend such assessment or make such orders as it deems fit.

Though in the appointment and composition of members of the tribunal, there seems to be some similarity between it and the TAT because both tribunals appointed persons versatile in law, accountancy or taxation. We shall now present the defects of the tribunal in seriatim:

3.2.2Limitations to the Operation of the Value Added Tax Tribunal

First, the VAT-T proceeding was held in camera.[144] It provides*, "... All appeals before the tribunal shall be held in camera"*. This gave an impression that there may not be fairness since the deliberations were not in the open.

Another limitation is the fact that the VAT Act[145]created the VAT offences and penalties which limits the powers of the VAT-T to looking at only assessments. This presupposes that only the Federal High Court can entertain criminal elements such as the offences and penalties. The VAT-T does not have the jurisdiction over Part V of the VAT Act.[146]

Thirdly, on the issue of Appeal of its decision to the Court of Appeal, the VAT-T has been declared unconstitutional by the Court of law for usurping the exclusive constitutional powers of the Federal High Court as was decided in **Stabilini Visononi Ltd. v. FBIR**[147].The Court cited Section 251 the Constitution of the Federal Republic of Nigeria, 1999.as follows:

> 1. Notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal

[143]Ibid.
[144]Paragraph 22,Ibid.
[145]Part V paragraph 21 -33,Ibid.
[146]Ibid.
[147](2009) 13 NWLR (Pt.117) P.9

> High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters-
> 2.
> (a) Relating to the revenue of the Government of the Federation in which the said Government or any organ thereof or a person suing or being sued on behalf of the said Government is a party.
>
> (b) Connected with or pertaining to taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal taxation.
>
> The Court of Appeal sitting in Ibadan unanimously held in response to the issue whether the VAT-T was right to have assumed jurisdiction to hear and determine a matter bothering on VAT in view of Section 251(1)(b),[148] that the above provision is unambiguous and therefore excludes all other courts from exercising the jurisdiction conferred on the constitution on the Federal High Court as regards matters relating to the revenue of the Federation. See Ratio 1 "…. The absence of jurisdiction renders a proceeding, no matter how well conducted, a nullity."

The court went further to state that the only way the VAT-T can entertain the action was through a competent amendment. The Court therefore declared Section 20 of the VAT-T Act[149]inconsistent with the Constitution[150] and declared it null and void[151].

Lastly for appeals to lie directly from the VAT-T to the Court of Appeal, such a court or tribunal must be spelt out in the Constitution through a constitutional amendment and not just in the statute creating such court or tribunal tax laws. Therefore, the constitution must spell such as a court of first instance. This the VAT-T never had.

3.3Comparative Analysis between the Body of Appeal Commissioners and the Tax Appeal Tribunal

[148]Constitution of the Federal Republic of Nigeria,1999(As amended in 2011-2012)
[149]Cap.V1;Laws of the Federation of Nigeria,2004
[150]Op. cit.
[151]See also, The Court of Appeal recent decision on the VAT Tribunal establishment provision in **Cadbury Nig. Plc. vs. FBIR (2010)2 NWLR (1179) 561**

In contrast between the TAT as discussed in chapter two and the BAC is the enabling laws creating them. While the TAT is providedfor in the FIRS (Establishment) Act[152] which has been amended to be superior to other tax laws, the BAC during its existence was a creation of the Personal Income Tax Act[153], Companies Income Tax[154] and the Petroleum Profit Tax Act[155].Therefore, the TAT provision in the FIRS (Establishment) Act expressly specifies that the TAT shall exercise jurisdiction over all disputes and controversies arising from the laws in the First Schedule to the Act[156]

Another contrast between the BAC and the TAT is that the latter is vested with wider powers and jurisdiction to cover virtually all Federal tax statutes in the country. See paragraph 11(1) (i)-(iv) of the fifth schedule to the Act[157] which vested in the TAT powers to adjudicate on "disputes and controversies" arising from Companies Income Tax, Petroleum Profit Tax , Personal Income Tax , Capital Gains Tax , Value Added Tax ,Educational Tax, Stamp Duty, Regulations, proclamations, government notices and other future taxes that may be made by the National Assembly. Whilst the BAC had limited jurisdiction over Personal Income Tax, Petroleum Profit Tax, Capital Gains Tax, Companies Income Tax, Educational Tax and the Stamp Duties.

Furthermore, another contrast is the powers, functions and jurisdiction of the tribunal which is enlarged by the Act [158]to determine not only the quantum of an assessment but also to adjudicate on "disputes and controversies". The word "dispute' is used in Personal Income Tax Act[159] and

[152]No .13, 2007
[153]Cap. P 8;Laws of the Federation of Nigeria,2004(Now Amended as No.20 of 2011).
[154]Cap.C21; Laws of the Federation of Nigeria,2004
[155]Cap.P10; Laws of the Federation of Nigeria,2004
[156]FIRS (Establishment)Act,2007
[157]Fifth Schedule to the FIRS (Est.) Act,2007.
[158]Ibid.
[159] Op. cit.at page 38.

Companies Income Tax Act[160] to mean disagreement on assessments. Therefore, if where "controversy" is included then tribunal would not only look at the "quantum of an assessment" but also the "validity of the assessment".

Again, one other contrast between the TAT and BAC is the power to hear and determine a matter in camera or otherwise, which was discretionary power given to the BAC Commissioners. But in this new dispensation, the tribunal is compelled to deliberate and determine tax disputes in an open, fair, just and equitable manner.

One other contrast is the level of administrative and financial autonomy the TAT has over the BAC. Though the BAC was inaugurated by the Minister of Finance which by implication the tribunal ought to be a Parastatal under the Ministry of Finance, the reality on ground as at then was that the BAC had its financial strings attached to the FBIR. But presently the TAT is a separate Parastatal in the Federal Ministry of Finance.

> The TAT Commissioners are to earn remunerations and allowances payable in accordance to the terms and conditions of service as TAT Commissioners which shall be determined by the Revenue Mobilization Allocation and Fiscal Commission[161]

More also, the TAT presently has more zones created for easy access by tax payers and the tax authority. The TAT has 8 zones consisting of 5 Commissioners in each of the zones and the FCT and Lagos, having a total of 40 Commissioners. This was not the case during the BAC which did not have more than 12 Commissioners.

Lastly, in the practice and procedure of the TAT, either the tax payer or the tax authority can appeal to the tribunal unlike the BAC where only the tax payer may appeal and the tax authority

[160]Op. cit.at page 38.
[161]Op. cit.at page 39.

may thereafter respond to the appeal. Where the tax authority wants to appeal on any issue against the tax payer, the tax authority is left with no option than to go to the Federal High Court. In contrast, for qualification of members of the BAC, the provision only provided for knowledge in law, accountancy and taxation. There was no special qualification for the chairman. But for the TAT, the qualification to be a chairman of a TAT zone is that such a person must be a legal practitioner for not less than 15years, having cognate experience in tax legislation and tax matters. For instance, a retired judge is the chairman of the Abuja TAT and a Senior Advocate of Nigeria heads the Lagos Zone of the tribunal.

Taking a look at the similarity and comparison between the TAT and the BAC, both were inaugurated by the Minister of Finance as a dispute resolution mechanism for tax matters within the ambit of the various tax legislations.

The TAT and the BAC were not established to exercise jurisdiction over criminal matters arising from tax evasion or forgery of tax clearance. They were to exercise power and jurisdiction over civil tax issues.Both the TAT and the BAC establishment provisions did not prevent tax matters from going into the Federal High Court. The tax payer was entitled to seek redress anywhere it pleased him. Interestingly, the TAT and the BAC have in their establishment provision provided for at least a Three year term for each Commissioner. While the TAT has a "two – term" tenure.[162]

On access to legal representative, accountant and tax practitioner, this is provided for by both the TAT and the BAC. See, Paragraph 18 of the Fifth Schedule to the Act[163]

Lastly, Appeal lie from the TAT and the BAC directly to the Federal High Court. See Paragraph 23 of the Fifth Schedule to the Act[164] and Section 64 of the Personal Income Tax[165]

[162]Paragraph 4, op. cit. at page 39.See also Section 62(2)(b) Personal Income Tax,Cap.P8;Laws of the Federation of Nigeria,2004

[163]Ibid.

3.4Comparative Analysis between the Value Added Tax Tribunal and Tax Appeal Tribunal.

First of all, the VAT-T in contrast to the TAT was established as a specialized tribunal to exercise limited jurisdiction to sole resolve disputes arising from VAT. The VAT-T was to exercise jurisdiction over VAT which was administered by the then Federal

Board of Inland Revenue now known as the FIRS. While the TAT as it operates today has to exercise unlimited jurisdiction on all subject matter relating to tax legislations as provided by the FIRS (Establishment) Act.[166]

Another contrast between the VAT-T and the TAT is the appointment of a serving public officer as a Zonal VAT tribunal secretary;[167] this is in sharp contrast with the TAT. The TAT establishment provision states that the Secretary together with the staff are appointed and are pensionable.[168]On the issue of Quorum at any sitting by members of the tribunal, the VAT provision provides for FIVE members[169] while the TAT provides for THREE members to form a quorum.[170]

Another contrast is the Appeal procedure against the VAT-Tribunal's decision which provides that appeal may be filed by any party to the Court of Appeal.[171] On the other hand, the TAT provides that appeal against its decision should be made to the Federal High Court. [172]Lastly, a

[164]Ibid.
[165] Op. cit.
[166]No.13,2007
[167] See paragraph 7,Second Schedule of the Value Added Tax Act,Cap.V1;Laws of the Federation of Nigeria,2004
[168]See paragraph 10 Fifth Schedule Op.cit.at page 41
[169]Paragraph 16, Op.cit.
[170]Paragraph 2(4), Op.cit.
[171]See Paragraph 24 Op.cit.
[172]Paragraph 23, Fifth Schedule Op. cit.

contrast is the fact that the VAT-T held its proceedings in camera,[173] while the TAT presently have its sittings in the open to ensure that there is justice and fairness.

Making a comparison, the VAT-T and the TAT were both established by the Minister of Finance through the Federal Gazette,[174] the VAT-T and the TAT have similar characteristics in the appointment and composition of members of the Tribunal. [175]Both tribunals have the Chairmen of each zone to be legal practitioners with at least 15 years post call in practice and with cognate experience in tax matters and legislation. For other members of the tribunal, they must be persons of integrity, adequate practical experience, professional knowledge about law, regulations, norms, practices and operations of taxation in Nigeria and men that have shown capacity in the Management of trade or a retired public servant in tax administration.

Furthermore, both tribunals[176] have a similar term of 3 years in office for members of the tribunal. Though, the TAT provision provides for a second term and an age limit of 70 years.

Lastly, on the powers, function and jurisdiction of the tribunals, both tribunals have the power to confirm, reduce, increase or amend the assessment or make such orders as they deem fit.[177].

In summary,the study has attempted to mirror the BAC and the VAT-T as bodies set up to resolve tax disputes and appeals within the limited sphere of operation. While the Federal government set up one BAC to entertain appeals on tax disputes regarding those taxes(except VAT) collected by the federal government through the FIRS, the states also were to set up their BAC to solve disputes and appeals flowing from Personal Income Tax, Stamp duties, Capital Gains and other taxes not within the federal ambit.

[173]See paragraph 18, Op.cit.
[174] Paragraph 1, Op. cit. See also, Paragraph 1, Op.cit.
[175]See paragraph 3 & 4 Op. cit. See also, paragraph 2 & 3 Op.cit.
[176]Paragraph 4, Op. cit.at page 42 and paragraph 4(b), Op. cit.at page 42.
[177]Paragraph 20,Ibid. and paragraph 15(8) Ibid.

It is also true that the establishment, rules of practice and procedure of the defunct bodies were controversial and their jurisdiction very limited. The tribunals were seen by the tax payers as appendages to the FIRS, hence the loss of confidence in them. The sittings of the tribunal which were held in camera and the controversies surrounding the rules of the VAT tribunal on appeals to the Court of Appeal created more harm than good to the image of these tribunals. The study did some form of comparison between the TAT, the VAT –T and the BAC.

CHAPTER FOUR

CONSTITUTIONAL LIMITATIONS TO THE POWERS AND FUNCTIONS OF THE TAX APPEAL TRIBUNAL (TAT) AS A DISPUTE SETTLEMENT MECHANISM IN NIGERIA.

The creation of the TAT as seen from the provision of the FIRS (Establishment) Act [178] has continued to generate controversy in the light of the Court of Appeal decision in **StabiliniVisononi Ltd v. FBIR**[179]. This case would be dissected and discussed extensively in the latter part of this chapter.The heat of the above decision, currently affects the legitimacy of the present tribunal due to the fact that the factual and legal elements in the case which has to do with the usurpation of the exclusive power and jurisdiction of the Federal High Court in accordance with the Constitution, can be brought to bear in the establishment, composition, jurisdiction and functions of the tribunal. The leverage of time the tribunal has in its operations is due to the pending appeal of the decision of the Court of Appeal in the **StabiliniVisononi ltd v.FBIR**[180]at the Supreme Court. In the previous chapters, a detailed discussion was given as to

[178]No.13, 2007
[179](2009) 13 NWLR (Pt.117) p.9
[180] Supra

the composition, jurisdiction power and functions of the TAT. But in this chapter, the limitations to the aforesaid would be discussed.

The jurisdiction of the TAT is provided in Section 59(2)[181]. It provides that, *"The tribunal shall have power to settle disputes arising from the operation of this Act and under the first schedule."* In other words, the tribunal is to determine disputes arising from the FIRS (Establishment) Act[182] and to adjudicate on disputes and controversies arising from the operation of the tax laws and government regulations as enumerated in the first schedule to the Act[183]. These legislations are not limited to:

1. Companies Income Tax[184]
2. Personal Income Tax[185]
3. Petroleum Profits Tax[186]
4. Value Added Tax[187]
5. Capital Gains Tax[188]
6. Stamp Duties[189]
7. Educational Tax Act(Now Tertiary Educational Trust Fund Act)[190]
8. Taxes & Levies (Approved list for Collection)[191]
9. National Information Technology Development Agency Act[192]

[181] FIRS (Establishment) Act, Op. cit.
[182]Ibid.
[183]Ibid.
[184] CAP.C21, Laws of the Federation of Nigeria, 2004.
[185] No.2 of 2011.
[186] CAP.P10, Laws of the Federation of Nigeria, 2004.
[187] CAP.V1, Laws of the Federation of Nigeria, 2004.
[188] CAP.C1, Laws of the Federation of Nigeria, 2004.
[189] CAP.S8, Laws of the Federation of Nigeria, 2004.See,Ejemeyovwi, I.A.K (2012), Understanding the Stamp Duties Act and the Administration in Nigeria, Christaindom Publications, Abuja, Nigeria. page 11-"The Tax Appeal tribunal has the power to adjudicate on disputes, controversies arising from the Stamp Duties Law. This is in accordance with Section 59(1)(2) of the FIRS (Establishment) Act,2007.
[190] CAP. E4,Laws of the Federation of Nigeria,2004 (Now, Tertiary Education Trust Fund (Establishment) Act,2011
[191] CAP.T2, Laws of the Federation of Nigeria,2004.

10. Deep Offshore And Inland Basin Production Sharing Contracts Act[193]

11. Industrial Development(Income Tax Relief) Act,[194]

12. Venture Capital (Incentives)Act[195]

The FIRS is empowered to also make and enforce Regulations, Proclamations, Government Notices or Rules issued in terms of these legislations. These are for example: Tax Administration (Self-Assessment) Regulations,2011and the Income Tax (Transfer pricing) Regulation No.1,2012.The FIRS (Establishment) Act, also empowers FIRS to enforce any other law for the assessment, collection and accounting of revenue accruable to the Government of the Federation as may be made by the National Assembly from time to time or regulation incidental to these laws, conferring any power, duty and obligation on the service.

Furthermore, the FIRS is empowered to enforce other Enactments or laws imposing collection of taxes, fees and levies collected by other government agencies and companies including signature bonus, pipeline fees, penalty for gas flared, depot levies and licenses, fees for oil Exploration License (OEL), Oil Mining lease (OML), Oil Production License (OPL), royalties, rents (Productive & Non-productive fees for licenses to operate drilling rigs, fees for oil pipeline licenses, haulage fees and all such fees prevalent in the oil industry, More so, the Act[196] empowers FIRS to collect certain levies imposed by the Act of the National Assembly.[197]These are some of the points highlighted against the Tax Appeal Tribunal.

1. The constitutionality of the jurisdiction of the TAT over taxing matters and revenue of the federal government in the light of the exclusive jurisdiction of the Federal High Court over

[192] CAP.N156,Laws of the Federation of Nigeria,2004
[193] CAP.D 3,Laws of the Federation of Nigeria,2004
[194] Act No.22,1971
[195] CAP.V2,Laws of the Federation of Nigeria,2004
[196] Op. cit. at page 44
[197]Okauru,I.O.(2010),A Comprehensive Tax History of Nigeria,Safari Books Ltd,Ibadan,Nigeria,p.124-"In addition to the eight taxes above, the National Information Technology Development Act,2007 empowers the FIRS to administer the National Information Technology Development Levy imposed by Section 12 of the Act."

such matters under Section 251 of the constitution of the Federal Republic of Nigeria,1999(As amended).

2. The constitutionality of the composition of the tribunal whose members are entirely appointed and removable by the minister, an agent of the federal government in the light of Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 (As amended) which guarantees fair hearing, by requiring every tribunal to be constituted in such a way as to secure its independence and impartiality.

3. The constitutionality of the ***ouster clause*** contained in paragraph 8 of the fifth schedule to the FIRS (Establishment) Act,2007 which precludes the Court from inquiring into the validity of the composition of the tribunal or the qualification of members of the tribunal.

4. The validity of the restriction of appeals from the TAT to the Federal High Court only on points of law.

4.1 Limitation to the Jurisdiction of the Tax Appeal Tribunal over Taxation and Revenue Matters of the Federal Government.

The constitutional question that begs for answer in the present tax regime is, whether there is conflict of jurisdiction over tax matters and revenue of the Federal government between the Tax Appeal Tribunal and the Federal High Court? Obviously, the TAT has two twin powers where it derives its jurisdictional powers to function. These are conferred by Section 59 and the fifth scheduled to the FIRS (Establishment) Act. It is interesting to know that both relate to the taxation of the government of the federation which brings it into conflict with the exclusive jurisdictional powers of the Federal High Court under the constitution. Section 251(1)(a) of the

Constitution[198] confers exclusive jurisdiction on the Federal High Court to adjudicate on civil cases and matters relating to the revenue of the government of the federation.

Furthermore, subsection (b) confers exclusive jurisdiction on the Federal High Court in all matters relating or pertaining to taxation of companies and all other bodies subject to federal taxation. In other words, revenue such as taxes, duties, charges among others assessed, collected and accounted for by federal bodies such as the Federal Inland Revenue Service, Nigerian Custom Service, Corporate Affairs Commission, Nigerian National Petroleum Corporation, to mention a few whose issues, matters or disputes regarding taxation arise, the Federal High Court is to exercise jurisdiction over them. Where also Ministries, Departments and Agencies (MDGs) act as collection Agents on behalf of government, the Federal High Court has jurisdiction over them.For emphasis, this Section 251(1) (a) and (b)[199] is cited below.

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

The aforementioned provision seems to be unambiguous as it excludes all other courts from exercising the jurisdiction conferred on the Federal High Court by this section.

[198]Constitution of the Federal Republic of Nigeria,1999(As amended).
[199]Ibid.at page 47

Another argument that has been put forward is that Section 251[200] excludes "any other court" as seen in the provision and that it does not include "tribunal" and this does not imply exclusive original jurisdiction, hence the Federal High Court can exercise appellate jurisdiction over the tribunal as it ismerely an administration body. To counter this argument, it should be noted that the courts listed in the constitution are only superior court of records. Therefore any other court and tribunal not in the constitution is an inferior court. *The question then is – if the constitution excludes other courts from exercising the jurisdiction conferred on the Federal High Court, how much more tribunals?.* It is absurd and incongruous to contend that powers excluded from other superior courts by the constitution can be exercised by inferior tribunals. Therefore it is submitted that the constitution contemplates the exclusion of any other body, whether judicial or quasi – judicial from meddling into the jurisdictional powers conferred on the Federal High Court.[201]

There is another argument that since the tax tribunal is merely an administrative one, Section 251 of the Constitution[202] does not affect its powers and functions in resolving disputes, this argument is misleading because paragraph 20(3) of the fifth schedule[203] provides as follows: "*Proceedings before the tax appeal tribunal shall be deemed to be a judicial proceeding and the tribunal shall be deemed to be a civil court for all purposes*".

[200]Ibid.See also, Moses, E.(2011),The Continuing Reverberation of the Existing Approach to Determining the Exclusive Jurisdiction of the Federal High Court, Nigerian Bar Journal,NBA,Abuja,p29-" Having examined the existing approach to determining the jurisdiction of the Federal High Court and its attendant problems, this writer is of the view that jurisdiction should be determined according to the requirements of each paragraph under Section 251(1) of the 1999 Constitution…"

[201]See **StabiliniVisononi v FBIR (2009)13 NWLR (Pt.117) P.9**

[202]Constitution of the Federal Republic of Nigeria,1999 (As amended in 2010 – 2011) See, Amucheazi, O.D. Jurisdictional Issues in Tax Appeal Tribunal Disputes, Being A Paper Presented at a 5 Day Training Workshop on the Practices and Procedure of the Tax Appeal Tribunal at Hawthorn Suites ,Area 11Garki,Abuja,from February 28 to March 4,2011 at page 12

[203]Federal Inland Revenue Service(Establishment)Act,2007

The above provision shows unequivocally that the tribunal is a judicial body in the exercise of the jurisdiction conferred on it by the FIRS (Establishment) Act.[204]Taking a look at its procedure rules[205], it is vested with powers which the regular court exercises. These are:

(a) Power to summon witnesses and compel their attendance

(b) Require the discovery and production of documents

(c) Receive evidence and affidavits

(d) Have the power to review its decisions.

(e) Dismiss an application for default or deciding matters *exparte*

(f) Set aside any order or dismiss any application for default or any order passed by it *exparte.*

(g) The power to give decisions out as on paragraph 8 of the Fifth schedule-power to conform, reduce, increase or annual the assessment or make orders as it deems fit.

(h) It has the power to do anything which in the opinion of the Tribunal is incidental or ancillary to its function under this schedule.

(i) Its decision can be appealed against to an appellate Court.

(j) And its judgment or award or decision shall be enforced as a judgment of the Federal High Court upon registration of a copy of such award or judgment with the Chief Registrar of the High Court.

In addition, the question of the constitutionality of the provisions of the VAT Act[206] which established the defunct VAT-T (the predecessor to TAT) came up for determination before the Court of Appeal, Ibadan Division in **StabiliniVisononi Ltd v. F B I R**.[207] In this case, the Court of Appeal unanimously declared the provision of Section 20 of the VAT Act of No.102 of 1993

[204]Ibid. Paragraph 20(2)(i) – (viii) of the Fifth Schedule.
[205]Ibid.
[206]No.102 of 1993(Now Section 20, CAP.V1, Laws of the Federation of Nigeria,1999(As amended).
[207] Supra at page 49.

unconstitutional, null and void for infringing and usurping on the exclusive jurisdiction of the Federal High Court under Section 251 of the Constitution[208]as it were. Before the Court, **Four** salient issues were raised and decided upon, these are:

> (1). Whether the value Added Tax Tribunal was right to have assumed jurisdiction to hear and determine this matter, in view of the provision of Section 251(1) of the Constitution of the Federal Republic of Nigeria, 1999 .
>
> On the importance of jurisdiction, the Court of Appeal stated thus;
> Jurisdiction is the pillar upon which the entire case before a Court stands . . . the instant case, the VAT Tribunal had no jurisdiction to entertain the action however well presented. In the circumstance, the ruling of the tribunal was null and void.
> Also looking at ratio 5:
>
> Where the constitution of the Federal Republic of Nigeria has vested jurisdiction on a Court of Law, it cannot be lightly divested. Where it is out intended to be divested, it must be done by clear, express and unambiguous words and by a competent amendment of the constitution.

From the above judicial pronouncements, the Court advised that only constitutional amendment can divest or water down the exclusive jurisdiction of the Federal High Court and give same to the tribunal.

4.1.1. Conflict of the Composition of the Tax Appeal Tribunal in the Light of Section 36(1) of the Constitution

The constitutionality of the composition of the TAT whose members are entirely appointed and removable by the minister, an agent of the federal government in the light of Section 36(1) of the Constitution[209] which guarantees fair hearing, by requiring every tribunal to be constituted in such a way as to secure its independence and impartiality is the bane of contention here. This is in relation to the constitutionality of the tribunal in the composition of its membership. Paragraph

[208]Op.cit.
[209]Constitution of the Federal Republic of Nigeria,1999(As amended)

2 of the fifth schedule [210] provides for the appointment and removal of **ALL** the members of the tribunal by the Minister of Finance. This provision undermines the *principle of fair hearing* under Section 36 (1) of the Constitution of the Federal Republic of Nigeria,1999(As amended).The Section provides thus:

> In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a way as to secure it independence and impartiality.

Impliedly, the tribunal's composition under the FIRS (Establishment) Act, 2007 is inconsistent with the above provision. The Minister is an agent of the Federal Government, the FIRS is either going to be the plaintiff or appellant or the defendant/ respondent as the case may be, yet the members of the tribunal are exclusively appointed and removable by the Minister, who is an agent of the Federal Government. The composition of the tribunal can be seen from the fifth schedule in paragraph 2(1)[211] which provides as follows: *"A tribunal shall consist of five members (hereinafter referred to as "Tax Appeal Commissioners" to be appointed by the minister".*

The provision empowers the Minister of Finance to unilaterally appoint members of the tribunal. This provision is arbitrary because the tribunal has been legislated into an Act of the National Assembly as provided in the FIRS (Establishment) Act,2007 to entertain issues, matters and disputes arising from the implementations of the Act and other tax legislations, the provision violates the spirit of the constitution. See Section 36(1) of the Constitution[212] which provides for the twin pillars of natural justice. The composition offends one of them which states *nemojudex in causa sua*meaning one cannot be a judge in his case-rule against bias.

[210] Federal Inland Revenue Service (Establishment) Act,2007
[211] Op. cit.at page 51.
[212] Op. cit. at page 51.

The composition of the tribunal can hardly be said to be constituted in such a way as to secure its independence and impartiality. The Federal Government, through the Minister, cannot have the power to exclusively appoint and remove members of a judicial tribunal that adjudicates over disputes in which it is always a party. This is a sharp departure from what operates in the judiciary. The judiciary is an independent arm, the National Judicial Council recommends to Mr. President a nominee as a judge at the Federal High Court, Court of Appeal or at the Supreme Court, such nominee's name is sent for confirmation before the senate before the appointment is confirmed and sworn in. From the instance, we can see the Checks and Balance that operates in appointment of judicial officers. It should be noted that once the composition of such a judicial or quasi-judicial body is found defective as per quorum, qualification or appointment; the tribunal itself becomes unconstitutional. See the case of **Madukolum v. Nkemdilim**[213], in a Supreme Court decision, thus:

> Jurisdiction of court is assumed to be present if all the following conditions are satisfied.
>
> (a) If the court is properly constituted with respect to the number and qualification of its members...

The Court has always held that where the composition of a tribunal is defective, it robs the Court jurisdiction. It is therefore submitted that the tribunal lacks jurisdiction to entertain any matter brought before it in the light of Section 36(1)of the Constitution[214]and Paragraph 8 of the fifth schedule[215] which purports ousts the power of the Court of Law to inquire into the validity of the composition of the tribunal.

[213]**(1962) 2SCNLR 341.(Same was cited in Stabilini's case)**
[214]Constitution of the Federal Republic of Nigeria,1999(As amended in 2010 -2011)
[215]Federal Inland Revenue Service (Establishment)Act,2009

4.1.2 The Provision of the *Ouster Clause* seeking to Prevent any Legal Action against the Propriety or otherwise of the Appointment of a Member of the TAT and the Constitution of the Tribunal.

> The question as to the validity of the appointment of any person as a Tax Appeal Commissioner shall not be the cause of any litigation in any court or tribunal and no act or proceeding before the tribunal shall be called into question in any manner on the ground merely of any defect in the constitution of the tribunal.

The above issue stems from Paragraph 8 of the Act [216] which purports to ouster the court of law from entertaining any issue or question that may arise due to any defect in the constitution of the tribunal. This in itself is an *ouster clause* which ousters the inherent jurisdiction of the court of law to exact its powers according to Section 6(6)(a)(b) of the constitution[217].

> Section 6(6) The judicial powers vested in accordance with the foregoing provisions of this section:
>
> (a)Shall extend, notwithstanding anything to the contrary in this constitution, to all inherent powers and sanctions of a court of law;
> (b)Shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person;

The above constitutional provision presupposes that it is the constitutional right, function and duty of the court to exercise its judicial powers in adjudicating and settling disputes between individuals, corporate persons and government in accordance with the constitution[218].The ouster clause in this provision which seeks to prevent any legal action against the validity of the appointment of persons as Tax Appeal Commissioner and the constitution of the tribunal is

[216] Ibid.
[217] Op. cit.at page 53.
[218] See, **United States v Arrendondo (31 U.S) 601 (1832)** collaborates the corollary between the United States" constitution and that of Nigeria. **" the right to determine actual controversies arising between diverse litigants, duly instituted in courts of proper jurisdiction."**

unconstitutional in the light of the above constitutional provision. Citing the judicial authority and *locus classicus*in **KikilomoLakanmi&Anor v. A G,Old Western Region of Nigeria & Others**

From the provision of the Act[219], two salient issues can be identified which the *ouster clause* seems to protect. These are the validity of the appointment of members of the TAT and the defect in the constitution of membership of the Tribunal. On the validity of the appointment of members of the tribunal, the *ouster clause* is inserted by the draftsman to ensure that the action of the Minister in the appointment of tribunal members is not challenged in court. The question therefore is does this clause not constitute an impediment on the wheel of justice to the taxpayer who deserves to ensure that members appointed are men of integrity. Likewise, the clause also seeks to protect any defect that may arise as to the constitution of the tribunal. That is to say that even where there is a gross violation of the provision of the Act[220] which deals with the sitting of members of the tribunal, the tax payer or the tax authority are stopped from challenging the jurisdiction of the tribunal either to the tribunal or to the regular court of law.

Obviously, this means that a challenge of the constitution of the tribunal or validity of the appointment cannot be appealed against in the Federal High Court. Also, it means that this provision contravenes Paragraph 17 of the Act[221] which provides that appeal may be filed against the tribunal's decision on point of law. Impliedly, this means that the issue bothering on the constitution of the tribunal and the validity or otherwise of the appointment can be challenged in the Federal High Court. Furthermore, looking at the judicial pronouncement of the Supreme Court in **Madukolum vs Nkemdilim**[222], the court stated that one of the condition precedent for

[219]Op. cit. at page 53.
[220]Ibid.
[221]Ibid.
[222]Supra.at page 53.

any court or tribunal as the case may be to exercise jurisdiction is for it to be properly constituted with respect to number and qualification of its members. This means that failure in this respect divests the tribunal or court the power to exercise its powers.

To this end, the issue above have raised exposed a serious lacuna in the intent and draftsmanship of the provision of the TAT in the FIRS (Establishment) Act, 2007. Consequently, failure to address this discrepancy will continue to negatively affect the reputation of the tribunal in the eyes of taxpayers and other stakeholders.

4.1. 3 Defects in Appeal Procedure before the Tax Appeal Tribunal to the Federal High Court.

The validity of the restriction under the Act of Appeals to the Federal High Court from the decision of the tribunal to appeals on the point of law. Paragraph 17(1) (2)(3)(4) of the Fifth Schedule[223] provides as follows:

> 17(1) Any person dissatisfied with a decision of the tribunal constituted under this schedule may appeal against such decision on point of law to the Federal High Court upon giving notice in writing to the secretary to the tribunal within 30days after the date on which such decision was given.
>
> (2)A notice of appeal filed pursuant to subparagraph
>
> (1) Of this paragraph shall set out all the grounds of law on which the appellant's case is based.
>
> (3) If the service is dissatisfied with the decision of the tribunal, it may appeal against such decision to the Federal High Court on points of law by giving notice to the secretary within 30days after the date on which such decision was given.

The aforementioned provision bars the right of appeal from decisions of the tribunal to the Federal High Court on points of fact and is therefore questionable in the light of the constitutional powers of the Federal High Court to entertain matters relating to taxation and revenue of the federal Government. It should be noted that the BAC had similar limitation under

[223] Op.cit.at page 53.

the repealed sections of the Companies Income Tax Act. The courts have also interpreted this provision to mean that it is *ultra vires* for Appeal Commissioners to go into issues of law as the restriction is to only determine assessments on point of facts.

Taking a look at the Federal High Court entertaining appeals from the TAT, the proceedings are deemed to be judicial since it is to look into actions and decisions of FIRS in cases of non-compliance. Note, that to enquire on any action of the FIRS whether it is valid or not is a point of law. Therefore, the tribunal is not different from the BAC as both can only "conform, reduce, increase or annul the assessment but cannot determine issues on point of law. Abdulrazaq M. T[224] in discussing the distinction between Facts and Law:

> The distinction between question of facts and law is vital, since the decision of the Commissioners as to the facts is conclusive. To this end, a distinction is often made between findings of "Primary facts" and "conclusion" or "inferences", which may be findings of facts, of law, or "mixed" findings of facts and law. Since the case stated by the Commissioners should set out the primary facts as found, followed by the conclusions arrived at from those, the question for the Court on appeal is whether, given the primary facts stated, the Commissioner were justified in law in reaching the conclusions they did reach.

Therefore the issue of validity of an assessment remains within the jurisdiction of the court of law. See the case of **FBIR v Joseph Rezcallah& Sons. Ltd**[225], where Bairamian F.J, of the Supreme Court opined that "a remedy against illegal assessment" remains within the purview of the court. The dividing line between a decision on point of law and on point of fact could be very thin such as there could arise conflict between a tax tribunal and the court of law which sometimes has led to conflict. From the past, the tax tribunals (BAC & VAT-T) by the various tax laws provision have been precluded from entertaining matters and issues relating on points of

[224]Abdulrazaq M.T.(2010), Revenue Law and Practice in Nigeria, Malthouse Press Ltd, Lagos ,Nigeria, p. 327
[225]50 (1962) I ANLR 1

law. So is the case of the TAT. The court on the other hand have by the same tax laws been precluded from entertaining issues, matters and disputes on points of facts. Notwithstanding, situations have occurred where the commissioners have found it difficult to draw the line of distinction between the two concepts. See the case of **Leeming v Jones** [226] The study has been able to give an exposition on the practice and procedure, structural and operational limitation to the TAT.

In summary, the concept of the TAT though novel, the tribunal is still and will continue to face more legal upheavals predicated on issues on jurisdiction, composition, *ouster clauses*, restrictive clauses and pending cases in the defunct BAC and VAT at the Court of Appeal and Supreme Court.

[226] (1930) AC 415.

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 SUMMARY

This dissertationdiscussed theestablishment of the TAT which is due to the failure of the regular courts to address tax related matters with dispatch, hitherto giving rise to back log of cases resulting to loss of revenue to the Federal Government. This study delved into thechallenges associatedwith thedefunct Body of Appeal Commissioners (BAC) and the Value Added Tax Tribunal (VAT-T) which were predecessors to the TAT which this study highlighted as pitfalls which unfortunately has affected the credibility of the present TAT. This is hitherto discussed in chapter four as constitutional limitations.

The objective of this dissertation examined the various laws that created the Tax Appeal Tribunal, examined the application of the law which gave the tribunal powers and jurisdiction to adjudicate andsettle tax disputes, examined the findings on the application of the law in settling disputes and provide recommendations on the problems and challenges. In justifying this study, it is no doubt that the TAT within the limits of its constitutional challenges, it has been able to

successfully resolve lots of tax disputes speedily, hence increasing revenue for government and has become a tool for tax compliance and enforcement.

Moreover, in examining the predecessor tribunals, the limitations to the powers and functions of the BAC and the VAT-T was highlighted. The BAC was created to determine issues and matters that may arise from the implementation of the Personal Income Tax, Companies Income Tax, Capital Gains Tax and the Petroleum Profit Tax within the federal level, the VAT was to only take care of Value Added Tax matters. This dissertation specifically elaborated on the case of **StabiliniVisononi v.FBIR**[227] in its land mark decision declared the powers of the tribunal as ultra vires, usurping the exclusive powers of the Federal High Court, hence the abolition of these tribunals.The writer also did a comparative analysis between the BAC and the TAT and between the VAT –T and the TAT. It was therefore concluded that there was a disparity between the TAT and the BAC and VAT-T as the TAT now has a wider jurisdiction making the tribunal to assuage the defunct tribunals.

Though there seems to be some distinction between the TAT and the dissolved tribunals, the major issues that arose as a threat to the survival of the dissolved tribunalsstill pose as a threat to the TAT in form of four constitutional limitations which would be discussed as findings in this dissertation.

5.2 CONCLUSION

The following are the findings from this work:

1. The first finding this research has brought out is the conflict of jurisdiction between the Tax Appeal Tribunal and the Federal High Court over tax matters and the revenue of the

[227] **(2009) 13 NWLR (Pt.117) p.9**

Federal government in the light of Section 251 of the Constitution[228]Obviously, Section 251(1)(a) of the Constitution[229] confers exclusive jurisdiction on the Federal High Court to determine civil cases and matters relating to the revenue.Furthermore, subsection (b) confers exclusive jurisdiction on the Federal High Court in all matters relating or pertaining to taxation of companies and all other bodies subject to federal taxation. The aforementioned provision seems to be unambiguous as it excludes all other courts from exercising the jurisdiction conferred on the Federal High Court by this section. The constitution contemplates the exclusion of any other body, whether judicial or quasi – judicial from meddling into the jurisdictional powers conferred on the Federal High Court.This is to say that the provisions of the TAT which unequivocally describes the tribunal as a judicial body in the exercise of the jurisdiction conferred on it by the FIRS (Establishment), 2007[230]is unconstitutional, null and void for infringing and usurping on the exclusive jurisdiction of the Federal High Court under Section 251 of the Constitution.[231]It is therefore submitted that only a constitutional amendment can divest or water down the exclusive jurisdiction of the Federal High Court and give same to the tribunal.

2. Theconflict of the composition of the TAT in the light of Section 36(1) of the Constitution of the Federal Republic of Nigeria (As amended**).**This is in relation to the constitutionality of the tribunal in the composition of its membership. This provision undermines the *principle of fair hearing* under Section 36 (1) of the Constitution[232]. Impliedly, the tribunal's composition under the Act [233] is inconsistent with the above provision. The Minister is an agent of the Federal Government, the FIRS is either going to be the plaintiff or appellant or the defendant/ respondent as the case may be, yet the members of the tribunal are exclusively appointed and removable by the Minister, who is an agent of the Federal Government.

[228] Constitution of the Federal Republic of Nigeria,1999 (Amended in 2011-2012)
[229] Ibid.
[230]Ibid. Paragraph 20(2)(i) –(viii) of the Fifth Schedule to the Act.

[232]Op.cit.at page 60
[233]Fifth Schedule to the FIRS (Est.) Act, 2007.

The provision empowers the Minister of Finance to unilaterally appoint members of the tribunal. This provision is arbitrary because the tribunal has been legislated into an Act of the National Assembly as provided for in the FIRS (Establishment) Act[234] to entertain issues, matters and disputes arising from the implementations of the Act and other tax legislations, the TAT cannot be seen as a mere administrative tribunal but a tribunal with judicial powers.. The composition offends the principle that states: *nemojudex in causa sua*meaning: one cannot be a judge in his case-rule against bias. The composition of the tribunal can hardly be said to be constituted in such a way as to secure its independence and impartiality. It should be noted that once the composition of such a judicial or quasi-judicial body is found defective as per quorum, qualification or appointment; just like this case, the tribunal itself becomes unconstitutional.

3. The third finding relates to the *ouster clause* contained in paragraph 8 of the Fifth Schedule to the Act[235].purporting to preclude any court of law from inquiring into the validity or otherwise of the composition of the tribunal or qualification thereto.
   This research concludes that this is unconstitutional and undermines the sanctity of the principles of checks and balances as entrenched in our presidential and federal constitution because where that the validity of the appointment of members of the TAT and the defect in the constitution of membership of the Tribunal cannot be challenged in the court of law, it becomes the precursor to anarchy.

   This clause however, constitutes an impediment on the wheel of justice to the taxpayer who deserves to ensure that members appointed are men of integrity.Obviously, this means that a challenge of the constitution of the tribunal or validity of the appointment cannot be appealed against in the Federal High Court or in any superior Court of Records.

   To this end, the issue above has exposed a serious *lacuna* in the intent and draftsmanship of the provision of the TAT in the FIRS (Establishment) Act[236]. Consequently, failure to

[234] Op. cit. .
[235] Op. cit. at page 61.
[236]2007.

address this discrepancy will continue to negatively affect the reputation of the tribunal in the eyes of taxpayers and other stakeholders.

4. This finding relates to the restriction of Appeals from the TAT to the Federal High Court only on points of law.The aforementioned provision bars the right of appeal from decisions of the tribunal to the Federal High Court on points of fact and is therefore, questionable in the light of the constitutional powers of the Federal High Court to entertain matters relating to taxation and revenue of the federal government.

   Moreover, where the Federal High Court entertains appeals from the TAT, the proceedings are deemed to be judicial since it is to look into actions and decisions of FIRS in cases of non-compliance. Note, that to enquire on any action of the FIRS whether it is valid or not is a point of law. Therefore, the tribunal is not different from the defunct BAC as both can only "conform, reduce, increase or annual the assessment but cannot determine issues on point of law. To this end, this research has come to a conclusion that maintain the present position will do more injustice to the tax payers as it would lead to plethora of appeals against the decision of the Federal High Court

5.3 Recommendations

In the light of the above findings, the following recommendations are considered pertinent:

1) **The Amendment to the Federal Inland Revenue Service (Establishment) Act, 2007 and the Federal High Court Act of 2005 to make Tax Appeal Tribunal a dispute resolution body under the Federal High Court.**

This dissertationrecommends an amendment to the FIRS (Establishment) Act, 2007making the TAT a tax dispute resolutionCentre to be known as Tax Appeal Division of the Federal High Court. This means incorporating the TAT as a division acting under the supervision of the Chief

Judge of the Federal High Court. The Chief Judge will be empowered by both Acts [237]to appoint experienced Judges and non-judges who are called Assessors comprising of lawyers of about 10years post call and tax practitioners of about 10 years or more to sit with the judges. These non-judges would be called Tax Appeal Commissioners.

Therefore, the issue of constitutional conflict between the Federal High Court and the present TAT will be a thing of the past since the tribunal will be chaired by both serving judges of the Federal High Court and non-serving judges.There is also a recent decision against the TAT by the Federal High Court in the unreported matter between **TSKJ II Construces Internationals Sociadade LDA v.Federal Inland Revenue Service**[238] wherein **Justice A.F.A Ademola** relying on the aforementioned cases and their decisions held that the TAT is operating illegally because its existence is an affront on the jurisdiction of the Federal High Court, citing Section 251(1)(a)&(b).Therefore, it is incumbent on all stakeholderssuch as lawyers, tax practitioners, accountants and tax payers put pressure on officials from the Ministries of Justice and Finance so that as a matter of urgency they send an Executive bill of amendment to the National Assembly to amend both the FIRS (Establishment) Act 2007 and the Federal High Court (Amendment) Act,2005 to ensure that the TAT is part of the judicial system operated based on administrative and

Economic exigency.

2 Amendment to Paragraph 2(1) of the Fifth Schedule to the FIRS (Establishment) Act, 2007 which relates to the composition of the TAT as it offends the 1999 Constitution.

[237] Federal Inland Revenue Service (Establishment)Act 2007 and the Federal High Court Act,2004

[238] **(Unreported case) The Court in its judgment relied on the Court of Appeal Decision in StabiliniVisononi vs. FBIR (Supra) and Cadbury Nig. PLC vs. FBIR (supra).**

This dissertation in its findings highlighted the unilateral powers of the Minister of Finance to appoint and remove a member of the TAT in accordance with the FIRS(Establishment) Act[239]. This in its self offends Section 36 of the constitution[240] and the rule against bias. However, due to the sensitive nature of this tribunal which has been empowered to exercise judicial powers in settling tax disputes, it would be recommended that anamendment be made to the FIRS Act to allow a reputable Recruitment firm to advertise and shortlist the candidates for Tax Appeal Commissioners and to send the successful candidates to a joint committee of officials from the Ministry of Finance and Justice which will be co – chaired by the Permanent Secretaries of both Ministries. The Federal Executive Council will then ratify the successful candidates who will then be posted to the Tax Appeal Division of the Federal High Court as Assessors. This will reduce political interference in the appointment method and secure the independence and integrity of the TAT while promoting Checks and Balances in the tax tribunal system.

3. The Removal of the *Ouster Clause* in Paragraph 8 of the Fifth Schedule to the FIRS (Establishment) Act which prevents any legal action as to the validity of the appointment of any member of the Tribunal

This Research suggests that the *ouster clause* inserted into the FIRS (Establishment) Act[241] in preventing any legal action as to the validity of appointment of any member of the tribunal or challenging the constitution of the tribunal before the tribunal or in any other court is not only worrisome but draconian.

This means that failure in this respect divests the tribunal or court the power to exercise its powers. Therefore in other to avoid this provision from being challenged before the appellate

[239] Paragraph 2 of the Fifth Schedule to the FIRS (Est.) Act,2007.
[240] Constitution of the Federal Republic of Nigeria,1999(As amended in 2011 – 2012)
[241] Op. cit.at page 64

courts, it would be expedient for an amendment be made by the National Assembly in deleting Paragraph 8 to the Fifth Schedule [242] in order to instill confidence in the tribunal.

4. Amendment to Paragraph17 of the Fifth Schedule to the FIRS (Establishment)Act with regards to Appeal on both Law and Facts to the Federal High Court.

The amendment to this provision cannot be overemphasized. Though appeals from the tribunal lies directly to the Federal High Court on points of law,the enabling Act of the TAT does not preclude anyone from commencing an action from the Federal High Court.. It therefore implies that the tribunal is expected to limit its self on ascertaining the facts and applying the law to it. And therefore, Federal High Court can only review the decision of the tribunal on points of law. Therefore this work suggests, that appeal to the Federal High Court should be on both facts and law so that where there is need for the court to examine certain factual evidence, the court will have the discretion to so do to arrive at a just and fair decision.

Therefore, wherein the first recommendation 1 in this dissertation is implemented and the TAT is now the Tax Appeal Division of the Federal High Court, the court may exercise the power to hear appeals on both facts and law in carrying out its judicial function as the court of first instance.

In summary, this dissertation has successfully undertaken a holistic examination into the establishment, powers, functions and jurisdiction of the TAT as provided in the FIRS (Establishment) Act[243], which though has expanded the frontiers of tax dispute settlement and engendered compliance, nevertheless this research was able to outline the constitutional and procedural defects in the operation of the TAT. There is no doubt about the intention of the

[242] Ibid..
[243] 2007.

federal government in trying to reassure Nigerians and foreign investors of the presence of a tax system which is equitable and reliable. Hence the need for a tax tribunal which ought to be efficient and effective in quick disposal of tax disputes.

On this note, it can be seen that both the law court and the tribunal can be an indispensable tool in any justice delivery system. This Research has therefore examined the TAT as a tribunal in the Nigeria's justice delivery system. Therefore all stakeholders must ensure that the present loopholes in the operation of the tribunal are adequately corrected for an efficient tax system that will ensure that taxation becomes a pivot of Nigeria's development.

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