AN EVALUATION OF THE RULES OF PRACTICE AND PROCEDURE OF TAX APPEALTRIBUNAL IN NIGERIA

BY

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BEING A THESIS SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES, AHMADU BELLO UNIVERSITY, ZARIA, IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF MASTER OF LAWS DEGREE-LL.M.

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MAY, 2015

DECLARATION

I hereby declare that this Thesis titled: ***"An Evaluation of the Rules of Practice and Procedure of the Tax Appeal Tribunal in Nigeria"*** has been carried out by me in the Department of Commercial Law. The information from other literary publications has been duly acknowledged in the text and a list of references provided. No part of this Thesis has been previously presented for the award of Master of Laws Degree – LL.M, Diploma or any higher degree at this or other institution.

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CERTIFICATION

This Thesis titled: ***"An Evaluation of the Rules of Practice and Procedure of the Tax Appeal Tribunal in Nigeria"*** meets the regulations governing the award of Master of Laws Degree – LL.M. of Ahmadu Bello University, Zaria and is approved for its contribution to legal knowledge and literary presentation.

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DEDICATION

This Thesis is dedicated to my Wife, Mrs Olaocha Adams for her love and support throughout the period of this exercise and my parents, Chief & Mrs. Medrack Arigunwo Adams for their unflinching commitment to my career development.

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LIST OF ABBREVIATIONS

A.C	-	Appeal Cases
All E.R.	-	All England Law Reports
All F.W.L.R.	-	All Federation Weekly Law Reports
All N.L.R	-	All Nigeria Law Reports
Cap.	-	Chapter
CFRN	-	Constitution of the Federal Republic of Nigeria
Ch.D.	-	Chancery Division Law Reports
F.S.C.	-	Federal Supreme Court Reports
F.W.L.R.	-	Federation Weekly Law Reports
FIRS	-	Federal Inland Revenue Service
K.B	-	King's Bench Reports
N.L.R.	-	Nigeria Law Reports
N.M.L.R.	-	Nigerian Monthly Law Reports
N.N.L.R.	-	Northern Nigeria Law Reports
N.S.C.C.	-	Nigerian Supreme Court Cases
N.S.C.Q.R.	-	Nigerian Supreme Court Quarterly Law Reports
N.W.L.R.	-	Nigeria Weekly Law Reports
NORA	-	Notice of Refusal to Amend
Q.B	-	Queen's Bench Reports
S.C.	-	Supreme Court Cases.
S.C.N.J.	-	Supreme Court of Nigeria Judgments
S.C.N.L.R.	-	Supreme Court of Nigeria Law Reports

T.L.R.N. - Tax Law Report of Nigeria

W.A.C.A. - West African Court of Appeal

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ABSTRACT

The role of tax as a major source of income for government cannot be overemphasized. The imposition, collection and administration of tax are matters which are within the exclusive domain of positive law. Not a kobo would be levied on any citizen unless there is a clear Statute that provides for such a levy. The courts have also construed taxing statutes strictly allowing no room for any intention or assumptions. These factors have made tax disputes between the tax authorities and taxpayers a daily occurrence. The Tax Appeal Tribunal was, therefore, established under the Federal Inland Revenue (Establishment) Act, 2007 to provide a platform for a cheaper, friendly and timely resolution of the inevitable disputes that would arise from the implementation of the various tax laws. To guide the Tax Appeal Tribunal in its function, the Tax Appeal Tribunal (Procedure) Rules, 2010, the main focus of this exercise, was made. This work evaluates the Tax Appeal Tribunal (Procedure) Rules 2010 and demonstrates the extent to which it can assist in the attainment of the lofty goals of quicker, cheaper and efficient resolution of tax disputes. Using the doctrinal methodology of research, a number of other Rules of Courts were compared to demonstrate that the Tribunal may not achieve the desired objective having regard to the many lacuna in the Rules as constituted. A good number of the lacuna have been identified here, chiefly amongst them is the very enormous powers of the Minister of Finance to solely appoint virtually all the Personnel of the Tribunal without any input or supervision from any other arm of government. Another major problem relates to the very scanty provision for a dissatisfied party to exercise his constitutional right of appeal to the Federal High Court. There is also the problem of apparent conflict in the exercise of the Tribunal's discretion to enlarge time within which to challenge an assessment and when same becomes final after service of demand notices. A great effort has been spared to review these lacuna with corresponding practicable suggestions on how best to address some of the problems so identified. In arriving at conclusions here, this work has drawn from a wide range of authorities and views expressed in both primary and secondary materials. It is hoped that the views expressed here would be found useful by all category of readers including tax administrators and practitioners and above all engender further research in this aspect of law.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 INTRODUCTION

The issue of taxation has often generated controversies between the tax authorities on one hand and the taxpayers on the other. These controversies or disputes generally stem from the very nature of tax itself and the peculiar way in which taxing Statutes are interpreted by the Courts.

Taxes are levies imposed under the authority of the legislature and they are levied by a public body for public purposes.[1] Tax is created by law and levied on individuals, incomes, commodities and transactions to yield public revenue that affords government the opportunity to offer protection and other socio – economic amenities to the citizens.[2] It is one of the sources of income for government.[3] Taxes are imposed by Statutes only.[4] The issue of tax is consequently outside the ambit of common law. Therefore, for any individual to be chargeable to tax there must be a clear link between the charging provisions and the intended taxpayer. The link must be direct, not inferential.[5] The insistence on the direct link between the charging provisions and the intended taxpayer has been a source of sustained controversies between the taxpayers and the tax authority.

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[1] Lawson v. Interior Tree Fruit and Vegetable Committee of Direction (1931) SCR 357. Per Duff J.

[2] Abdulrazaq, M.T., Principles and Practice of Nigerian Tax Planning and Management, Batay Law Publications Ltd. Ilorin (1993) P.1

[3] Farayola, G.O., Guide to Nigerian Taxes, All Crowns Ltd, Lagos (1987) P. 3

[4] Tenant v. Smith (1892) A.C. 150. It was held that no person must be made to pay tax except the taxing Acts specifically provided for it ; Also in Addax Petroleum Development (Nig.) Ltd v. FIRS. (2012) 7 T.L.R.N. 74, @ 85, the Tax Appeal Tribunal held that "payment of tax or who is entitled to pay tax is an issue of law not of agreement, contract or compromise."; Ayua, I.A. Nigerian Tax Law, Spectrum Law Publishing Ltd. Ibadan (1996) P.46.

[5] Abdulrazaq, M.T., Revenue Law And Practice In Nigeria, Malthouse Press Ltd. Lagos (2010), p.11

The Nigerian tax system has a number of inherent challenges. The challenges range from the administration of the tax system itself, tax collection, assessments, apathy on the part of the citizenry, widespread corruption and absence of competent Tax Administrators.[6] Another huge challenge is the objective of designing the tax system in such a manner that is acceptable to what Adam Smith in the 'Wealth of Nations' called the 'maxims of a good tax system.'[7] All of these have made tax disputes inevitable. It is for the purpose of achieving an effective, cheap and speedy system of resolving tax disputes that the Tax Appeal Tribunal was established under the Federal Inland Revenue Service (Establishment) Act, 2007.[8] The FIRS (Establishment) Act also empowered the Minister of Finance to make rules of practice and procedure that will regulate proceedings before the Tax Appeal Tribunal.[9] Pursuant to the powers enabling him in that behalf, the Former Minister of Finance, Mr. Olusegun Aganga made the Tax Appeal Tribunal (Procedure) Rules, 2010 on September 1, 2010. The "Tax Appeal Tribunal Rules are like the typical High Court Civil Procedure rules, which most common law jurisdictions are used to."[10]

This work, therefore, appraises critically, and analyses the entire rules of practice and procedure of the Tax Appeal Tribunal with a view to explaining the process for tax dispute resolution in Nigeria.

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[6] Asada, D. The Administration of Personal income Tax in Nigeria: Some Problem Areas. @ www.dspace.unijos.edu.ng/bitstream/10485/263/1/cj106-119.pdf last visited on 18/2/13.

[7] Nlerum, F.E., Reflections on the Attitude of the Courts to Tax Incentive Mechanism in Nigeria. NIALS Journal of Business Law, Maiden Edition, Pp. 111 -157. See also www.nials-nigeria.org/journals/Dr. Francisca E. Nlerum us.pdf. visited on 31/11/12; Nlerum F.E. , Law and Ethics in Today's Tax System: Recommendations for a Competitive Tax Regime for the Nigerian Tax Appeal Tribunal. A Paper presented at a 2 day Interactive Workshop on Tax Laws, Ethics and Judicial Interpretation for Superior Court Judges and Tax Appeal Commissioners held at Transcorp Hilton Hotel, Abuja, from November 5 - 6, 2013 at Page.5.

[8] CAP F36 Laws of the Federation of Nigeria, 2004 as amended by Act No. 13 of 2007. (The FIRS Act)

[9] Para 21, 5th Schedule, Federal Inland Revenue Service (Establishment)Act, 2007

[10] Amasike C.J. Brief Notes on the Adjudication of Tax Disputes in Nigeria: The Tax Appeal Tribunal Perspective. www.iatj.net/congress/documents/Adjudication of Tax Disputes in Nigeria-prof.c.j.Amasike.pdf. P.5.

1.2 BACKGROUND OF THE STUDY

As shown above, tax disputes are inevitable. That being the case, the only reasonable option is to find a way of resolving the disputes effectually and expeditiously. This is the prime object of the Tax Appeal Tribunal (Procedure) Rules, 2010 which is examined in this study. Rules of Court generally aid the speedy dispensation of justice. The Supreme Court recently confirmed this hallowed principle of law in *Fidelity Bank Plc v. Chief Andrew Monye,*[11] Adekeye, JSC said:

> Rules of Court touch upon the administration of justice. They are promulgated to regulate matters in court and to assist parties in the presentation of their cases within a procedure made for the purpose of fair and quick dispensation of justice. The courts have leaned heavily on the side of doing justice. Strict compliance with the rules makes for quicker administration of justice. The rules must be understood as made with that fundamental principle at the background. Whatever the case may be in the court proceedings, the rules are no more than an adjunct to the course of justice. The court must never interpret a rule of court to defeat access to justice which is guaranteed by the constitution.[12]

Consequently, the essence of this study is to undertake a comprehensive evaluation of the Tax Appeal Tribunal (Procedure) Rules 2010 with a view to determining the extent it can assist in the attainment of the lofty goals of quicker, cheaper and efficient resolution of tax disputes as heavily touted by its proponents. In this connection, the work shall unearth some of the weaknesses in the rules and proffer solutions on how to improve upon them. It shall also review the entire Tax Appeal Tribunal Rules vis-à-vis the regular High Court rules in identifying the lacuna and suggesting the options to fill in the gaps. It must be noted from the outset that the Tax Appeal Tribunal Rules, like any other rules of court are mere handmaids for a smooth administration of justice and cannot be used as an engine of injustice.[13] The work shall be guided

[11] (2012)All F.W.L.R. (Part 631) 1412
[12] Ibid. P. 1439, para E-G.
[13] FSB v. Emeano (2000) 3 N.S.Q.R. 1.

by the preceding immutable position of the law in the evaluation of the Tax Appeal Tribunal Rules.

1.3 STATEMENT OF PROBLEM

Over the years, the Federal Government has made consistent efforts at ensuring that tax disputes are resolved rather speedily without going through the whole hog of litigation in our regular Courts which are bugged down by technicalities, unending adjournments, over-crowded case dockets, rigid and mechanical justice system. Tax dispute relates to revenue. It is thus in the interest of both the tax authorities and the taxpayer to have tax disputes resolved effectively and speedily. The challenges of the defunct tax dispute resolution system were multifaceted. Even the present Tribunal is not immune from these challenges which are summarized below:

a. there is an apparent conflict on the powers to make rules of practice and procedure of the Tax Appeal Tribunal. The Federal Inland Revenue Service (Establishment) Act, 2007 vests the powers in this regard on the Tribunal itself and the Minister of Finance at the same breadth;[14]

b. the powers vested on the Minister of Finance to solely appoint both the Chairman, the Tax Appeal Commissioners and all the support staff of the Tribunal portend serious danger to the objectivity of the Tribunal and send a wrong signal to the public. In effect, the safeguard provided for the Tax Appeal Commissioners appear very insufficient to shield the Commissioners from the arbitrary whim and caprices of the Minister of Finance who may want to dismiss them for any wrong doing real or perceived;

[14] Cf: para 20(1) and para 21, 5th Schedule, FIRS Act, 2007.

c. the Federal Inland Revenue Service (Establishment) Act, 2007 has been judicially interpreted to have abolished the requirement for "Notice of Refusal to Amend" (NORA) as a condition precedent to filing appeal before the Tax Appeal Tribunal contrary to established judicial tradition and this has a grave potential of denying the Service (FIRS) the opportunity to correct human errors that may have led to grievance on the part of taxpayers;

d. there seems to be an avoidable contradiction between paragraph 13 (2) and 13(3), 5th Schedule to the Federal Inland Revenue Service (Establishment) Act. While the one vests jurisdiction on the Tax Appeal Tribunal to enlarge time within which an aggrieved person may file appeal, the other appears to foreclose the Tribunal from exercising such discretionary powers. The extracts of the provisions of paragraph 13, 5th Schedule to the FIRS (Establishment) Act are reproduced hereunder for ease of reference:

> 13(1) 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 to in paragraph 11, may appeal against such decision or assessment or demand notice within the period stipulated under this Schedule to the Tribunal.
>
> 13(2) An appeal under this schedule shall be filed within a period of 30 days from the date on which a copy of the order or decision which is being appealed against is made, or deemed to have been made by the Service …provided that the Tribunal may entertain an appeal after the expiry of the said period of 30 days if it is satisfied that there was sufficient cause for the delay.
>
> 13(3) Where a notice of appeal is not given by the appellant as required under subparagraph (1) of this paragraph within the period specified, the assessment or demand notices shall become final and conclusive and the Service may charge interests and penalties in addition to recovering the outstanding tax liabilities which remain unpaid from any person through proceedings at the Tribunal.

e. Order XXIV[15] of the Tax Appeal Tribunal Procedure Rules is too scanty to be of any meaningful assistance to a party who desires to appeal against the decision of the Tribunal to the Federal High Court. It merely states that a dissatisfied party may appeal against the decision of the Tribunal on a point of law to the Federal High Court thereby reducing the right of appeal on a point of law only. Besides, it fails to specify the Form the notice would take and the contents thereof.[16] This is a serious problem that has created an avoidable uncertainty in the exercise of appellate jurisdiction by the Federal High Court.

It is against this backdrop that this exercise examines the mechanism for resolving tax disputes via the Tax Appeal Tribunal window. This is achieved with the aid of Statutes, case laws, rules of practice and procedure, amongst others. It is hoped that it will help obliterate or reduce the frustrations in resolving tax disputes, minimize the energy, time and resources expended in that regard and above all expand our Tax law jurisprudence.

1.4 OBJECTIVES OF THE STUDY

This study principally evaluates the rules of practice and procedure of Tax Appeal Tribunal in Nigeria. The objectives therefore are as follows:

a. to scrutinize the operative rules of practice and procedure for the resolution of tax disputes and demonstrate the apparent power contest in the rules making powers between the Tribunal and the Minister of Finance;

[15] Order XXIV deals with appeals to the Federal High Court.
[16] Cf: Order 6, Rule 2, Court of Appeal Rules, 2011.

b. to identify the problems, the gaps and complexities associated with the system and in particular, the enormous powers of the Minister of Finance over the Tax Appeal Commissioners and their support staff;

c. to identify and explain the method (s) of initiating legal actions in the Tax Appeal Tribunal and the place of "Notice of Refusal to Amend (NORA)" as a prerequisite for filing appeals before the Tribunal;

d. to examine the apparent avoidable contradiction between paragraph 13 (2) and 13(3), 5th Schedule to the Federal Inland Revenue Service (Establishment) Act; and

e. to highlight how a party sued at the Tribunal may enter appearance to defend the suit. How the parties may present their respective cases and how a party dissatisfied with the decision of the Tribunal may pursue his constitutional right of appeal and in which Court he can file his appeal. It also makes useful suggestions and recommendations at the end of the exercise.

1.5 SIGNIFICANCE OF THE STUDY

The relevance of this study cannot be over emphasized. Specifically, this study will be relevant to Taxpayers, tax Lawyers, tax Advisors and Consultants, legal Practitioners generally, Legislators, Judges, Members of the Tax Appeal Tribunal, Law Teachers, Law Students, Researchers and the general public. It is one thing to know the existence of one's rights and it is another to know how to go about ventilating these rights and in the proper forum. This difficulty as it relates to tax has aggravated the incidence of tax evasion and avoidance in the past. This is where this study makes itself inevitable as it seeks to graphically explain the mechanism for addressing disputes arising from the application and enforcement of tax laws. This study will

help the readers to ease off the accumulated anger and frustration against the Tax Authority as they would now be properly advised on how to go about ventilating their grievances.

1.6 SCOPE OF THE RESEARCH

This study focuses on the evaluation of the rules of Practice and Procedure of Tax Appeal Tribunal in Nigeria as a system for the resolution of tax disputes under the FIRS Act, 2007 in particular. Accordingly, it is limited to the provisions of the FIRS (Establishment) Act, 2007 as it affects the resolution of tax disputes. To that extent, laws providing for the resolution of other kinds of disputes other than tax disputes or laws providing for the resolution of tax disputes at the States level shall not be considered in this study.

1.7 RESEARCH METHODOLOGY

The research methodology used in this study is the Doctrinal method. This involves the analyses of key primary sources such as the Federal Inland Revenue Service (Establishment) Act, 2007, the Tax Appeal Tribunal (Procedure) Rules, 2010, as well as Rules of Practice and Procedure of other Courts such as the State High Courts, Federal High Courts and the Court of Appeal. Applicable case laws are also analyzed. The study also considered a number of secondary sources such as Textbooks, Journals, Newspapers, Magazines and publications on relevant websites.

1.8 LITERATURE REVIEW

Ejemeyovwi[17] has argued that the Tax Appeal Tribunal is unconstitutional in that it usurps the exclusive jurisdiction of the Federal High Court. He founded his argument on section 251[18] of the Constitution of the Federal Republic of Nigeria and the decision of the Court of Appeal in *Stabilini Visinoni Limited v. Federal Board of Inland Revenue.*[19]

This study holds a different view from that of Ejemeyovwi. It does appear that he did not take into consideration the peculiar circumstances of the case of *Stabilini Visinoni Limited v. Federal Board of Inland Revenue*[20]. First, the respondent filed the action before the VAT Appeal Tribunal while their action at the Federal High Court on the same set of facts was still pending and subsisting. Furthermore, Section 20(3) of the VAT Act and Article 24(1) of schedule 2 to the VAT Act vest appellate jurisdictions on the Court of Appeal. In order words, appeals from the VAT Tribunal lie directly to the Court of Appeal thus contesting the exclusive jurisdiction of the Federal High Court. It was against this backdrop that Ogunbiyi, J.C.A., was quick to declare that "on the totality of the deductions arrived at, it goes without much saying that section 20 of the VAT Tribunal Act is very inconsistent with the Constitution and hence same cannot, therefore, stand and is hereby declared null and void."[21]

This study demonstrates that there is a world of difference in the present Tax Appeal Tribunal and the defunct VAT Appeal Tribunal in arriving at the conclusion that the Tax Appeal Tribunal is constitutional.

[17] Ejemeyovwi, E.M., An Examination of the Powers, Functions and Jurisdiction of the Tax Appeal Tribunal in Nigeria, An LLM. Seminar Paper presented at the Faculty Board Room, Faculty of Law, A.B.U., Zaria, on Friday, March 1, 2013 at Page 16.
[18] S. 251 (1) (a) & (b), C.F.R.N., 1999, as amended.
[19] (2009) 13 N.W.L.R. [part 1157] 200.
[20] (supra)
[21] (supra), at P. 229, paras F-G.

Nwamara[22] also wrote extensively on the Tax Appeal Tribunal and tax laws generally. However, his writing was limited to the establishment of the Tax Appeal Tribunal and the Tax laws over which it has jurisdiction to adjudicate. He did not discuss the practical steps that an aggrieved taxpayer or tax authority may take in ventilating his perceived right before the Tribunal. This is one aspect where this study is ahead of Nwamara's work as it discusses the operative rules of Practice and Procedure of the Tax Appeal Tribunal to the understanding of the average reader.

Another author, Abdulrazaq[23] also wrote on this subject.[24] He discussed the establishment, composition and qualification for appointment as a Tax Appeal Commissioner. He also dealt with the terms of office of the Commissioners, jurisdiction, criminal prosecutions, right to legal representation before the Tribunal and appeals made out of time, amongst others. Notwithstanding his in depth discussion of the subject, there remains some outstanding areas which this study hopes to cover. Some of which are joinder of parties before the Tax Appeal Tribunal, who should apply for joinder, at what stage of the proceedings can joinder of a party be ordered, the effect of joinder or misjoinder as the case may be. This study also examines the procedure for substitution of another person for a deceased party to an appeal at the Tax Appeal Tribunal. Another important aspect this study covers relates to the amendment of processes before the Tribunal. Others are interlocutory applications, consolidation of appeals, procedure for consolidation of appeals and a host of others. These are some of the areas that remain outstanding in the works of the seasoned professor of Tax law.

[22] Nwamara, T.A., Encyclopedia of Taxation Law and Practice, Law and Educational Pub. Ltd. Lagos, 1st Ed (2008)
[23] Abdulrazaq, M.T., Revenue Law And Practice In Nigeria, Malthouse Press Ltd. Lagos (2010), pp.325-347
[24] Abdulrazaq, M.T., Introduction to VAT in Nigeria, Ababa Press Ltd. Ibadan (2011) Pp.115-124.

Arogundade[25]discussed the triggers of tax appeals, the establishment of the Tax Appeal Tribunal, the jurisdiction and the appeal process under the Tribunal generally. In fact, he argued that with the new law, the Tax Appeal Tribunal has superior powers over its predecessor, the Body of Appeal Commissioners in that it is not only to determine the quantum of an assessment but also to adjudicate on disputes and controversies.[26] He emphasized that the Tax Appeal Tribunal, unlike its predecessor, is not to be tied to the financial and administrative apron of the FIRS but it is to operate as an independent body.[27] He however did not focus on the rules of practice and procedure of the Tax Appeal Tribunal which is the prime object of this study.

One cardinal point which the trio of Nwamara, Abdulrazaq and Arogundade did not discuss relates to the cessation of the issuance of "Notice of Refusal to Amend" as a condition precedent to the institution of action at the Tax Appeal Tribunal. This is one area where this study is significantly distinct from the earlier works. The requirement for the issuance of Notice of Refusal to Amend as a pre-condition for filing appeals before the defunct Tribunals have been done away with under the FIRS (Establishment) Act. This position was recently emphasized in ***Oando Supply & Trading Limited v. Federal Inland Revenue Service***[28] where one of the issues that fell for determination before the Lagos Zone of the Tax Appeal Tribunal was whether the issuance of Notice of Refusal to Amend (NORA) by the tax authority is a condition precedent to commencing an appeal at the Tax Appeal Tribunal.

In response, the Tribunal held as follows:

[25] Arogundade, J.A., Nigerian Income Tax and Its International Dimension. Spectrum Books, Ibadan, 2nd Ed. (2010)
[26] Ibid. P.362.
[27] Ibid.
[28] (2011) 4 TLRN 113. This case was decided on April 7, 2011.

> It is clear that the Act does not require a Notice of Refusal to Amend to issue from the tax authorities to the taxpayer before the latter can approach this Tribunal for redress. Provisions in other Statutes purporting to stipulate any such condition are inconsistent to the FIRS Act and by operation of section 68 of that Act void.
> Without prejudice to the taxpayer's freedom to explore that aspect of the taxman's in-house review mechanism, it appears to us that the instant case is in accordance with the text of the Act, the former may equally choose to appeal against an assessment. Therefore, an aggrieved taxpayer can appeal to this tribunal without first receiving a Notice of Refusal to Amend from the FIRS. NORA is not a requisite pre-action protocol for proceedings here. Neither section 69 nor 72 of the Companies Income Tax Act governs appeals to this Tribunal.[29]

The Tax Appeal Tribunal also re-affirmed the above position of the law lately.[30] Its removal is arguably not in the best interest of our tax dispute resolution system which this thesis distinctively highlights.

1.9 ORGANIZATIONAL LAYOUT

Chapter One contains the general introduction to the study, background of the study, statement of problems, objectives of the study, its significance, scope, as well as the research methodology. It also includes literature review, and organizational layout.

In Chapter Two, the thesis discusses the establishment and composition of the Tax Appeal Tribunal. The qualification for appointment as a Tax Appeal Commissioner, term of office, resignation or removal, salary, Allowances and conditions of service of Tax Commissioners, filling up of vacancies, the jurisdiction of the Tax Appeal Tribunal, criminal prosecution, appeals against the decisions of the FIRS and appeals by the FIRS for non-compliance are discussed.

[29] Ibid. P. 129, per Kayode Sofola, SAN (Chairman, Lagos Zone of the Tax Appeal Tribunal)
[30] Federal Inland Revenue Service v. General Telecom Plc. (2012) 7 T.L.R.N. 108, decided on July 4, 2012

In Chapter Three, the attention of the thesis focuses on the parties to the Tax Appeal Tribunal, types of parties, proper parties; desirable parties, nominal parties as well as necessary parties. The Chapter thereafter proceeds to consider the legal capacity to sue and be sued at the Tax Appeal Tribunal from the standpoint of individuals, corporate bodies, firms of partnerships, estate of a deceased and infant/persons of unsound mind and representative actions. Chapter three further considers parties and representations at the Tax Appeal Tribunal, joinder of parties, non-joinder of parties, misjoinder of parties, joinder of persons severally or jointly and severally liable, who should apply for joinder, the stage of the proceedings at which joinder may be ordered, as well as effect of non-joinder or misjoinder of parties.

In Chapter Four, the Practice and procedure in the Tax Appeal Tribunal constitutes the focal point of discussion. Also discussed here are preliminary issues before commencement of appeals, cause of action, jurisdiction, locus standi, condition precedent, statute bar, place of instituting the appeals, commencement of appeals, form of commencement of appeals, service of processes, mode of entry of appearance, default of appearance and effect of non-compliance with the rules of the Tribunal.

Chapter Five discusses the issue of interlocutory applications in the Tax Appeal Tribunal. It reviews mode of applying to the Tribunal, types of motions, ex parte, life span of ex parte orders, motion on notice, contents of a motion, affidavits in support of motions, counter affidavits in opposition to motions, written address in support of motions, hearing of motions, computation of time, dates and adjournments as well as Amendment of Processes before the Tax Appeal Tribunal. The Chapter also appraises the circumstances in which two or more appeals may be consolidated, when consolidation will not be ordered, and judgment in consolidated Appeal. Furthermore, the Chapter discusses discontinuance of an appeal by either of the Parties before

the Tribunal, hearing of appeals, presentation of appellant's case, presentation of the respondent's case, evidence before the Tax Appeal Tribunal and witness summons/warrants. Also considered here are written final addresses, determination of Appeal and characteristics of a valid decision. The Chapter closes with a review of the enforcement of Tax Appeal Tribunal Decisions, procedure following decision of the Tribunal, fees and miscellaneous powers of the Tribunal as well as Appeals against the decision of the Tribunal.

Chapter Six is the last chapter. This chapter summarizes the entire study after which conclusion is drawn based on analysis and discussions in preceding Chapters. Chapter Six also proffers recommendations on how to improve and sustain effective and efficient tax dispute resolution mechanism in order to bolster voluntary tax compliance in Nigeria.

CHAPTER TWO

2.0 THE ESTABLISHMENT AND COMPOSITION OF THE TAX APPEAL TRIBUNAL

2.1 INTRODUCTION

Tax Appeal Tribunal was borne out of Government's desire to achieve a speedy, cheap and convenient resolution of tax disputes with a view to building confidence in the Nigerian tax system. This explains why this chapter focuses on the establishment of the Tribunal, the composition and the qualification for appointment as a Tax Appeal Commissioner. The Chapter also considers other issues such as term of office, resignation or removal from office of members of the Tribunal, salaries, allowances and conditions of service of Tax Appeal Commissioners.

Another crucial issue considered in this Chapter relates to the jurisdiction of the Tax Appeal Tribunal. The predecessors of the Tax Appeal Tribunal had suffered so much criticism on the basis of the issue of jurisdiction. The yardstick for the jurisdictional conundrum has been the exclusive jurisdiction of the Federal High Court as specified under the Constitution. The vexed issue of whether or not Notice of Refusal to Amend (NORA) remains a condition precedent to filing appeals before the Tax Appeal Tribunal is also addressed. These issues, amongst others received analyses in this Chapter.

2.2 THE ESTABLISHMENT OF THE TAX APPEAL TRIBUNAL

The Tax Appeal Tribunal was created by section 59 of the Federal Inland Revenue Service (Establishment) Act, 2007. The Act provides that the Tribunal shall have power to settle disputes arising from the operation of the Federal Inland Revenue Service (Establishment) Act, 2007 and

under the first schedule that lists the various tax legislation enforced and administered by the FIRS (the Service).[31] The Tribunal is intended to function as an independent quasi-judicial forum for the resolution of such disputes that would inevitably arise from the enforcement and administration of tax laws by the Service.

Paragraph 1 (1) and (2) of the 5th Schedule to the FIRS Act also provides for the establishment of the Tax Appeal Tribunal. The provision is reproduced below for emphasis:

> 1(1) pursuant to section 59(1) of this Act, there shall be established a Tax Appeal Tribunal (hereinafter- referred to as "the tribunal") to exercise the jurisdiction, powers and authority conferred on it by or under this schedule.
>
> (2) The Minister[32] may by notice in the Federal Gazette specify the number of zones, matters and places in relation to which the Tribunal may exercise jurisdiction.

Pursuant to the powers enabling him in that behalf, the then Minister of Finance, Dr. Mansur Muhtar[33] made an Order constituting the Tax Appeal Tribunal into the following Zones of the Federal Republic of Nigeria:

(i) the North East Zone sitting in Bauchi, Bauchi State shall cover Adamawa, Borno, Bauchi, Gombe, Yobe and Taraba States;

(ii) the North West Zone sitting in Kaduna, Kaduna State shall cover Kaduna, Kano, Katsina, Kebbi, Jigawa, Sokoto and Zamfara States;

(iii) the North Central Zone sitting in Jos, Plateau State shall cover Benue, Nassarawa, Niger, Kogi, Kwara and Plateau States;

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[31] S. 59 (1) and (2), FIRS Act, 2007.

[32] S. 69, ibid., Minister means the Minister charged with responsibility for matters relating to Finance

[33] The Order was published in Federal Government Official Gazette No. 296, Vol. 96 of 2nd December, 2009; Yisa, A.N., Tax Appeal Tribunal: Achievements, Challenges and Prospects. A Paper presented at a 2 day Interactive Workshop on Tax Laws, Ethics and Judicial Interpretation for Superior Court Judges and Tax Appeal Commissioners at Transcorp Hilton Hotel, Abuja, from November 5 - 6, 2013 at page 1.

(iv) the South West Zone sitting in Ibadan, Oyo State shall cover Ekiti, Ogun, Ondo, Osun and Oyo States;

(v) South East Zone sitting in Enugu shall cover Abia, Anambra, Ebonyi, Enugu and Imo States;

(vi) South South Zone sitting in Benin, Edo State shall cover Akwa Ibom, Bayelsa, Cross River, Delta, Rivers and Edo States;

(vii) Abuja Tax Appeal Tribunal covers the Federal capital Territory only; and

(viii) Lagos Tax Appeal Tribunal covers Lagos State only.[34]

Consequently, the Tax Appeal Tribunal Chairmen and Commissioners were inaugurated on the 4th of February, 2010 while the secretariat staff resumed duties at their respective posts on 1st of July 2010 after a two-week induction training. This marked the formal take-off of the new Tax Appeal Tribunal in Nigeria. All proceedings before the Tribunals are guided by the Tax Appeal Tribunal (Procedure) Rules 2010.[35] Tax Appeal is an important component of the tax system and the new tax policy offers a step by step objection and appeal process which gives the complainant an opportunity to explore other dispute resolution mechanisms before gaining access to the regular court system.[36]

[34] S. 1, Tax Appeal Tribunals (Establishment) Order, 2009, S.I. 38 of 2009. This Order was made on 25th November, 2009.

[35] The Rules were published in Federal Government Official Gazette No. 67, Volume 97 of 3rd September, 2013. See also Yisa, A.N., Op. cit. P.3.

[36] www.tat.gov.ng (official website of the TAT), assessed on 25/2/13 at 12:17am

Commenting on the importance of the Tribunal as a means of resolving tax disputes, Amasike[37] said:

> Perhaps, it may be a good starting point to state the philosophy behind the establishment of the Nigerian Tax Appeal Tribunal (TAT) is basically to resolve disputes and controversies relating to tax issues between the parties who appear before the TAT, which invariably mean the tax authority and the taxpayer, as quickly and as friendly as possible. Before the establishment of the Tax Appeal Tribunal all tax matters went to the Nigerian Federal High Court by virtue of section 251 of the Nigerian Constitution. But it had long been realized that the traditional or conventional law courts are not only over-burdened with cases which on the averaged take about 12 years, to move from High Court to Supreme Court, but additionally that the court do not have the skills and competences to deal *(sic)* specialized matters like taxation. Against this background, inter alia, the Nigerian Government thought it fit to establish the Tax Appeal Tribunal[38].

This much was recently corroborated by the Tribunal when it pronounced as follows in ***Federal Inland Revenue Service v. General Telecom Plc,***[39]

> Sound policy demands the establishment of administrative tribunal like this. Among other things, they help to reduce the caseloads of the over-laden regular courts by providing less formal fora for quicker, cheaper, resolution of disputes in a specific field with respect to which speedy results are in the public interest.[40]

Another Tax writer also shares this sentiment when he penned down the following words:

> 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 high cost of litigation resulting from 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.[41]

Impressive as the philosophy behind the establishment of the Tax Appeal Tribunal may sound, it is without gainsaying that the rules of practice and procedure must be modified to be able to

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[37] Professor Amasike is the Chairman, South East Zone of the Tax Appeal Tribunal sitting in Enugu

[38] Amasike C.J. Brief Notes on the Adjudication of Tax Disputes in Nigeria: The Tax Appeal Tribunal Perspective. www.iatj.net/congress/documents/Adjudication of Tax Disputes in Nigeria-prof.c.j.Amasike.pdf. P.1.

[39] (2012) 7 T.L.R.N. 108.

[40] Ibid. P.134.

[41] Arogundade, J.A., Nigeria Income Tax and Its International Dimension. Spectrum Books, Ibadan 2nd Ed. (2010) Pp. 362-363.

engender this objective. Where the rules are weak or fundamentally flawed, the objectives will not be actualized. It is for this reason that this study views the glowing words of the afore cited comments with cautious optimism. It is submitted (and it shall be demonstrated) that the present Tax Appeal Tribunal (Procedure) Rules 2010 as constituted cannot beneficially assist the Tribunal in achieving these winsome objectives except fundamental amendments are urgently effected to the Rules.

2.3 THE COMPOSITION OF THE TAX APPEAL TRIBUNAL

Each of the zones of the Tribunal shall consist of five members otherwise known as Tax Appeal Commissioners to be appointed by the Minister of Finance.[42] The appointment of the Tax Appeal Commissioners by the Minister has generated comments in some quarters. One writer has argued that this contravenes the fundamental principle of fair hearing. In his words:

> The constitution of the tribunal whose members are entirely appointed and removed by the minister *(sic);* an agent of the federal government which in the light of section 36(1) of the 1999 Constitution (As amended) does not guarantee fair hearing, as it requires every tribunal to be constituted in such a way as to secure its independence and impartiality.[43]

This research takes the view that the power of the Minister to appoint the Tax Appeal Commissioners does not contravene section 36 (1) or any other section of the Constitution. The relevant section of the Constitution is reproduced hereunder for ease of reference:

> 36(1) in the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other

[42] Para 2(1), 5th Schedule, FIRS Act, 2007; section 2, Tax Appeal Tribunals (Establishment) Order, 2009

[43] Ejemeyovwi, E.M., An Examination of the Powers, Functions and Jurisdiction of the Tax Appeal Tribunal in Nigeria, An LLM. Seminar Paper presented at the Faculty Board Room, Faculty of Law, A.B.U., Zaria, on Friday, March 1, 2013 at Page 15.

> tribunal established by law and constituted in such manner as to secure its independence and impartiality.[44]

The appointment of the Tax Appeal Commissioners by the Minister of Finance without more cannot by any stretch of legal argument be said to be unconstitutional. If this were to be true, it means that the entire judicial system would collapse. For instance, the President appoints the Chief Justice of Nigeria (CJN) as well as other Justices of the Supreme Court on the recommendation of the National Judicial Council subject to the confirmation of the Senate.[45] Can it be said that the CJN and the entire Supreme Court would disqualify themselves to determine any case to which the President is a party? It cannot be reasonably said that the Supreme Court's independence and impartiality has become tainted by the mere fact of the appointing authority. The fact must not be lost that the Tax Appeal Commissioners are seasoned professionals who are quite familiar with the enormity of their responsibilities and therefore cannot be so easily influenced as feared.

Furthermore, the Constitution itself provides very potent safeguards to ensuring the impartiality of the Tribunal. This is achieved by the twin requirements that the individual whose rights and obligations are to be determined by the Tribunal must be given the opportunity to make representations before the Tribunal and his right of appeal must not be extinguished. In construing the Constitution, the Courts have generally leaned in favour of a liberal and broad reading of the sections as opposed to an isolated consideration of the provisions.[46] In this connection, a community reading of section 36 (1) and (2) of the Constitution clearly endorses the position of this research. Section 36(2) provides:

[44] Constitution of the Federal Republic of Nigeria, 1999, as amended.
[45] Ibid. S. 231(1) and (2)
[46] Tukur v. Gongola State (1989) 4, N.W.L.R. [Pt. 117] 517

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

The Tax Appeal Tribunal (Procedure) Rules 2010 makes provision for the parties to present their respective cases before the Commissioners decide one way or the other. The right of appeal of the parties is also guaranteed under the FIRS (Establishment) Act. It is therefore submitted that the appointing powers of the Minister does not detract from the objectivity, impartiality and independence of the Tax Appeal Tribunal. This issue recently presented itself for determination before the Tribunal in ***Federal Inland Revenue Service v. General Telecom Plc.***[47] Reaching a similar conclusion, the Tribunal noted:

> The *raison d'etre* of section 36(2) is to save the lives of statutory provisions like section 59 of (sic) and the 5th Schedule to the FIRS Act which confers on authorities like the Tax Appeal Tribunal "power to determine questions arising in the determination of a law that affects or may affect the civil rights and obligations of any person." The saving grace of such legislative clauses is found in paragraphs (a) and (b) of section 36 (2): (a)-they must allow fair hearing, and (b) their decisions must be subject to appeal or review. The FIRS Act meets both criteria. Paragraphs 13 to 15, especially 15(8), of the 5th Schedule to the Act make ample provision for fair hearing, and paragraph 17 provides for appeals.
>
> The conjuncture of section 36(2) and 36(1) is meant to say: while insisting on the twin tenets of natural justice required in section 36(1), no administrative tribunal or its constitutive clause should be struck down if: (a) it guarantees *audi alterem partem*, and (b) its decisions are appealable or reviewable. Section 36(2) came

[47] (2012) 7 T.L.R.N. 108.

> into existence to secure tribunals other than courts, since the lives of the latter had been adequately safeguarded by other constitutional and statutory provisions.[48]

The effect of the foregoing is that independence and impartiality do not necessarily stem from who appoints, but from who is appointed and the manner of appointment. The Constitution is concerned with the manner of appointment and not the appointing authority.[49]

The Act provides that a Chairman for each zone shall be a legal practitioner who has been so qualified to practice for a period of not less than 15 years with cognate experience in tax legislation and tax matters.[50] Pitching the qualification of the Chairman at 15 years post call is highly commendable. It is the same qualification for the highest judicial office in Nigeria namely, the Chief Justice of Nigeria and other Justices of the Supreme Court.[51] Beyond the 15 years post call experience, the Act provides that the Chairman must have cognate experience in tax legislations and tax matters. The emphasis on technical expertise other than the general knowledge of law alone gives the Tribunal an edge over the regular Courts and guarantees the much needed maturity, probity and accuracy in the resolution of tax disputes. To further strengthen this, the Act provides that the Chairman shall preside at every sitting of the Tribunal. In the event of his absence however, the members shall appoint one of them to be the Chairman. In practice, the most senior of the members usually presides in the absence of the Chairman. The Act also requires that the quorum of any sitting of the Tribunal shall be three members.[52] All of these are intended to secure a satisfactory resolution of tax disputes that will stimulate confidence in the tax system.

[48] Ibid., P. 156.
[49] Ibid. Pp. 156 – 157.
[50] Para 2(2), supra
[51] S. 231(3), C.F.R.N., 1999, CAP C24. L.F.N. , 2004
[52] Para 2(4), 5th Schedule, FIRS (Establishment) Act, 2007.

2.4 THE QUALIFICATION FOR APPOINTMENT AS A TAX APPEAL COMMISSIONER

The Act specifies the qualifications for appointment as a Tax Appeal Commissioner. A person shall not be so appointed 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 a retired public servant in tax administration.[53] It is submitted that this provisions are sufficiently clear to guide the Minister in appointing the Commissioners.

2.4.1 Term of Office

The Act provides that a Tax Appeal Commissioner shall hold office for a term of three years, renewable for another term of three years only and no more, from the date on which he assumes his office or until he attains the age of 70 years whichever is earlier.[54] In effect, a Tax Appeal Commissioner has only six years to hold office and no more.

It is submitted that the Act should be amended to allow for more years in office for the Tax Appeal Commissioners and indeed for the Commissioners to remain in office until their retirement. It is further suggested that their term of office should be structured in such a manner that they would be transferred to the various Zones of the Tribunal upon the exhaustion of the first six years or less in a particular zone as is the case with the Justices of the Court of Appeal. This will significantly deepen the competence of the Commissioners and guarantee some degree of certainty and consistency in the decisions of the Tribunal and in the tax dispute resolution system generally.

[53] Ibid. Para 3.
[54] Ibid. Para 4.

2.4.2 Resignation and Removal of a Tax Appeal Commissioner

A Tax Appeal Commissioner may resign his appointment by notice in writing to the Minister of Finance. However, the Commissioner shall continue to hold office until the expiration of three months from the date of receipt of his letter of resignation or until a person duly appointed to replace him assumes office or until the expiration of his term of office whichever is earlier unless the Minister permits him to relinquish his office sooner.[55] The object of this provision is to ensure that the Tribunal is not understaffed at any given time as to prevent it from forming a quorum to discharge its responsibilities arising from the resignation of the Commissioners.

A Tax Appeal Commissioner may also be removed from office. It is a trite principle of law that he who has the power to hire also has a corresponding power to fire.[56] Consequently, the Minister of Finance may remove a Tax Appeal Commissioner from office on grounds of misconduct or incapacity after due inquiry has been made and the Tax Appeal Commissioner concerned has been informed of the reasons for his removal and given an opportunity of being heard in respect of the reasons.[57] It is submitted that the safeguards provided for the Tax Appeal Commissioners are insufficient to shield them from the arbitrary whim of an irate Minister. The power to remove an officer acting in a judicial or quasi-judicial capacity must not be left in the hands of a single authority. The reference point here relates to the stringent provisions for the removal of Judicial Officers by the President or the Governor as the case may be, on the recommendation of the National Judicial Council under the Constitution.[58] This provides Judicial Officers some air of job security which in turn affords them the impetus to discharge their duties

[55] Ibid. Para 5(1).
[56] Olaniyan v. University of Lagos & Anor. (1985)2 N.W.L.R. [Pt.9] 599
[57] Ibid. Para 5(2)
[58] S.292, C.F.R.N., 1999.

without fear or favour. Granted that the Tribunal is an adhoc arrangement which cannot be compared or equated with the superior courts of record, it is nonetheless submitted that the removal of Tax Appeal Commissioners by the Minister should be on the recommendation of the National Judicial Council or at least, subject to the approval of the Senate and the House of Representatives Joint Committee on Finance and Appropriation. It is submitted that this would largely boost the confidence of the Commissioners and also enhance their objectivity in Tax disputes adjudication.

2.4.3 Salary, Allowances and Conditions of Service of Tax Appeal Commissioners

The salary and allowances payable to and the terms and conditions of service of the Tax Appeal Commissioners shall be determined by the Revenue Mobilization Allocation and Fiscal Commission and shall be prescribed in their letters of appointment. Provided that neither the salary and allowances nor the other terms and conditions of service of a Tax Appeal Commissioner shall be varied to his disadvantage after appointment.[59]

2.4.4 Filling up of Vacancies

To ensure continuity, the Act empowers the Minister to appoint another person in accordance with the provisions of the Act to fill up in the event of any vacancy in the office of a Tax Appeal

[59] Para. 6, 5th Schedule, FIRS (Establishment) Act.

Commissioner for any reason other than temporary absence.[60] The question as to the validity of the appointment of any person as a Tax Appeal Commissioner shall not be a cause of any litigation in any court or tribunal and no act or proceedings before the Tribunal shall be called into question in any manner on the ground merely of any defect in the constitution of the Tribunal.[61] Perhaps the object of this provision is to reduce intentional attacks on technicality targeted at the personality of the Commissioners rather than the substance of the dispute. However, it has been argued that this 'ouster clause' is unconstitutional and negates the doctrine of natural justice.[62] Much as his argument may appear plausible, the law remains that a court of law has no power to inquire into why its jurisdiction was ousted. In order words, once an ouster clause is ingrained in any enactment, removing the jurisdiction of courts, then they are hamstrung in that they are precluded from looking into matters that are the products of the law.[63] The Supreme Court was very clear on this point when it emphasized as follows in ***Osita C. Nwosu v. Imo State Environmental Sanitation Authority & Ors***[64]

> In the interpretation of a statute ousting or restricting the court's jurisdiction in respect of a particular cause no court has the power to inquire into why its jurisdiction was ousted; all it can inquire into is whether or not on the facts, and circumstances of the particular case its jurisdiction had infact been ousted or restricted.[65]

Generally, perhaps, because of the peculiar nature of taxing statutes, the powers of the courts are usually circumscribed to focus on the substantive issues rather than giving room for unbridled

[60] Para. 7, ibid.
[61] Para. 8, ibid.
[62] Ejemeyovwi, E.M., Op. Cit. P. 22.
[63] Ogbuinya, O.F. Understanding the Concept of Jurisdiction in the Nigerian Legal System, Snaap Press Ltd. Enugu (2008) P.116.
[64] (1990)All N.L.R. 379, 383; (1990) 2 N.W.L.R. [Pt. 135] 688.
[65] See also Emuze v. V.C. University of Benin (2003) 10 N.W.L.R. [Pt. 828] 378; Oduko v. Government of Ebonyi State (2004) 13 N.W.L.R. [Pt. 891] 487.

recourse to technicalities which lawyers are wont to. Tax disputes relate to revenue and it is thus in the interest of the tax authority and taxpayers to have such disputes determined expeditiously. To achieve this objective, draftsmen of taxing statutes exact themselves to tailor the statutes in such a way that will focus on the real issues as much as possible. This explains why in most tax legislation, one finds that the powers of the courts are ousted to quash or void any errors, mistakes and defects in tax assessments and notices.[66] Viewed from this perspective, one would probably concede that the provisions of Paragraph 8 of the 5th Schedule to the FIRS (Establishment) Act which ousts the powers of the courts to question the validity of appointment of any person as a Tax Appeal Commissioner is in order.

The Minister shall also appoint for each place or zone a secretary who shall be responsible for keeping records of the proceedings of the Tribunal amongst other functions.[67] The Minister shall also appoint such other employees as he may deem necessary for the efficient performance of the functions of the Tribunal and the remuneration of persons so employed shall be determined by the National Salaries and Wages Commission.[68] In essence, the Minister is empowered to make such appointments as would guarantee a smooth running of the Tribunal. Even though the powers of the Minister, in strict legal point of view are consistent with the extant laws as shown above, it remains to be reemphasized that the Minister's powers to appoint persons to man the Tax Appeal Tribunal ought to be circumscribed. In a democracy, no single agent of government should be vested with the powers to solely make appointments that would constitute a body that is intended to act in a quasi-judicial manner. This is not to say that the Minister may easily

[66] See S.39, Petroleum Profits Tax Act, CAP. 13, L.F.N., 2004; S. 70, Companies Income Tax Act, CAP. C21, L.F.N., 2004; S.59, Personal Income Tax Act, CAP. P8, L.F.N., 2004

[67] Para 9(1), 5th Schedule, FIRS Act, 2007.

[68] Para. 10, ibid.

become arbitrary, biased or influenced in the exercise of his powers but because of the impression that may be created in the public domain. This is more so if it is recalled that it is of fundamental importance that justice should not only be done but should be manifestly and undoubtedly be seen to be done.[69] It is therefore suggested that the powers of the Minister to make appointments here should be subjected to the confirmations of the National Assembly or the National Assembly Joint Committee on Finance. This will inject the much needed fairness and transparency in our tax adjudication system.

2.5 JURISDICTION OF THE TAX APPEAL TRIBUNAL

The concept of jurisdiction is a threshold issue in legal parlance. It has been an enduring element in legal jurisprudence of the common law. The word jurisdiction means the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted, and may be extended or restricted by similar means.[70] The view that jurisdiction is limited has also been long affirmed by an eminent Jurist during the first half of the 19th Century when he held that although Courts have great powers, these powers are not without limits as they are bound by lines of demarcation.[71] This also applies to the Tax Appeal Tribunal as its jurisdiction is spelt out and circumscribed by the FIRS Act which provides thus:

> 11(1) The Tribunal shall have power to adjudicate on disputes, and controversies arising from the following tax laws (hereinafter referred to as 'the tax laws') –

(i) Companies Income Tax Act, CAP. 60 LFN; 1990.

[69] R. v. Sussex Justices ex Parte Macarthy (1924) 1 KB. 256, per Lord Hawart C.J.
[70] Halsbury's Laws of England, Vol. 10. 4th ed., page 323.
[71] Kings v. Justices of Devcon (1819) 1Chit. Rep. 37. Per Abbot C. J.

(ii) Personal Income Tax Act No. 104, 1993.

(iii) Petroleum Profit Tax Act CAP. 354, LFN; 1990

(iv) Value Added Tax Act No. 102; 1993

(v) Capital Gains Tax Act CAP. 42; LFN 1990

(vi) Any other law contained in or specified in the first schedule to this Act or other laws made or to be made from time to time by the National Assembly.

(2) The tribunal shall apply such provisions of the tax laws referred to in subparagraph (1) of this paragraph as may be applicable in the determination or resolution of any dispute or controversy before it.[72]

Paragraph 11(1) (vi) extends the jurisdiction of the Tax Appeal Tribunal to cover any other law contained or specified in the first Schedule to the Act. In other words, the Tribunal has additional jurisdiction over the items listed in Paragraphs 6 to 11 of the First Schedule to the FIRS Act and these include:

(a) Stamp Duty Act CAP 411 LFN, 1990;

(b) Taxes and Levies (Approved List for Collection) Act 1998 No.2, 1998;

(c) All regulations, proclamations, government notices or rules issued in terms of these legislations;

(d) 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;

(e) Enactment or laws imposing Taxes and Levies within the Federal Capital Territory; and

(f) Enactment of Laws imposing collection of taxes, fees and levies collected by other government agencies and companies including signature bonus, pipeline fees, penalty for

[72] Para 11(1), 5th Schedule, FIRS Act, 2007.

gas flared, depot levies and licenses, fees for oil Exploration Licence (OEL), Oil Mining Licence (OML), Oil Production Licence (OPL), royalties, rents (productive and non-productive), fees for licences to operate drilling rigs, fees for oil pipeline licences, haulage fees and all such fees prevalent in the oil industry but not limited to the above listed.

The jurisdiction of the Tax Appeal Tribunal is the subject of serious legal debate. The criminal and civil jurisdiction of the Tax Appeal Tribunal is considered below beginning with criminal prosecution.

2.5.1 Criminal Prosecution

Proceedings before the Tax Appeal Tribunal are deemed to be judicial proceedings and the Tribunal is deemed to be a civil court for all purposes. Consequently, 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 Attorney General of any State of the Federation or any relevant law enforcement agency. It, therefore, follows that the Tribunal must decline jurisdiction in cases where there is likely evidence of criminality such as failure to deduct or remit taxes, obstruction, false declaration, counterfeiting documents, amongst others.[73] In such cases, the Tribunal is obliged to forward the information to any of the Attorneys General or other law enforcement agencies such as the Police, Independent Corrupt Practices Commission or the Economic and Financial Crimes Commission.[74] The use of the expression "*shall be obliged*" in Paragraph 12 of the 5th Schedule to the FIRS (Establishment) Act denotes that the Tribunal's obligation to pass evidence of possible criminality is mandatory and peremptory. This is because

[73] See Ss. 40 – 49, FIRS Act that specifies all the offences and their penalties.
[74] Cf: S.304, Investments and Securities Act, 2007.

the word '*shall*' in its ordinary meaning has been held in a plethora of decided cases, to mean an expression of obligation or command. It represents compulsion and has the invaluable consequence of excluding the thought of discretion to impose a duty which may be enforced. If a statute provides that a thing shall be done, the law is settled that the expected and proper meaning is that a peremptory and absolute is enjoined.[75] It thus goes without saying that the Tribunal is bound to pass evidence of possible criminality to the appropriate authority once same is discovered. The North Central Zone of the Tax Appeal Tribunal[76] recently acted in line with this provision when it directed the Attorney General of Plateau State to prosecute seven Federal Inland Revenue Service (FIRS) Officers for alleged tax fraud. The officers were alleged to have forged federal government's tax receipts to claim over ₦ 17 Million Naira from the Plateau State Universal Basic Education Board (SUBEB). The Tribunal uncovered the forged tax receipts when the FIRS dragged the SUBEB before the Tribunal for tax evasion. In its defence, the SUBEB tendered the forged tax receipts to substantiate its claim to have discharged its tax obligations. This led the Tribunal to suspect that the receipts were fraudulently produced.[77]

2.5.2 Civil Jurisdiction

The civil jurisdiction of the Tax Appeal Tribunal is the most controversial amongst tax scholars and jurists alike. In fact it has been said that the Tax Appeal Tribunal is unconstitutional in that it usurps the exclusive jurisdiction of the Federal High Court.[78] Perhaps it is necessary to admit from the outset that a simplistic perusal of the jurisdiction of the Tribunal vis a vis section 251 of

[75] Adams v. Umar (2009) 5 N.W.L.R. [Pt.1133] 41, at 109, Para G-H. see also Ugwu v. Ararume (2007)12 N.W.L.R.[Pt. 1048] 365, at 441-442; Onochie v. Odogwu (2006)6 N.W.L.R. [Pt. 975] 65, at 89

[76] Mr. Abraham Ndana Yisa, is the Chairman, TAT, North Central Zone that sits in Jos, Plateau State.

[77] Adinoyi Seriki, "Tribunal Orders Trial of Seven FIRS Workers over Fraud." In: Thisday Newspapers, Page 24, Thursday, June 27, 2013.

[78] Ejemeyovwi, E.M., An Examination of the Powers, Functions and Jurisdiction of the Tax Appeal Tribunal in Nigeria, An LLM. Seminar Paper presented at the Faculty Board Room, Faculty of Law, A.B.U., Zaria, on Friday, March 1, 2013 at Page 16.

the Constitution as well as some Nigerian Case laws, such as ***Stabilini Visinoni Limited v. F.B.I.R.[79] and Cadbury Nig. Plc v. F.B.I.R.[80],*** one may be persuaded to arrive at a conclusion which suggests that the Tax Appeal Tribunal does not have the requisite jurisdiction to determine disputes arising from tax laws as envisaged under the constitutive Act. However, it is submitted that such conclusion will amount to a failure to appreciate the distinct type of jurisdiction that is conferred on the Tribunal as opposed to that of the Federal High Court. The relevant provision of section 251 of the Constitution is reproduced below for ease of reference.

> 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) relating to the revenue of the Government of the Federation in which the said Government or any organ thereof or 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 persons subject to federal taxation.[81]

The preceding provision is interpreted to mean that the Federal High Court has the exclusive jurisdiction on matters listed therein. Consequently, should any other law or indeed any other provision of the Constitution seek to confer jurisdiction on another Court in respect of the same subject matters, such will be struck down as being unconstitutional. It is therefore instructive to consider whether the Tax Appeal Tribunal has been conferred with identical jurisdiction.

First, it is submitted that the Tribunal is not a Court and more importantly, the Tribunal has not been vested with co-ordinate jurisdiction with the Federal High Court. The jurisdiction conferred on the Tribunal is subject-matter jurisdiction to hear and determine disputes arising from the

[79] (2009) 13 N.W.L.R. [Pt. 1159] 200 (the facts are supplied at P. 35 infra)
[80] (2010) 2 N.W.L.R. [Pt. 1179] 561 (the facts are supplied at P. 36 infra)

[81] S.251 (1) (a) and (b). C.F.R.N., 1999 CAP. C.21, L.F.N., 2004.

administration of the various tax legislations. The operative words in section 251 are: "*the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters."* Underlining supplied for emphasis.

The exclusivity relates to any other court and not necessarily all other adjudicatory processes. The test will obviously be whether such adjudicatory process attempts to assume jurisdiction otherwise exclusive to the Federal High Court. To determine this question, it will be necessary to consider the Tax Appeal Tribunal's adjudicatory process and whether it assumes competing jurisdiction with the Federal High Court.

(i) The Federal High Court as a superior Court of record:

The Federal High Court is listed in section 6(5) (c) of the Constitution as a superior court of record. By virtue of section 6(4) (a) of the Constitution, the National Assembly has the power to establish courts with subordinate jurisdiction to that of the High Courts including the Federal High Court. Consequently, the jurisdiction of a superior court of record and that of a subordinate court are distinct even though they might relate to the same subject matter. In essence, whereas the jurisdiction of superior courts are expressly defined in the Constitution, for inferior court, one would have to look at the statute creating it to determine the extent of its jurisdiction.

Another distinguishing factor is that while the unreserved judgment of a superior court is conclusive, the judgment of an inferior court is not final. In other words, judgment of inferior courts is superintended over by superior courts of record. For instance, if an inferior court goes beyond its jurisdiction, it can be checkmated by the superior courts by the issuance of a prerogative writ.[82] The judgment of inferior courts can be quashed on the grounds that it has exceeded its jurisdiction. On the other hand, superior courts are not subject to judicial review. There are a number of provisions in the FIRS Act that clearly suggest that the jurisdiction

[82] Certiorari and writ of Prohibition

conferred on the Tax Appeal Tribunal is subordinate to that of the Federal High Court. These include:

a. Appeals are to the Federal High Court[83];
b. The Chief Judge of the Federal High Court may make Rules for the procedure in respect of appeals from the Tribunal[84]; and
c. The proceedings of the Tribunal is deemed to be judicial proceedings as well as a civil court. In other words, the Tribunal is treated as if it is a Civil Court but in actual fact, the statute recognizes that it is not.[85] The word 'deemed' has been defined to mean treating a thing as being what it is not, or possessing certain qualities it does not possess.[86]

It follows that the constitutive Act of the Tribunal re-enforces the subordinate nature of the Tribunal and does not attempt to confer jurisdiction otherwise exclusive to the Federal High Court on the Tribunal. This was the approach adopted by the Tax Appeal Tribunal in ***Federal Inland Revenue Service v. General Telecom Plc,***[87] the facts of which are summarized as follows:

The respondent, General Telecom Plc filed a Preliminary Objection to a tax Appeal commenced by the FIRS on the grounds that:-

a. in the light of the provisions of the Constitution, the Tribunal lacks the jurisdiction to entertain the tax matter; and
b. the present composition of the Tribunal offends the maxim nemo judex in causa sua ("no man shall be a Judge in his own cause").

[83] Para 17, 5th Schedule, FIRS Act.
[84] Ibid. Para 17(5)
[85] Ibid. Para 20(3)
[86] Orji v. DTM Nigeria Limited (2009) 18 N.W.L.R. (Pt. 1173) 467, 497.
[87] (Supra) Pp. 138 - 147.

The Tribunal considered the issues in the respondent's preliminary objection and dismissed same on the basis of the arguments canvassed above.

(ii) A Tribunal is not a Court properly so-called:

The objection in section 251 is directed at creating courts of coordinate jurisdiction and not Tribunals that have a distinct and confined jurisdiction. Consequently, if an Act establishing a Tribunal restricts its powers accordingly, it inevitably follows that it is distinct and separate from a court. This was the approach adopted recently by the Indian Supreme Court where the constitutionality of *special courts* was called into question in ***Union of India v. R. Ghandhi, President, Madras Bar Association***.[88] The Court explained as follows:

i) Courts are established by the states and are entrusted with the states inherent judicial power for the administration of justice in general. Tribunals are established under a statute to adjudicate upon disputes arising under the said statute, or dispute of a specific nature. Therefore, all courts are Tribunals, but not all Tribunals are Courts;

ii) Courts are exclusively manned by Judges, Tribunals can have a Judge as a sole member or can have a combination of a judicial member and a technical member who is an expert in the field to which the Tribunal relates. Some high specialized fact finding Tribunals may only have technical members, but there are exceptions; and

iii) While courts are governed by detailed statutory procedural rules, in particular the code of civil procedure and evidence Act, requiring an elaborate procedure in decision making, Tribunals generally regulate their own procedure applying the provisions of the code of civil procedure only when it is required, and without being restricted by the strict rules of evidence.

It suffices to say that the distinction above clearly differentiates the Tribunal from the Federal High Court. Even the Tax Appeal Tribunal itself has admitted that it is not a court.[89]

It is now necessary to review some of the Nigerian Case laws that were touched upon earlier. It is submitted that the cases are distinguishable and re-enforces the view that where the

[88] (2010) 2 Comp LJ 577 (SC)

[89] F.I.R.S. v. General Telecom Plc (Supra).

jurisdiction of the Tribunal is subordinate to that of the Federal High Court, the Tribunal is constitutional. The cases are examined below:

(a) Stabilini Visinoni Limited v. F.B.I.R:[90]

In the instant case, the respondent instituted an action against the appellant at the VAT Tribunal and claimed that the appellant failed to remit and render its monthly value added tax returns to the respondent as required by law from August 1995 to July 2000 and from August 2000 to December 2002 and for failure to remit the appropriate value added taxes. The appellant entered a conditional appearance and further filed a preliminary objection praying for orders dismissing the suit on the ground that the Tribunal lacked the Jurisdiction to hear the suit and that the suit was an abuse of court process because the respondent had already filed a suit against the appellant at the Federal High Court in respect of the same subject matter and reliefs.

Notwithstanding the earlier suit pending before a superior court, the Federal High Court, the VAT Tribunal affirmed its jurisdiction. The distinguishing factor here is that the VAT Tribunal not only wrestled constitutional powers from the Federal High Court but impliedly debarred the Federal High Court from acting as superintendent over it. Furthermore, Section 20(3) of the VAT Act and Article 24(1) of schedule 2 to the VAT Act vest appellate jurisdictions on the Court of Appeal. In order words, appeals from the VAT Tribunal lie directly to the Court of Appeal thus contesting the exclusive jurisdiction of the Federal High Court over tax matters. It was, therefore, easy and correct for the Court of Appeal, Ibadan Division to strike it down for being inconsistent with the Constitution.

(b) Cadbury Nigeria Plc v. F.B.I.R[91]:

[90] (Supra).
[91] (Supra).

In the instant case, by a letter of 3/6/2003 the respondent requested the appellant to render returns and consequently instituted an action against the appellant at the VAT Tribunal sitting at Ibadan. Pleadings were exchanged and the matter proceeded to trial. In its judgment entered on the 13th of March, 2006, the Tribunal awarded a total sum of N249, 121,726.00 in favour of the respondent. The appellant was dissatisfied and filed an appeal to the Court of Appeal contending inter alia that the VAT Tribunal lacked the jurisdiction to entertain the respondent's claim. The Court of Appeal affirmed the appeal.

The distinguishing factor here, as in the Visinoni case was that appeals from the VAT Tribunal went directly to the Court of Appeal thus contesting the exclusive jurisdiction of the Federal High Court. Modupe Fasanmi, J.C.A was, therefore, correct to have affirmed the appeal.

One fundamental distinction with all the cases that have been decided thus far ***(Stabilini Visinoni Ltd. V. F.B.I.R and Cadbury Plc v. F.B.I.R.)*** and the Tax Appeal Tribunal is the procedure for appeal. In the provisions considered in the cases referred to, appeal lay directly to the Court of Appeal. Although the possibility of appealing to the Federal High Court was considered in the ***Visinoni case***, Ogunbiyi J.C.A. was not persuaded because there was no specific provision that allowed for an appeal to the Federal High Court. If the VAT Tribunal was clearly perceived to be inferior to the Federal High Court, there would not have been bases to declare section 20 of the VAT Act unconstitutional. This is evidently unlike the Tax Appeal Tribunal that the constitutive Act expressly subordinates to the Federal High Court by vesting it with both appellate as well as supervisory jurisdiction over the Tax Appeal Tribunal.

Finally, it must be emphasized that the view supported in this work has been endorsed by the Tax Appeal Tribunal in the ***General Telecom case*** and same has also been tested and endorsed by a superior court of law. Accordingly, in ***Ajaab Global Investment & Anor. v. Federal Inland***

Revenue Service & Anor.[92]**,** the ***Hon. Justice Z.B. Abubakar*** of the Federal High Court, Gusau, Zamfara State had this to say while over ruling an objection to the jurisdiction of the Tax Appeal Tribunal to determine disputes arising from Value Added Tax:

> Now by the combined effect of the provisions of S.59 and paragraph 11(1) of the FIRS Act, the Plaintiffs must first submit their grievance in respect of the alleged VAT deducted by the 2nd Defendant to the VAT Tribunal[93] and not this Honourable court, the Tribunal being the administrative body charged with the responsibility of settling such disputes and which derives its strength from the constitution itself by virtue of S.36(2) thereof. See Kasunmu v. Shittabey (supra).
> Having said that, it is settled that once a law has prescribed a particular mode of exercising a statutory power, any other mode of exercising it is excluded. In other words, where a statute creates a right and in plain language, gives a specific remedy or appoints a specific Tribunal for its enforcement, as in the instant case, a party seeking to enforce that right must resort to that remedy or that Tribunal and not others.[94]

The foregoing clearly bears out the judicial affirmation that the Jurisdiction of the Tax Appeal Tribunal is not inconsistent with that of the Federal High Court.

Unfortunately, on 30/10/2013, ***Justice A.F.A. Ademola*** of the Federal High Court, Abuja reached a different conclusion when he held that the Tribunal is unconstitutional and ordered the Minister of Finance to disband all the Tax Appeal Tribunals forthwith.[95] It is submitted that the latest decision is wrong for the reasons canvassed above. The text of the judgment, with respect, evidences a limited understanding of the status, nature and character of the jurisdiction of the Tax Appeal Tribunal on the part of his lordship.

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[92] (2011) 5 TLRN 24.

[93] Reference to the VAT Tribunal is an omission. The appropriate Tribunal is the Tax Appeal Tribunal by virtue of ***Ss. 10 (4) & (5), VAT (Amendment) Act. 2007*** which expressly provides that appeals against the decision of the FIRS shall be to the Tax Appeal Tribunal.

[94] Ibid. P. 39 – 40.

[95] FHC/ABJ/TA/11/12-TSKT II - Construces Internacionals & Anor v. FIRS; www.businessdayonline.com/2013/11/courts-order-finance-minster-to-disband-tax-appeal-tribunals- extracted on 14/11/13; **Tobi Soniyi**, "Court Orders Finance Minister to Disband Tax Appeal Tribunal." In: Thisday Newspapers, Page 26, November 26, 2013.

Thankfully, on 3/12/2013, ***Justice Ibrahim Nyaure Buba***[96] of the Federal High Court, Lagos Division reaffirmed in ***Nigerian National Petroleum Corporation v. Tax Appeal Tribunal & 3 Others***[97] that there was nothing unconstitutional about the Tax Appeal Tribunal because it is not a Court within the meaning of section 6 of the 1999 Constitution, even though it sits to determine the rights of parties before it, nonetheless, it is a mere inferior administrative Tribunal. The facts of this case are as follows:

The Applicant, with leave of Court, applied for judicial review of a decision rendered by, and proceedings pending before the 1st respondent – the Tax Appeal Tribunal. The Applicant's prayers were as follows:

1. An order of certiorari bringing up to the Federal High Court for the purpose of being quashed the decision of the 1st respondent at the Tax Appeal Tribunal, Lagos in the consolidated appeals between ***Esso Exploration & Production Nigeria (Deep Water) Ltd & Anor v. Federal Inland revenue Service & Anor with Appeal Nos. TAT/LZ/018/2011, TAT/LZ/007/2012, and TAT/LZ/008/2012*** titled Determination of Jurisdiction Objection dated and delivered on the 8th day of February, 2013 for being unlawful and ultra vires the powers of the 1st respondent;
2. An order of prohibition prohibiting the maintenance and continuation of further proceedings in the consolidated appeals between ***Esso Exploration & Production Nigeria (Deep Water) Ltd & Anor v. Federal Inland revenue Service & Anor with Appeal Nos. TAT/LZ/018/2011, TAT/LZ/007/2012, and TAT/LZ/008/2012*** before the 1st respondent by (sic) delivering any interim or final decision containing conclusive

[96] "The Jurisdiction of the Tax Appeal Tribunal is Indeed, Constitutional-FHC." In: Thisday Newspapers, Pages 12 and 15, March 18, 2014.

[97] Suit No. FHC/L/CS/630/2013 (Unreported)

findings in respect to (sic) the tax obligations and liabilities of the Applicant with respect to the Petroleum Sharing Contracts dated 21st of May, 1993 between the Applicant and the 2nd and 3rd respondents being subject matter which are exclusively within the jurisdiction of this Honourable Court under Section 251 of the 1999 Constitution; and

3. Cost of the action.

It is instructive to emphasize that in determining the case of ***Nigerian National Petroleum Corporation v. Tax Appeal Tribunal & 3 Ors,*** the ***Hon. Justice I. N. Buba*** was strongly urged by Mr. Etigwe Uwa, SAN, learned Counsel for the Applicant to follow the decision of ***A.F.A. Ademola J***. in ***Construces Internacionals & Anor v. FIRS*** [98] and declare the Tax Appeal Tribunal unconstitutional. His lordship however, discountenanced the submissions of the Counsel for the Applicant and declined to follow the decision of his learned brother, ***Ademola J*** of the Abuja division of the Federal High Court. The Court reasoned further that apart from the fact that the Tax Appeal Tribunal is not a Court, its decisions are subject to appeal to the Federal High Court and it is indeed supervised by the Federal High Court through judicial review as in the instant case. This feature distinguished the Tax Appeal Tribunal from the VAT Tribunal that triple jumped its decisions to the Court of Appeal. It is submitted that the reasoning of ***Buba J*** in this decision are clearly along the lines of the arguments earlier on discussed above.

The conflicting decision of the various divisions of the Federal High Court on the constitutionality of the Tax Appeal Tribunal is quite unfortunate. Regardless of the fact that the law is trite that where there are two conflicting decisions of a superior court on the same question, the inferior Court, in this case, the Tax Appeal Tribunal, is at liberty to choose which

[98] Suit No. FHC/ABJ/TA/11/12 (Unreported)

of the conflicting decisions it is to follow, the reason being that resolution of conflict in the decisions of a higher court is the prerogative of that higher court, not the business of the lower court to resolve existing conflicts in the decisions of a superior court.[99] It is however, suggested that, in the interest of harmony in the tax politic and order in the Nigerian judicial system generally, the Tribunal should suspend sittings pending when the Court of Appeal or the Supreme Court would determine the question of its jurisdiction with finality.

2.5.3 Appeals Against the Decision of the Federal Inland Revenue Service

Any person aggrieved by an assessment or demand notice made upon him by the Service or aggrieved by an action or decision of the Service under the provisions of the tax laws referred to in paragraph 11 may appeal against such decision or assessment or demand notice within the period stipulated under this Schedule to the Tribunal.[100]

The Act provides that an appeal under the schedule shall be filed within a period of 30 days from the date on which a copy of the order or decision which is being appealed against is made, or deemed to have been made by the service and it shall be in such form[101] and may be accompanied by such fee[102] as may be prescribed provided that the Tribunal may entertain an appeal after the expiry of the said 30 days if it is satisfied that there was sufficient cause for the delay.[103]

It seems the FIRS (Establishment) Act has done away with the requirement for the issuance of Notice of Refusal to Amend (NORA) as a pre-condition for filing appeals before the defunct

[99] Awojugbagbe Light Industries Ltd v. Chinukwe (1993)1 N.W.L.R. [Pt.270] 509; Guaranty Trust Bank Plc v. Fadco Industries Ltd (2007) 7 N.W.L.R. [Pt.1033] 325; Complete Communication Ltd v. Onoh (1998) 5 N.W.L.R. [Pt.549] 217.

[100] Para 13(1), 5th Schedule FIRS, 2007.

[101] Form TAT 1, 1st Schedule, Tax Appeal Tribunal (Procedure) Rules, 2010

[102] Ibid. 2nd Schedule for Schedule of Fees.

[103] Para 13 (2), 5th Schedule FIRS, 2007.

Tribunals. Before now, the position for filing appeals before the Tribunal was well explained by Nwamara in the following words:

> The Tax Appeal Tribunal now replaces the Body of Income Appeal Commissioners of the Federation.
> Appeals.- If any company disputes the assessment issued by the notice of objection issued by the Board of Inland Revenue, it may apply to the Board, by notice of objection in writing, to review and to revise the assessment (see s. 51 CITA). Such application shall state precisely the grounds of objection to the assessment and shall be made within 30 days from the date of the service of the notice of assessment. Thereafter the Board may revise the assessment according to the best of its judgment on good cause shown or give notice of refusal to amend the assessment.
> Where a company remains aggrieved with the assessment issued by the Board after receipt of a Notice of refusal to amend, it may under s.59 of the Federal Inland Revenue Service (Establishment) Act, 2007, appeal to the Tax Appeal Tribunal (which now replaces the Body of Income Tax Appeal Commissioners of the Federation), but this must be done within 30 days of the service of the Notice (see paragraph 13(2) of the 5th Schedule thereof).[104]

It must be noted that there remains the mention of the Body of Appeal Commissioners and requirement for the issuance of Notice of Refusal to Amend (NORA) before an aggrieved taxpayer can approach the Tribunal for redress in a number of our Tax Statutes.[105] However, such Statutes that retain the relevance of NORA will have to be read with such modifications as to bring them into conformity with the provisions of the Federal Inland Revenue Service (Establishment) Act, 2007.[106] It appears that NORA has been dispensed with under paragraph 13, 5th Schedule to the FIRS (Establishment) Act. The text of paragraph 13 is fully reproduced below for evidential value:

> 13(1) 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 to in paragraph 11, may appeal against such

[104] Nwamara, T.A., Encyclopedia of Taxation Law and Practice, Law and Educational Pub. Ltd. Lagos (2008) P.61; see also FBIR v. Manila Industrial Security Services Ltd (1976) 2 FRCR 116.
[105] Ss. 71 and 72, Companies Income Tax Act, CAP. C21, L.F.N., 2004, S. 41, Petroleum Profits Tax Act, CAP. P13, L.F.N. 2004.
[106] S.68 FIRS (Establishment) Act, 2007.

> decision or assessment or demand notice within the period stipulated under this Schedule to the Tribunal.
>
> 13(2) An appeal under this schedule shall be filed within a period of 30 days from the date on which a copy of the order or decision which is being appealed against is made, or deemed to have been made by the Service and it shall be in such form and be accompanied by such fee as may be prescribed provided that the Tribunal may entertain an appeal after the expiry of the said period of 30 days if it is satisfied that there was sufficient cause for the delay.
>
> 13(3) Where a notice of appeal is not given by the appellant as required under subparagraph (1) of this paragraph within the period specified, the assessment or demand notices shall become final and conclusive and the Service may charge interests and penalties in addition to recovering the outstanding tax liabilities which remain unpaid from any person through proceedings at the Tribunal.

This position was recently emphasized in ***Oando Supply & Trading Limited v. Federal Inland Revenue Service***[107] where one of the issues that fell for determination before the Lagos Zone of the Tax Appeal Tribunal was whether the issuance of Notice of Refusal to Amend (NORA) by the tax authority is a condition precedent to commencing an appeal at the Tax Appeal Tribunal. The facts of this case are as follows:

In 2010, the respondent served Notices of Additional Assessment for the 2006, 2007 and 2008 years of assessment on the appellants. By a letter dated 26th May 2010, the appellant objected to the Notices of Additional Assessment. However, six months after the Notice of Objection had been given, the respondent claimed it was still reviewing the appellant's Notice of Objection. As a result of the respondent's failure to act on the Notice of Objection, the appellant decided to appeal against the assessment at the Lagos Zone of the Tax Appeal Tribunal. The appellant filed a motion seeking for enlargement of time to file the appeal against the additional assessment. In swift response, the respondent filed a preliminary objection seeking for the appellant's

[107] (2011) 4 TLRN 113. This case was decided on April 7, 2011.

application to be struck out or dismissed on the ground that no Notice of Refusal to Amend had been issued by the respondent. In response, the Tribunal held as follows:

> It is clear that the Act does not require a Notice of Refusal to Amend to issue from the tax authorities to the taxpayer before the latter can approach this Tribunal for redress. Provisions in other Statutes purporting to stipulate any such condition are inconsistent to the FIRS Act and by operation of section 68 of that Act void.
> Without prejudice to the taxpayer's freedom to explore that aspect of the taxman's in-house review mechanism, it appears to us that the instant case is in accordance with the text of the Act, the former may equally choose to appeal against an assessment. Therefore, an aggrieved taxpayer can appeal to this tribunal without first receiving a Notice of Refusal to Amend from the FIRS. NORA is not a requisite pre-action protocol for proceedings here. Neither section 69 nor 72 of the Companies Income Tax Act governs appeals to this Tribunal[108].

Again on July 4, 2012, the same Lagos Zone of the Tax Appeal Tribunal re-affirmed the above position of the law when it poignantly stated:

> An important factor to be borne in mind when trying to draw a distinction between this Tribunal and a court of law-a factor which in addition necessitates and compels its existence and rationale-is that many, perhaps most, of the cases that come before this Tribunal cannot even be countenanced at the Federal High Court at the phase they are brought here. These are cases that are not ripe for litigation. An example is where a taxpayer appeals here against an assessment by the FIRS without first filing an objection to its assessment, let alone waiting for Notice of Refusal to Amend. A normal Court like the Federal High Court would jettison such a claim as premature.[109]

Regardless of what the argument in favour of removal of NORA may be it is submitted that same is against the fundamental principle of law known as the Doctrine of Exhaustion of Prescribed Mechanism. The Supreme Court enunciated this doctrine in ***Sunday Eguamwense v. James I. Amaghizemwem***[110] when it noted:

> Where a statute prescribes a legal line of action for determination of an issue be that issue an administrative matter, chieftaincy matter or a matter of taxation, the

[108] Ibid. P. 129, per Kayode Sofola, SAN (Chairman, Lagos Zone of the Tax Appeal Tribunal)
[109] Federal Inland Revenue Service v. General Telecom Plc. (supra), P.134.
[110] (1993) 9 N.W.L.R. [Pt. 315] 1

> aggrieved party must exhaust all the remedies in that law before going to Court. The provisions of section 21 and S.22(1) - (6) of Traditional Rulers and Chiefs Edict (No. 16) 1979 (Bendel State) are clear as to steps to take. The plaintiff seemed to have jumped the stile as he avoided all avenues that availed him and went to the High Court. I am of the view that he did a wrong thing indeed. This Court is not asked nor were the lower Courts fully adverted to S.22(4)(a) and (b) (supra) and I shall not pronounce per incuriam on that subsection; but suffice to say here that provisions of S.22(5) and (6) have amply provided for redress which the plaintiff failed to seize advantage of[111]. (Underlining ours for emphasis)

The doctrine of exhaustion has also been applied in a number of other cases.[112] Applying this doctrine to disputes arising from assessment in Companies Income Tax for instance, one would expect that the taxpayer must exhaust the tax's authority's internal mechanism as provided under section 72.[113] It, therefore, follows that the aggrieved taxpayer must first file a notice of objection within 30 days with the FIRS and wait for the issuance of NORA before the taxpayer can file an appeal before the Tax Appeal Tribunal within another 30 days after receipt of NORA from the tax authority. Failure to follow this process would be struck down as amounting to 'jumping the stile' as held in ***Sunday Eguamwense*** case.

It is conceded that the preceding argument may no longer be sustainable having regard to the overarching influence of section 68 of the FIRS (Establishment) Act which provides that all tax laws shall be read with such modifications as to bring them in conformity with the provisions of the FIRS (Establishment) Act.[114] However, it is further submitted that the point at which a taxpayer can be said to be aggrieved should be upon receipt of NORA and not otherwise. It may well be that the offensive Decision, Assessment or Demand Notice may have been made upon the taxpayer in error which the tax authority could promptly correct upon receipt of notice of

[111] Ibid. P. 23. Per Belgore, J.S.C.
[112] Gbadamosi Lahan v. A.G. Western Region (1963) 1 All N.L.R. 226; Ogologo v. Uche (2005) 7 S.C. (111) 165; Benin Rubber Producers Limited v. Ojo (1997) 9 N.W.L.R. [Pt. 521] 388.
[113] Companies Income Tax Act. See also S. 41, Petroleum Profits Tax Act.
[114] S.68 provides that all tax laws shall be read with such modifications as to bring them into conformity with the provisions of the FIRS (Establishment) Act, 2007.

objection from the taxpayer. The benefit of the doubt here ought to operate in favour of the tax authority until otherwise established by the issuance of NORA which will then serve as a conclusive proof of the tax authority's position on the Demand Notice or Assessment as the case may be. At this point, the tax payer can now be properly said to have become aggrieved.

The Tribunal apparently contradicted itself on this issue in ***Oando Supply & Trading Limited v. Federal Inland Revenue Service***[115] when it held that the provisions in other tax legislations which require the issuance of NORA as a condition precedent to commencing actions before the Tribunal were inconsistent with the FIRS Act and therefore void. In the same breadth, the Tribunal proceeded to hold that the provisions of paragraph 13, 5th Schedule to the FIRS Act was without prejudice to the taxpayer's freedom to explore the taxman's in house review mechanism.[116] This with respect amounts to judicial summersault.

It is submitted that the issuance of NORA before the commencement of action at the Tax Appeal Tribunal should be retained in line with the extant judicial tradition. This would foster the much needed certainty and consistency in the Tribunal and minimize unnecessary confusion in tax adjudication system generally. It will also afford the tax authority the opportunity to correct certain inevitable human errors in Assessments and Demand Notices which will in turn reduce the number of case dockets that would come before the Tribunal. It remains to be added that this will increase the efficiency of the Tribunal as their attention will only be called into matters where there are real tax disputes.

The Act also provides that where a notice of appeal is not given by the appellant as required within the 30 days period specified, the assessment or demand shall become final and conclusive

[115] (2011) 4 T.L.R.N. 113.
[116] (Supra) P. 129

and the Service may charge interests and penalties in addition to recovering the outstanding tax liabilities which remain unpaid from any person through proceedings at the Tribunal.[117] This provision is wont to create many avoidable challenges in practice when juxtaposed with paragraph 13(2) which clothes the Tribunal with discretion to enlarge the time within which an aggrieved person may file an appeal if sufficient cause for the delay is shown. The use of the words "the assessment or demand notice shall become final and conclusive" clearly forecloses the exercise of discretion to enlarge time on the part of the Tribunal. As we mentioned above, the use of the word 'shall' denotes compulsion and forbids discretion. Consequently, it is submitted that there is a manifest contradiction between Paragraphs 13 (2) and 13(3), 5th Schedule to the FIRS (Establishment) Act. Every Court of law/Tribunal is generally vested with inherent powers to extend time for the doing of certain acts in the interest of Justice. This is the established judicial standard all over the common law jurisdictions. Therefore, for a piece of legislation to prohibit the Tribunal from exercising such discretionary powers is an antithesis to a productive Tax dispute resolution system. It is therefore suggested that the affected portions of the FIRS (Establishment) Act should be amended to conform to the established judicial standards.

2.5.4 Appeals by the Federal Inland Revenue Service for Non-Compliance

The Service aggrieved by the non-compliance by a person in respect of any provision of the tax laws, it may appeal to the Tribunal where the person is resident giving notice in writing through the secretary to the appropriate zone of the Tribunal.[118] By this provision, the FIRS may also file an appeal against any person who has failed to comply with any of the tax legislation it has powers to administer. Such appeals must be filed at the Zone of the Tribunal where the person

[117] Para 13(3), 5th Schedule, FIRS Act.
[118] Paragraph 14, 5th Schedule, FIRS Act.

resides. It remains to be added that the word person includes a company or body corporate and any unincorporated body of persons.[119]

In summary, the Tax Appeal Tribunal is a radical departure from its predecessors. It is tailored to function as an independent arbiter in all tax legislation in Nigeria. Apart from the few pitfalls, the establishment of the Tax Appeal Tribunal is a fantastic development that will secure the much desired confidence in our tax system. It is hoped that the few gray areas would be addressed urgently to pave way for certainty and stability in our tax and commercial system generally.

[119] S.69, FIRS (Establishment) Act, 2007.

CHAPTER THREE

3.0 PARTIES BEFORE THE TAX APPEAL TRIBUNAL

3.1 INTRODUCTION

In most adjudicatory proceedings, there usually exists two parties, namely, 'the Accuser' and 'the Accused,' generally described as Plaintiff/Claimant/Appellant on the one hand and Defendant/Respondent on the other hand. The Tax Appeal Tribunal is no different. The two parties to the Tax Appeal Tribunal are termed as Appellant[120] and Respondent.[121] This Chapter focuses on examining the various parties to an appeal before the Tribunal. The types of parties, the legal capacity to sue and be sued such as individuals, corporate bodies, partnerships, estates of deceased persons, infants and persons of unsound mind. Other issues considered relates to joinder of parties and non-joinder, who should apply for joinder and at what stage of the proceedings can an order for joinder be made, misjoinder of parties and the effect of non-joinder or misjoinder. Finally, another important issue relates to the death of a party to an appeal and what steps to be taken to substitute the deceased party.

3.2 TYPES OF PARTIES

Generally, before filing an appeal at the Tax Appeal Tribunal, one fundamental preliminary question that must be determined from the outset is the issue of parties. This is anchored on the elementary principle of law to the effect that bringing the correct parties before the court is necessary to enable the court determine the issues between the parties effectually, adequately and

[120] The aggrieved Party who files an appeal at the Tribunal. See Order II, Rule 1, Tax Appeal Tribunal (Procedure) Rules, 2010.
[121] The Party other than the appellant or applicant directly affected by an appeal. See Order II, Rule 1. (Supra)

completely in other to do justice in the matter.[122] Basically, the parties to a civil action can be classified into four groups namely: Proper Parties, Desirable Parties, Nominal Parties and Necessary parties. The basis of categorization depends on the degree of interest such persons have in the action.[123] Types of Parties are therefore examined closely here albeit briefly.

3.2.1 Proper Parties

Proper Parties are those who, though not interested in the claim, but are made parties for some good reasons essentially because of their involvement in the matter or events leading to the cause of action. For instance, in a suit filed to rescind a contract, any person is a proper party to it, who was active or concurring in the matters which gave the plaintiff the right to rescind the contract.[124] A proper party must be one who has played a role in the set of facts constituting the cause of action.

3.2.2 Desirable Parties

These are persons who may be affected in one way or the other by the result or outcome of the suit and whose interest will be prejudiced if they are not joined as parties. A desirable party is one who is not originally a party to the action nor whose presence is necessary for the just determination of the issues in the action but nevertheless needs to be a party in order to be bound since the decision in the case may directly affect him.[125]

3.2.3 Nominal Parties

[122] Green v.Green (1987) 3 N.W.L.R. [Pt. 61], 480, per Oputa, J.S.C.
[123] Afolayan, A.F. and Okorie, P.C., Modern Civil Procedure Law. Dee-Sage Nig. Ltd. Lagos (2007)Pp.49-50
[124] Green v. Green (Supra), P.496.
[125] Peenock Investment Ltd. V. Hotel Presidential Ltd.[1982] 12. S.C. P.1; Col. Hassan Yakubu (Rtd.) v. The Governor of Kogi State & ORS (1995) 9. S.C.N.J. 122; see also Efevwerhan, D.I., Principles of Civil Procedure in Nigeria. Chenglo Ltd. Enugu (2007) P. 68.

A Party is a Nominal Party when he has no interest in the subject matter of the suit, but he is joined by virtue of his office. The foremost example here is the office of the Attorney General who is usually joined in a suit involving the government of the Federation or a State as the case may be.

3.2.4 Necessary Parties

These are persons who are not only interested in the subject matter of the proceedings, but also in their absence, the proceedings cannot be fairly dealt with. In the case of *Panalpina World Transport (Nig) Ltd v. J.B.Oladeen International & Ors*,[126] the Supreme Court explained that a necessary party to a proceeding is a party whose presence and participation in the proceeding is necessary or essential for the effective and complete determination of the claim before the court.

Relating the preceding discussions of types of Parties to the Tax Appeal Tribunal, it would seem that they may not practically apply *mutatis mutandis* to the Tribunal. For instance, the FIRS (Establishment) Act empowers a party who is aggrieved by any action or decision of the service to appeal against such decision, assessment or demand notice made upon him.[127] In filing the appeal, will the appellant join the Attorney General of the Federation in the appeal seeing that the latter is the chief law officer of the Federation and the FIRS is an Agency of the Federal Government? While it is conceded that the general procedural practice is that the Attorney General of the Federation must be joined in every action involving the Federal Government or any of its agencies, it is submitted that appeals at the Tribunal are an exception to this general rule. It is further submitted that this is one aspect where the provision that "any proceedings

[126] (2011) All F.W.L.R. [Pt. 564] 21, 36, paras C-D
[127] Para 13(1), 5th Schedule, FIRS (Establishment) Act, 2007

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"[128] must be read with some circumspection. The rationale for this view is not far-fetched. Disputes before the Tax Appeal Tribunal are basically between the tax payer and the tax collector thus making it narrower than is the case in the conventional civil court proceedings. The Lagos Zone of the Tax Appeal Tribunal apparently endorsed this position when it enthused as follows in ***Federal Inland Revenue Service v. General Telecom Plc,***[129]

> The appellant FIRS asserts that the Attorney General must be a party in a case of this nature in which an Act of the National Assembly is impugned. But all the authorities the appellant relies on for this proposition deal with court proceedings. So presuming without conceding that the Attorney General is a necessary party in all litigation challenging Federal legislation, that principle does not govern proceedings before the Tribunal like this with a narrow jurisdiction over persons. It is only in extremely rare cases that parties before us can extend beyond taxpayer and tax collector.[130]

It is therefore the submission that strict legal grouping of Parties as in the conventional court proceedings may not necessarily apply to the Tax Appeal Tribunal having regard to its narrow jurisdiction with respect to subject matter as well as persons.

3.3 LEGAL CAPACITY TO SUE AND BE SUED

As emphasized above, disputes before the Tax Appeal Tribunal essentially involves Tax payers and the tax collector. While the tax collector is known,[131] tax payers may vary. Tax payers could be individuals or corporate bodies, government or its parastatals, partnerships, estates of deceased persons or infants/persons of unsound mind. It thus becomes very germane to determine whether the tax payer who purports to be aggrieved, has the capacity to file an appeal before the Tribunal. This is more so because the onus is on the party whose capacity to sue is

[128] Ibid. Para 20(3)
[129] (2012) 7 T.L.R.N. 108.
[130] Ibid. P.135.
[131] The tax collector is the FIRS.

challenged to prove that he has the legal capacity to institute the appeal.[132] Conversely, the FIRS can only maintain an action for non-compliance[133] against a tax payer who has the requisite competence to sue and be sued. Where a party does not have the capacity to sue or be sued, the action will be struck out.[134] It is therefore intended to review some of the various parties that could maintain an action at the Tax Appeal Tribunal.

3.3.1 Individuals

Every normal individual of full age has the legal capacity to sue and be sued in his personal name. In fact the general rule is that only individuals and corporate entities with distinct legal personality can sue or be sued.[135] It therefore follows that any individual who is aggrieved by a real or perceived wrongful charge to tax or any decision or demand notice made upon him by the Federal Inland Revenue Service can competently approach the Tribunal by way of an appeal.

3.3.2 Corporate Bodies

Corporate bodies like companies also have legal capacity to sue and be sued in their corporate names. This competence is derived from the incidence of incorporation at the Corporate Affairs Commission. The incidence of incorporation vests all the powers of a natural person of full capacity on the company.[136] A company is therefore competent to file an appeal before the Tax Appeal Tribunal in its corporate name without joining any of its Directors or alter egos and vice versa.

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[132] Aguda, A., Practice and Procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria. MIJ Professional Publishers Ltd. Lagos. 2nd Edition (1995) P.90.
[133] Para 14, 5th Schedule, FIRS (Establishment) Act, 2007.
[134] Shittu v. Ligali (1941) 16 NLR. 21; Agbonmagbe Bank Ltd v. General Manager, G.B. Ollivant Ltd. (1961) All N.L.R. 116.
[135] A folayan, A.F. and Okorie, P.C., Op. cit. P. 54.
[136] Ss 37 and 38, Companies and Allied Matters Act. CAP. C20, L.F.N., 2004.

3.3.3 Partnership Firms

The general position is that Firm of Partners is not an incorporated body and therefore cannot sue or be sued in its partnership name. However, some rules of Court appear to suggest that a firm of Partners could be sued in its business name. For instance, the Federal High Court (Civil Procedure Rules) 2009 provides as follows:

> Any two or more persons claiming or alleged to be liable as partners and doing business within the jurisdiction may sue or be sued in the name of the firm, if any, of which they were partners when the cause of action arose and any party to an action may in such case apply to the Judge for a statement of the names and addresses of the persons who were partners in the firm when the cause of action arose, to be furnished in such manner, and verified on oath or otherwise as the Judge may direct.[137]

Similarly, Order 13, Rule 24, High Court of Lagos State (Civil Procedure) Rules 2012 provides as follows:

> Any two or more persons claiming or alleged to be liable as partners and doing business within the jurisdiction may sue or be sued in the name of the firm, if any, of which they were partners when the cause of action arose and any party to an action may in such case apply to the Judge for a statement of the names and addresses of the persons who were partners in the firm when the cause of action arose, to be furnished in such manner, and verified on oath or otherwise as the Judge may direct.[138]

The Supreme Court appears to have also endorsed the view that a Firm of Partners may be sued in its name once any law or rule of court so provides. The Supreme Court expressed this view in the case of ***Iyke Medical Mercandise v. Pfizer Inc. & Anor.***[139]

[137] Order 9, Rule 26, Federal High Court (Civil Procedure Rules) 2009.
[138] Order 13, Rule 24, High Court of Lagos State (Civil Procedure) Rules 2012.
[139] (2001) 5 SCNJ. 12

Whichever position is adopted, it is not certain whether or not a firm of partners could maintain an action in its name at the Tax Appeal Tribunal. This uncertainty is largely created by two factors:

(a) The rules of practice and procedure of the Tribunal has no such provision as that of the Federal High Court and Lagos State High Court cited above;

(b) The second option would have been that the Firm would be sued in the name of the Partners. Yet this is mired with problems having regard to the fact that "partners' incomes are usually apportioned to each partner in accordance with the provisions embedded in the partnership agreement. Thus, the assessment on the partners is done as if they were trading individually."[140]

Even though the incomes of Partners are assessed as if they were trading independently,[141] it is submitted that the Firm or any of its members may sue on behalf of others. This view is supported by Order V Rule 1(b) of the Tax Appeal Tribunal (Procedure) Rules, 2010 which expressly provides that a Partnership may act through one of its partners. Admittedly, Order V Rule 1(b) refers to the option available to a partnership to present or argue its case before the Tribunal through one of its partners, it is however submitted that the instant rule suffices to denote capacity for Partnership firms to sue and be sued before the Tax Appeal Tribunal.

3.3.4 Estates of Deceased Persons

The law is trite that incomes arising from the estate of a deceased person are subject to tax. The tax authority in this case is the State in the Inland Revenue Department where the administration

[140] John, D. C. General Principles of Taxation, (Unpublished) Lecture Notes, Faculty of Law, ABU, Zaria, (2012), P. 15.
[141] S. 8, Personal Income Tax Act, 2011 as Amended.

of the estate took place or where the deceased was last resident.[142] In the event of a perceived wrongful charge to tax of the incomes arising from the estate, the Trustees, Executors and Administrators of the estate may sue or be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any beneficiaries. When they so sue or are sued, they will be considered as representing such beneficiaries.[143] Here again is another lacuna in the Tax Appeal Tribunal (Procedure) Rules. Other rules of court make clear provisions for the trustees, executors or administrators of an estate of a deceased person to maintain an action on behalf of the beneficiaries of the estate they represent.[144] It is submitted that this lacuna is unfortunate and needs to be filled by way of an amendment to the Tax Appeal Tribunal Rules to make for clarity. This will reduce, if not totally eliminate, avenues for preliminary objections that may unwittingly foist delay upon the Tribunal and reduce it to the same ills of the regular courts.

3.3.5 Infant/Persons of Unsound Mind

An infant or a lunatic is a taxable person. The fact that a person is handicapped or otherwise incapacitated does not mean that he is not liable to income tax. The infant or a lunatic is usually assessed in the name of his agent, guardian or any person acting on his behalf. Where the infant has no guardian or trustee, an assessment can be made in his own name or an agent may be appointed for him.[145] That being the case, it would seem that guardian or agent of the lunatic/infant may file an appeal at the Tax Appeal Tribunal on behalf of the infant/lunatic and vice versa. Again the rules of practice and procedure of the Tribunal is painfully silent on this

[142] S.2 (6) Personal Income Tax Act; John, D.C. Op. cit. P. 17.
[143] Efevwerhan, D.I., Op. cit. P.76.
[144] Order 10, rule 15, High Court of the FCT, Abuja (Civil Procedure Rules), 2004, Order 13, rule 11, High Court of Lagos State (Civil Procedure) Rules, 2012.
[145] John, D.C. Op.cit. P. 18

very crucial issue unlike the rules of conventional courts.[146] It remains to be added that this lacuna needs to be filled and very urgently too.

3.3.6 Representative Action

In civil litigations generally, actions may be instituted by one or more plaintiffs or defendants for and on behalf of other parties to the suit. The rules of court however require that such group of persons must have the same interest in the cause or matter and any or a few of them could, with leave of court sue or defend the suit on behalf of the others.[147] This is usually applicable in cases where a group of persons have a common right, which has been or perceived to have been invaded or infringed by a common enemy. This procedure therefore allows them to come together to seek redress.[148] The consent of all the members of the group must however be sought and obtained before their representatives can file the suit on their behalf.

Some group of tax payers resorted to this procedure before a Federal High Court siting in Akure, Ondo State in the case of ***Chief (Mrs.) Victoria Ogundana Adedotun and Anor. V. Federal Inland Revenue Service (Akure Integrated Tax Office) and Anor.***[149] In that case, the plaintiffs initiated the action as suing for themselves and on behalf of all food vendors in Akure South Local Government. They sought for a declaration that the plaintiffs are not mandated by any law to pay Value Added Tax amongst other reliefs. Unfortunately, the action was dismissed on

[146] Order 10, rule 12, FCT High Court Rules; Order 13, rules 9 and 10, High Court of Lagos State (Civil Procedure) Rules, 2012.
[147] Order 10, rule 8, FCT High Court Rules; Order 13, rule 12, High Court of Lagos State (Civil Procedure)Rules, 2012.
[148] Afolayan, A.F. and Okorie, P.C., Op. cit. P. 63.
[149] (2011) 4 T.L.R.N. 88.

preliminary grounds for failure to give the statutory notice to the FIRS before commencing the action. It is submitted that even though the action was not heard on the merit, it none the less sets a satisfying precedent that a representative action could be maintained in tax matters. It thus becomes a matter of serious concern for the omission of this important procedure in the rules of practice and procedure of the Tax Appeal Tribunal.

3.4 PARTIES AND REPRESENTATIONS AT THE TAX APPEAL TRIBUNAL

The Tax Appeal Tribunal (Procedure) Rules, 2010 makes extensive provisions for the representation of parties in proceedings before the Tribunal. The representation is in different categories viz:

(a) An appellant may appear for himself;

(b) A partnership may act through one of its partners;

(c) A corporate entity may act through one of its directors, officers or employees; and

(d) A party may be represented at all stages of the proceedings before the Tribunal by a legal practitioner or a chartered accountant or an adviser.[150]

The foregoing further underscores the informality of the procedure at the Tax Appeal Tribunal which is aimed at securing cheaper and friendly resolution of tax disputes. Allowing an aggrieved tax payer to appear for himself as well as availing partners and corporate entities the opportunity to choose who should represent them is a development that would encourage tax payers to ventilate their grievances without having to incur legal fees for the services of a legal practitioner. Tax payers has had cause to 'stomach' wrongful assessment to tax which they

[150] Order V, rules 1 and 5; para 18 (1) and (2), 5th Schedule, FIRS (Establishment) Act, 2007.

would have ordinarily challenged for fear of the high cost of engaging the services of a legal practitioner. This problem, no doubt may have induced a lot of tax payers to deepen their indulgence in tax avoidance and evasion practices to the detriment of the revenue of the State.

Similarly, expanding representation before the Tribunal to include Legal Practitioners, Chartered Accountants and Advisers[151] is a laudable idea. It is incontestable that taxation is a specialized field of knowledge that is not by any stretch of the imagination within the exclusive preserve of legal practitioners. This provision affords an aggrieved tax payer the latitude to choose who should represent him before the Tribunal if, for any reason, he does not intend to represent himself. It is submitted that the choice here would largely be made along the lines of competence, skill and more importantly, cost.

The foregoing notwithstanding, it is submitted that it would not be in the best interest of any appellant to engage the services of a Chartered Accountant or an Advisor who has no knowledge of law whatsoever to represent him before the Tribunal. The pitfall of such choice comes to the fore if it is remembered that the Tribunal is chaired and presided over by a legal practitioner who is so qualified for a period of not less than 15 years with cognate experience in tax legislations and tax matters.[152] That being the case, it will, therefore, require a legal practitioner to represent the appellant in order to present his case using the right legal approaches. To say that a lawyer would better appreciate and communicate with a Tribunal presided over by a 'like mind' in terms of training is just to state the obvious. To achieve optimum result before the Tribunal, it is submitted that appellants would need to engage the combined services of a Chartered Accountant, a tax Advisor and a Legal Practitioner or either a Chartered Accountant or an

[151] An Adviser includes a Chartered Tax Practitioner. See Order II, rule 1.
[152] Para 2(2) and (3), 5th Schedule, FIRS (Establishment) Act, 2007.

Adviser and a Legal Practitioner. While the one would assist in accurately reconciling the accounts, the legal practitioner would be in a better position, given his training, to communicate the arguments before the Tribunal. This strategy is usually adopted in practice and it has proved to be very effective.

3.5 JOINDER OF PARTIES

It has been explained earlier that disputes at the Tax Appeal Tribunal are characteristically between the tax collector otherwise known as the Federal Inland Revenue Service and Tax payers. It has also been mentioned that while the tax collector is a single authority, tax payers vary and are multifarious. Consequently, circumstance may arise where the dispute or appeal before the Tribunal for determination may involve two or more tax payers. In other words, two or more tax payers may have a joint right to relief in a particular appeal arising out of the same or a series of transactions. Would such tax payers, assuming they are up to 50 aggrieved persons, be required to maintain separate actions before the Tribunal? What happens where someone who ought to have been joined in an appeal was in fact not joined? Conversely, what happens where someone who ought not to have been joined is mistakenly joined? Furthermore, where a taxpayer believes that he has an interest to protect in a pending appeal before the Tribunal, at what stage of the proceedings can such a taxpayer apply to be joined as a party to the appeal. These are some of the issues that will engage attention hereinafter, beginning with Non-Joinder of Parties.

3.5.1 Non-Joinder of Parties

Non-Joinder of parties arises when there is a failure to include a party who ought to have been made a party to an action in court.[153] The law is settled that a litigant who conceives that he has a cause of action against a particular respondent must be allowed to pursue his cause against such respondent only and must not be compelled to proceed against any other respondent he does not desire or intend to sue.[154] In fact, in ***Attorney General Federation v. Attorney General Akwa Ibom State***,[155] the Supreme Court held that "it is clearly the undisputed right of the Plaintiff to choose the person or persons he wished to sue." This general rule of law gives way once a suit has been filed thus making the Court the '*dominous litis*.' Accordingly, the Court assumes the duty and responsibility to ensure that the proceedings are conducted in such a manner that will secure the interest of justice to all concerned. This objective compels it to make orders joining parties who for whatever reason were not joined at the commencement of the suit. This is the intendment of Order V rule 2 of the Tax Appeal Tribunal (Procedure) Rules, 2010.

3.5.2 Misjoinder of Parties

When the mistake relates to joining a party to a suit who ought not to have been joined in the suit, it is said that a misjoinder of parties has occurred. When this happens, the provisions of the majority of rules of Court are that the Court may make an order that the name of the misjoined party be struck out. For instance, under the Federal Capital Territory High Court Civil Procedure Rules, a Court may, at any stage of the proceedings and on such just terms order that the name of any party improperly joined, be struck out, whether as plaintiffs or defendants.[156]

[153] Efevwerhan, D. I., Op.cit. P.82.
[154] Dollfus Mieq et Companies S.A. v. Bank of England (1950) 2 All.E.R. 605, 615.
[155] (2011) 8 N.W.L.R. [Pt. 1248] 31, 87, Para B.
[156] Order 5, Rule 5(5), High Court of the Federal Territory Abuja (Civil Procedure Rules) 2004; see also Order 13, rule 16(2), High Court of Lagos State (Civil Procedure) Rules, 2012.

Unfortunately, no similar provision is found in the rules of practice and procedure of the Tax Appeal Tribunal. The question therefore is: what happens in the event of a misjoinder of parties to an appeal before the Tribunal? Perhaps, the Tribunal may avail itself with either of two options which are apparently interrelated. The first option would be that the Tribunal will fall back on its inherent jurisdiction to order that the name of the party so misjoined be struck out. As a second option, the Tribunal may call in aid the provisions of Order XXII rule 4 which empowers it (the Tribunal) to adopt such procedure as will in its view do substantial justice between the parties in any matter in respect of which no provision or no adequate provisions are made in the Rules as it is in the instant issue.[157] While this research concedes that either of the two options would suffice, it is none the less submitted that in the interest of clarity, the Rules should be altered to reflect this provision. The importance of this cannot be overemphasized if it is remembered that the fundamental objective for establishing the Tribunal is to build the confidence of all in the tax system.

3.5.3 Joinder of Persons Severally or Jointly and Severally Liable

The Tax Appeal Tribunal (Procedure) Rules, 2010 makes provision for the joinder of persons who are severally or jointly and severally entitled to sue or liable as the case may be. It provides as follows:

> All persons may be joined in an appeal as appellants in whom any right to relief (in respect of or arising out of the same transaction or in a series of transactions) 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 relief, for such relief as he or they may be entitled to without any amendment.[158]

[157] Order XXII, Rule 4, Tax Appeal Tribunal (Procedure) Rules, 2010.
[158] Order V, Rule 2, Tax Appeal Tribunal (Procedure) Rules, 2010.

Conversely, the rules also provides that all person may be joined as respondents against whom the right to any relief is alleged to exist, whether 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.[159] These provisions afford the Tribunal the wide latitude to require as many parties as may be affected or interested in a given appeal to appear before it. This is designed to prevent multiplicity of actions and prevent delay and thus save the parties unnecessary costs.[160] But for this rule, countless appeals would have littered the Tax Appeal Tribunal.

3.5.4 Who should apply for Joinder of a Party

From the rules, it seems uncertain who may apply for joinder of parties. What is rather clear is that the rules vest the prerogative of ordering joinder of parties on the Tribunal. Same is reproduced below for emphasizes:

> If it appears to the Tribunal, at or before the hearing of an appeal that all the persons who may be entitled to or who may 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 shall be made either appellants or respondents in the appeal.[161]

Notwithstanding the foregoing provision, it is submitted that any of the parties to an appeal before the Tribunal may apply for joinder of a party who hitherto was not joined or for striking out of the name of a party who was joined in error. This could be done by notice of motion supported by an affidavit stating the reason for the particular relief sought and a written address in support. This view, apart from being consistent with the practice and procedure in civil

[159] Ibid., Order V, Rule 3.
[160] Taiwo v. A.R.M.T.I (2012) All F.W.L.R. [Pt. 617] 781
[161] Order V, Rule 4.

litigations generally,[162] is also fortified by Order XI[163] of the rules of practice and procedure of the Tribunal which makes provisions for applications before the Tribunal.

3.5.5 Stage of the Proceedings at which Joinder may be Ordered

Admittedly, the rules do not provide specifically the stage at which an order of joinder may be made or not made. However, the general principle of law is that an order for joinder of parties may be made at any time before judgment provided the party sought to be joined is a necessary party. ***Bode Rhodes-Vivour, JSC*** enunciated this position of the law in the following illuminating words:

> The reason for making a person a party to an action is that he should be bound by the result of the action. Consequently the question to be settled in the action must be one which cannot be effectually and completely settled unless he is a party … Joinder is necessary to ensure that proper parties are before the court for determining the point in issue. Application to join may be made at any time.[164]

It is also fairly established now that joinder may be ordered for the first time on appeal. This was the case in ***Laibru Limited v. Building and Civil Engineering Contractors***[165] the facts of which were as follows: At the hearing of the action, evidence adduced on behalf of the plaintiff company showed that early in 1959 one Michael Ibru, an individual trading under the name of 'Laibru' sold the goods in question to the defendant for which the defendants failed to pay. It further showed that, later in the same year, Ibru and others formed the Plaintiff company for the purpose of taking over and running the business formerly run by him personally: that Ibru assigned all of his debts in the business to the plaintiff company, including the debt owing to him

[162] Afolayan, A.F. and Okorie, P.C., Op. cit. P.69; Efevwerhan, D.I., Op.cit, P.87.
[163] See Chapter 5 (infra.) for a detailed discussion of Order XI
[164] Panalpina World Transport Nig. Ltd v. J.B. Olandeen International (Supra), P. 38, para. A-B.; Odahe v. Okujeni & Ors. (1973) All NCR. [Pt.2] 156.
[165] (1961)1 All. N.L.R. 385

by the defendants for goods sold by him to them earlier in that year; and that notice of the assignment of the debt to the company had not been given by him to the defendants. At this point, counsel for the plaintiff company applied for an order adding Michael Ibru as co-plaintiff in the action. He later applied for an order to substitute Ibru for the company as Plaintiff. The Defendants' Counsel objected and the objection was upheld by the trial judge. On appeal, the Federal Supreme Court reached the following illuminating decision while allowing the appeal:

> Where, by a mistake of law, the lower court refused to substitute or join a party as plaintiff, who should have been substituted or joined; and where joinder of such a party does not involve any amendment of the pleadings or affect the substantive rights of the other parties to the action, the Federal Supreme Court will, of its own motion, direct that Notice to Appear on the Appeal be served upon such party … and will, in a proper case, order the joinder of such party for all of the purposes of the action, without remitting the action to the lower Court for a new trial.[166]

More recently, in ***Yakubu v. Governor of Kogi State***,[167] the Court of Appeal also joined the 5th defendant as a co-defendant for the first time at the Court of Appeal. The 5th defendant was not a party to the suit as at the time it was filed at the lower Court.

In effect, an order for joinder of a party may be made at any time once the Court is of the view that the joinder is in the interest of doing justice in the case. It is therefore submitted that the Tax Appeal Tribunal would be better off if it imbibes this established judicial attitude to joinder.

3.5.6 Effect of Non-Joinder or Misjoinder

The law is that non-joinder or misjoinder of parties does not operate to defeat an action competently before a court of law. ***Aboki, J.C.A.*** was very forthright on this point in the case of ***Nnaji v. Nigerian Football Association***[168] where he enthused as follows:

> It is trite law that no cause or matter shall be defeated by reason of mis-joinder or non-joinder of parties and courts are enjoined in every

[166] Per Bairamian and Brett, F.JJ.: Taylor, F.J. dissenting. At P. 387.
[167] (1995) S.C.N.J. 122.
[168] [2011] ALL F.W.L.R. (Pt.559) 1195.

> cause or matter to deal with the matter in controversy so far as it regards the rights and interest of the parties before it.[169]

The Supreme Court has also reached a similar decision in a long line of decided cases.[170] It is therefore submitted that notwithstanding the gap in the rules of practice and procedure of the Tax Appeal Tribunal in this regard, appeals before the Tribunal cannot be disavowed by reason of non-joinder or misjoinder in line with the extant judicial authorities. It needs to be added that although non joinder of a necessary party is a mere procedural irregularity which will not affect the competence or jurisdiction of the Court to determine the action before it. However, where such irregularity leads to a miscarriage of justice or unfairness to the opposing party, the appellate Court may set aside the judgment.[171]

It is arguable if the Tax Appeal Tribunal can join parties in much the same way as our regular courts. This argument arises from the limited jurisdiction of the Tribunal under paragraph 13, 5th Schedule to the Federal Inland Revenue Service (Establishment) Act, 2007 which provides as follows:

> 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 to in paragraph II, may appeal against such decision or assessment or demand notice within the period stipulated under this Schedule to the Tribunal.[172]

The contention here is whether a person who is not aggrieved by an assessment or a demand notice could be joined as a party in an appeal before the Tribunal. In other words, can the Tribunal order the joinder of a party who has not in any way shown any grievance or complained against any assessment, decision or notice made upon him by the Federal Inland Revenue Service simply because the case cannot be effectively and effectually determined in his absence or that the outcome of the decision would affect him one way or the other? The Lagos Zone of the Tax Appeal Tribunal was recently called upon to answer this question in two related cases. The first case was ***Esso Exploration & Production Nigeria (Deep Water) Limited and***

[169] Ibid. P. 1204
[170] Osondu v. Solel Boneh (Nig.) Ltd (2000) 3. S.C. 429; Okoye v. Nigeria Construction & Furniture Co. Ltd. (1991) 6 NWLR. [Pt. 199] 501, 502; Peenock Investments Ltd. V. Hotel Presidential Ltd.(Supra)
[171] Ayorinde v. Oni (2000) 2. S.C. 33.
[172] Para. 13(1) 5th, Schedule, FIRS Act, 2007.

SNEPCO Limited. v. Federal Inland Revenue Service.[173] In this appeal, the crux of the appellants' complaint is that their joint-venture partner, the NNPC filed Tax Returns with the respondent unilaterally on their behalf without taking into consideration their submissions on the Tax Returns in respect of Education Tax and Petroleum Profit Tax. The respondent brought a preliminary objection contending that the Appellants had no locus standi to bring the appeal since they did not file any returns nor were served with any assessment notice. This instant objection was overruled by the Tribunal. The respondent also brought an application for joinder of the NNPC arguing that the NNPC was a necessary party since the outcome of the appeal would impact it financially whichever way it was decided. In allowing the joinder, the Tribunal noted:

> However phrased, this is an admission that the verdict of the Tribunal would have an impact on the party sought to be joined. It is for that party to put forward its case and decide what is beneficial to it. At any rate it is not for the Tribunal to make any conjecture about the NNPC's interest in its absence. The nature of the interest of the party sought to be joined falls within the parameters set in Weldem Limited v. Akpainenem (supra) in our view. It is the correct position of the law that NNPC is foreclosed from initiating the process of tax appeal not having objected. Where however in the unusual case where it has a material stake, or will be impacted by the outcome of the tribunals *(sic)* determination, the tribunal will be duty bound to give it and all necessary parties, as defined above, the opportunity if so minded, but the tribunal is bound by law to afford it such opportunity.[174]

Upon being served with the enrolled order of the Tribunal joining it in the appeal, the respondent (NNPC) filed a preliminary objection to the appeal on the ground that the Tribunal cannot exercise personal jurisdiction over the NNPC, which is neither the tax collector nor an aggrieved taxpayer contemplated in paragraphs 13 and 14 of the 5th Schedule to the Federal Inland Revenue Service (Establishment) Act, amongst others grounds. Ruling on this objection, the Tribunal quipped in the words below:

> The right to fair hearing cannot seek to compel a person to present a case for himself; the right only makes available to that person the opportunity to present his case –Audu v. INEC (2010) 13 NWLR[pt. 12] p. 456 at p. 535 paras C-D (sic). It therefore follows that a person having been given an opportunity to present his case, can choose not to present any arguments or submissions.

[173] (2012) 8 T.L.R.N. 45.
[174] Ibid. P.57.

> The 2nd respondent has elected not to complain against the assessment when the on-going appeal was brought to its attention. Justice is therefore served and the matter is put to rest by an order striking out the 2nd Respondent from this appeal and it is hereby so ordered.[175]

The preceding decision of the Tribunal suffers two major pitfalls: firstly, it appears that the Tribunal failed or avoided a categorical response to the issue raised by the 2nd respondent. It is the view herein that the Tribunal was evasive in its approach of the issue. Rather than pronounce whether or not it has jurisdiction to order the joinder of the 2nd respondent in the circumstances of the instant case, the Tribunal, with respect, resorted to whipping up the sentiment of the constitutional concept of fair hearing. The evasive approach of the Tribunal on this issue runs afoul of the fundamental principle of administration of justice which holds that a court of law has a duty to consider and resolve all issues canvassed before it. In the words of ***Obasaki, J.S.C***., "a court must give full and dispassionate consideration to all issues raised and canvassed before it."[176] The Tribunal erroneously abnegated this bolden duty in the instant case.

Secondly, it is submitted that the Tribunal does not enjoy the extended powers to join the 2nd defendant. Once it is shown that a party before the Tribunal does not fall within the purview of an aggrieved tax payer or tax collector, the Tribunal cannot exercise personal jurisdiction over such individual. The reason here is because the Tribunal has a very narrow jurisdiction. This much has been admitted by the Tribunal itself when it wrote that "it is only in extremely rare cases that parties before us can extend beyond taxpayer and tax collector."[177] Despite this earlier pronouncement which is much more consistent with the law, the Tribunal went ahead to hold as it did in ***Esso Exploration case***[178] and the 'sister' case ***CNOOC Exploration and Production Nigeria Limited and South Atlantic Petroleum Corporation v. Federal Inland Revenue Service and Nigeria National Petroleum Corporation.***[179] It is submitted that the only option open to the Tribunal in the circumstance was to decline jurisdiction and order the parties to approach the

[175] ***Esso Exploration & Production Nig. (Deep Water) Ltd & Anor. v. FIRS & NNPC.*** Appeal No. TAT/LZ/036 & 037/2010 (Unreported) delivered on February 8, 2013. P. 5.

[176] Atanda v. Ajani (1989) 3 N.W.L.R. [Pt. 111] 511, 539; Ojobue & Anor. V. Ajennubia & Anor. (1972) 6 S.C. 27.

[177] FIRS v. General Telecom Plc (2012) 7 T.L.R.N. 108, P. 135

[178] (Supra)

[179] (2012) 7 T.L.R.N. 1 and (2013) 9 T.L.R.N. 28 for the first and second sets of objections respectively. The facts are on all fours with the **Esso Exploration appeal.** See also **Shell Nigeria Exploration & Production Co. Ltd & Ors v. FIRS (2012) 8 T.L.R.N. 59.** 3

Federal High Court which has a wider and unlimited jurisdiction over revenue matters generally. This view is supported by the principle of law which holds that if there is a court which has the jurisdiction to determine all the issues raised in a matter, it is improper to approach a court that is competent to determine only some issues. ***Obasaki, J.S.C.***, was forthright on this score when he noted as follows in ***Tukur v. Government of Gongola State***:[180]

> If there is a court with jurisdiction to determine all the issues raised in a matter including the principal issue, it is improper to approach a court that is competent to determine only some of the issues. The incompetence of the court to entertain and determine the principal question is enough to nullify the whole proceedings and judgment in any matter brought before the court,"
>
> "Judges have no duty and indeed no power to expand the jurisdiction conferred on them...the courts have always emphasised the need to decline jurisdiction where its exercise will determine issues it has no jurisdiction to hear and determine**.**"[181] (Underlining supplied)

Furthermore, having made the order to join the 2nd respondent in the first place, the Tribunal by that singular order loudly affirmed that the 2nd respondent was a necessary party in the appeal and that the appeal cannot be effectually determined in the absence of the 2nd respondent. Turning round to strike out the 2nd respondent amounts to over ruling itself and sitting on appeal over its own decision which is not allowed in law. The decision of ***Orji-Abadua, J.C.A.***, in ***Augustine Bassey Ene v. Chief Asuquo Asikpo & Anor***[182] is very apposite here. The Eminent jurist held that "once a court has decided an issue in a particular way, the court becomes *funtus officio* in respect of that issue and cannot reach a different decision on the issue in the same case.[183]" Again, in ***Alhaji (Hon.) Ishola Lawal & 5 Ors v. A.G, Kwara State & Anor.***[184] ***Denton-West, J.C.A.*** cited the Supreme Court case of ***Nigerian Army v. Iyela*** with approval and therefore concluded that:

> A court becomes automatically *funtus officio* in matters it gives a decision. To review such decision is an absolute abuse of power and the only body that can review such is the appellate court. A court cannot reopen the matter it has initially dealt with.

[180] (1988) 4 N.W.L.R. [Pt. 117] 517.
[181] Ibid. P.522.
[182] (2011) All F.W.L.R. [Pt. 553] 1907
[183] Ibid. P. 1937, para B-C.
[184] (2011) All F.W.L.R.[Pt. 590] 1308

> The trial court having granted the order to bring the action in a representative capacity as prayed, cannot reopen the matter or review itself even if the evidence upon which it acted was wrong. The lower court is *funtus officio* and cannot vary the form of its earlier decision because it cannot sit on appeal on its own case.[185]

The preceding declarations of the Court make it abundantly clear that the decision of the Tribunal to join the 2nd respondent on the application of the 1st respondent and thereafter order that the 2nd respondent's name be struck out from the appeal on the objection of the 2nd respondent is a grave error and same is a far cry from the established judicial tradition.

Suffice it to mention that these two cases are now pending before the Federal High Court as the 2nd respondent has long appealed against the ruling of the Tribunal.

3.6 CHANGE OF PARTIES

It is a common saying that change is constant. It is, therefore, expected that there may be a change after the commencement of an appeal before the Tax Appeal Tribunal. The closest example that readily comes to mind is death. This is because of its inevitability amongst mortals. This aspect of the research is very crucial because, a dead man has no legal capacity to sue or be sued and an order made in his favour or against him is invalid.[186] The same thing applies to a company that has been wound up. This segment will therefore address what happens in the event of the death of an appellant or respondent as the case may be. It will also discuss how this applies to a corporate body.

3.6.1 Death of a Party to an Appeal before the Tax Appeal Tribunal

[185] Ibid. P. 1316, Paras D-E.
[186] Okotie & Ors v. Olughor (1995) 5 S.C.N.J. 15

Order VI of the Tax Appeal Tribunal (Procedure) Rules, 2010 categorically provides that there shall be no abatement of proceedings before the Tribunal. Accordingly, the Rules provides that where after the filing of a notice of appeal, and the appellant, being an individual, dies, becomes insane or is adjudged bankrupt, or being a company, is wound up, the proceedings before the Tribunal shall not abate but may continue by substituting in place of the appellant, the executor, administrator or other legal representative of such individual appellant or by the assignee, receiver or liquidator of such appellant company, as the case may be.[187] The Rules also provides that where an appeal has been filed, and the respondent, being an individual, dies, becomes insane or is adjudged bankrupt, or being a company, is wound up, the proceedings before the Tribunal shall not abate but may be continued by substituting in place of the respondent, the executor, administrator or other legal representative of such individual respondent or by the assignee, receiver or liquidator of such respondent company, as the case may be.[188]

This provision only makes it open for the survivors of the deceased party to proceed with the action if they elect to so do. Perhaps this informs the reason why the drafters of the Rule used the words "…shall not abate but may be continued…" The ultimate choice to continue the appeal or not rests with the representatives of the deceased appellant or respondent as well as the liquidators or receivers of a wound up company as the case may be.

3.6.2 Procedure for Application to Substitute another Person for a Deceased Party to an Appeal

This is another area where there seems to be a grievous lacuna in the Rules as they are silent on the procedure for making the substitution in the event that there arises a need to so do. Generally,

[187] Order VI Rule 1.
[188] Order VI Rule 2.

in the case of the death of a sole surviving defendant, the plaintiff may apply to court specifying the name and address of any person whom the plaintiff alleges to be the legal representative to be substituted for the deceased sole defendant.[189] It is submitted that under the Tax Appeal Tribunal Rules, such application can be made by notice of motion under the provisions of Order XI and the inherent jurisdiction of the Tribunal.

In conclusion, discussions so far have revealed that although the Tax Appeal Tribunal is deemed to be a civil court for all purposes, it none the less does not enjoy all the latitudes of a conventional civil court like the Federal High Court. As seen from the point of view of the parties before the Tribunal, the capacity of the parties to sue or be sued before it as well as its powers to order joinder of parties, amongst others. What this means is that the Tax Appeal Tribunal is a specialized conception of the law with a very narrow jurisdiction. It is therefore suggested that each appeal that comes to the Tribunal should be subjected to serious scrutiny to be sure it actually falls within the narrow jurisdictional competence of the Tribunal. Where it does not, the Tribunal should be quick to decline jurisdiction and never be seen to arrogate jurisdiction to itself where none exist. This is one way the prime objective of building confidence in the tax system can be achieved.

[189] Efevwerhan, D.I., Op.cit. P. 90.

CHAPTER FOUR

4.0 PRACTICE AND PROCEDURE IN THE TAX APPEAL TRIBUNAL

4.1 INTRODUCTION

Every judicial process, be it a court, a tribunal or a body of inquiry, is usually conducted in accordance with a well laid down procedure. The settled procedure serves as a guide both to the court or judicial panel as well as litigants who appear before it. The procedure which generally comes in the form of rules of practice and procedure assists the court to do justice to the parties. In fact, it has been held that rules of Court touch upon the administration of justice. They are to regulate matters in court and to assist parties in the presentation of their cases within a procedure made for the purpose of fair and quick dispensation of justice. The courts have leaned heavily on the side of doing justice. Strict compliance with the rules makes for quicker administration of justice. The rules must be understood as made with that fundamental principle at the background.[190] In this Chapter therefore, this work will continue its evaluation of the rules of practice and procedure of the Tax Appeal Tribunal by focusing on the preliminary issues prior to commencement of appeals before the Tribunal. Other issues considered here are cause of action, jurisdiction, locus standi, condition precedent to commencement of an appeal, statute bar, place of commencement of appeals as well as commencement of appeal. This aspect will also evaluate the form of commencement of Appeal, services of processes emanating from the Tribunal, mode of entering appearances, default of appearance and effect of non-compliance with the rules of

[190] Fidelity Bank Plc v. Monye (2012)All F.W.L.R. (Part 631) 1412

practice and procedure of the Tribunal. The foregoing summarizes the focal points of discussion in this Chapter.

4.2 PRELIMINARY ISSUES BEFORE COMMENCEMENT OF APPEAL

The Federal Inland Revenue Service (Establishment) Act, 2007 clothes every aggrieved tax payer as well as the Service itself with the right to file an appeal in the event of any perceived grievance.[191] Wise counsel however, requires that before a party approaches the Tribunal for redress, he must give thought to a number of preliminary issues, the neglect of which may prove fatal to his case, no matter how genuine it may appear. These issues will be discussed hereunder beginning with cause of action.

4.2.1 Cause of Action

The courts are unanimous in their definition of Cause of Action as the entire set of circumstances giving rise to an enforceable claim.[192] It is the factual situation the existence of which entitles one person to obtain from the court a remedy against another person. Put differently, it is the act on the part of the defendant which gives the plaintiff his cause of complaint.[193] The Court of Appeal described it in lucid terms in ***Takum Local Government v. U.C.B. (Nig.) Ltd***[194] when it stated:

> …any set of facts relied upon by the plaintiff or claimant resulting from the act of the defendant which gives rise to a justifiable complaint … every fact which is material to be proved to entitle a plaintiff to succeed or all those things necessary to give a right to relief in law or in equity.[195]

[191] Paras 13 and 14, 5th Schedule.
[192] Savage v. Brown Uwaechi (1997) 3 S.C. 214, 221.
[193] Attorney General of Kwara State v. Olawale (1993) 1 N.W.L.R. [Pt. 272] 645; Sanda v. Kukawa LGA (1991) 2 N.W.L.R. [Pt. 174] 379.
[194] (2003) 16 N.W.L.R. [Pt. 846] 288.
[195] Ibid., P.300.

It is the sole responsibility of the aggrieved tax payer or the Service as the case may be to thoroughly scrutinize the set of facts prior to filing an appeal before the Tribunal. The essence of this preliminary exercise is to ascertain the legal foundation of the action. Failure to do this may prove fatal if it turns out that there was no cause of action. The rationale here is simple: for an action to be maintained in court, it must show a reasonable cause of action, that is, a cause of action that has a chance of success when viewed independent of defence.[196] It remains to be added that in determining whether an action discloses a reasonable cause of action, the courts are enjoined to circumscribe itself to the plaintiff's claim without recourse to the defendant's statement of defence.[197] In the case of an appeal before the Tax Appeal Tribunal, the Tribunal will only have recourse to the appellant's Notice of Appeal to determine whether same discloses a reasonable cause of action.

4.2.2 Jurisdiction

Another preliminary concept that an aggrieved party must take into consideration before filing an appeal at the Tax Appeal Tribunal for relief is the issue of jurisdiction. As was stated in Chapter Two of this work, the concept of jurisdiction is a threshold issue in legal parlance. It has been an enduring element in legal jurisprudence of the common law. The word jurisdiction means the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by

[196] Nasiru Bello v. Attorney General, Oyo State (1986) 5 N.W.L.R. [Pt. 45] 828.
[197] Aladegbemi v. Fasanmade (1988) 3 N.W.L.R. [Pt. 81] 129.

statute, charter or commission under which the court is constituted, and may be extended or restricted by similar means.[198]

The issue of jurisdiction is fundamental. In fact, at any point the issue of jurisdiction comes to limelight in any proceedings, it must be given preference by the court tackling it first before taking any step, if need be. This is to avert wasting the stupendous judicial time if it turns out that the court is incompetent to hear the matter.[199] Elsewhere, ***Ogbuinya, J.C.A.*** said at the hallowed chambers of Kaduna Division of the Court of Appeal:

> Jurisdiction consists in the competence of a court, including a tribunal, to deal with matters in controversy, be they civil or criminal, from their cradle to judgment. It is the linchpin and heartbeat of all adjudications, whether civil or criminal. It is to proceedings in court what oxygen is to human beings. It is therefore the barometer or template with which the competence or otherwise of courts and proceedings are properly gauged.[200]

In the words of ***Ogwuegbu, J.S.C***., "where there is a defect in competence of a court to adjudicate on a matter, such defect is fatal to the proceedings and will render the proceedings, however well conducted and decided they may be, a nullity. It is immaterial, however sympathetic the cause or application may seem."[201]

The *locus classicus* case of ***Madukolu & Ors. v. Nkemdilim***[202] enunciates the criteria for jurisdiction of a court. ***Brett F.J.*** of then Federal Supreme Court said that a court is competent when:

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[198] Halsbury's Laws of England, Vol.10. 4th ed., page 323.
[199] Ogbuinya, O.F., Understanding The Concept of Jurisdiction In The Nigerian Legal System, Snaap Press Ltd. Enugu (2008) P.48. (Ogbuinya is a serving Justice of the Court of Appeal, at Makurdi Division)
[200] Agundi v. Commissioner of Police (2013) All F.W.L.RL [Pt. 660] 1247, 1326, paras C-D. per Ogbuinya, J.C.A.
[201] Sanusi v. Ayoola (1992) 9 N.W.L.R. [Pt. 265] 275
[202] (1962) 1 All N.L.R. (Pt. 4) 587, 595; (1962) 2 S.C.N.L.R. 341.

a. The court must be properly constituted as regards numbers and qualification of the members of the bench and no member is disqualified for one reason or another;

b. The subject matter of the case must be within the court's jurisdiction and there must not be any feature in the case which prevents the court from exercising jurisdiction; and

c. The case before the court must be initiated by due process of law and upon fulfillment of any condition precedent to exercise of jurisdiction.

The preceding ingredients or determinants of jurisdiction have been exhaustively discussed elsewhere by a notable jurist.[203] Therefore, the need for an aggrieved party to painstakingly evaluate his facts and to comply with all necessary preconditions before filing appeal before the Tribunal cannot be over emphasized.

4.2.3 Locus Standi

Another preliminary issue to be considered is Locus Standi. Locus Standi is the legal capacity to institute an action in a court of law and if a person had no legal standing to institute an action, the court will have no jurisdiction to entertain his claim.[204] The basic principle here is that no man can sue in respect of a wrongful act unless it constitutes the breach of a duty owed to him by the wrongdoer, or unless it causes him some damage.[205] In the words of ***Bello, J.S.C.,*** "to entitle a person to invoke the judicial powers, he must show that either his personal interest will immediately be or has been adversely affected by the action or that he has sustained or is in immediate danger of sustaining an injury to himself."[206]

[203] Ogbuinya, O.F., Op.cit. Pp. 71-83.
[204] Dada v. Ogunsanya (1992) 23 NSCC (Pt. 1) 569, 574.
[205] Olawoyin v. A.G. Northern Nigeria (1961) All N.L.R. 269.
[206] Adesanya. V. The President Federal Republic of Nigeria (1981) 5 S.C. 112.

Possessing legal capacity to sue must be distinguished from locus standi. A party may have the requisite legal capacity to sue and be sued yet he may be constrained by locus standi.[207] The person in whom this enforceable right is vested as his personal right is the person that has the locus standi to sue. No one else can properly sue on his behalf for the enforcement of that right. The principle operates to deprive a party of the right to institute an action on the grounds that such intended plaintiff lacks connection or sufficient connection with the subject matter of the action. The Tax Appeal Tribunal made a very helpful explanation of the distinction between locus standi and legal capacity when it emphasized thus in ***Mobil Producing Nigeria Unlimited v. Federal Inland Revenue Service***[208]

> The Appellant seems to muddle up locus standi and legal capacity. Capacity relates to the legal status of the claimant (whether he is a minor, a person of unsound mind, a lunatic, a corporate person and so on). Capacity deals with the claimant's eligibility to bring all actions or all actions in a particular class or category of suits, whereas locus standi has to do with the claimant's eligibility, having regard to his relationship with the specific complaint and his interest in it, to bring a particular action. capacity is intrinsic- it inheres in the claimant. Locus standi is extrinsic-it is about the claimant's relationship with external factors forming the cause of action. one may have capacity and lack locus standi, or have locus standi but want capacity.
> Capacity and standing are therefore two distinct legal tenets. The linguistics of one should not be employed in an exegesis of the other.[209]

It thus becomes of paramount importance for a prospective litigant to ascertain upon whom the enforceable right in the cause of action is vested to enable him decide whether himself can properly approach the Tribunal for the perceived relief.[210] The prospective appellant must be conscious of this precondition for the obvious reason that where it is established that he has no

[207] Bank of Baroda v. Iyalabani Company Limited (2002) 7 S.C. [Pt. 2] 21.
[208] (2012) 6 T.L.R.N. 119.
[209] Ibid. Pp. 124 – 125.
[210] Afolayan, A.F. and Okorie, P.C., Modern Civil Procedure Law. Dee-Sage Nig. Ltd. Lagos (2007)P.95

locus standi, the Tribunal will strike out his appeal without going into the merits of the case. It can only be wished here that litigants at the Tribunal would avoid these pitfalls.

4.2.4 Condition Precedent

Condition precedent to instituting an action is another very important issue that a prospective litigant must take into consideration. Sometimes, the law requires certain conditions to be satisfied before filing an action in court. Such condition precedent may be by way of service of pre-action notice or satisfaction of other steps required by law before commencement of action.[211] In the case of the Federal Inland Revenue Service, the Act makes provision for the service of Pre-Action Notice before any suit may be instituted against the Service. The relevant section of the Act is fully reproduced below for evidential purposes:

> 55 (3) No suit shall be commenced against the Executive Chairman, a member of the Board, or any other officer or employee of the Service before the expiration of a period of one month after written notice of the intention to commence the suit shall have been served on the Service by the intending plaintiff or his agent.
>
> (4) The notice referred to in subsection (3) of this section shall clearly and explicitly state the-
>
> (a) cause of action;
>
> (b) particulars of claim;
>
> (c) name and place of abode of the intending plaintiff; and
>
> (d) relief which he claims.[212]

Once it is shown that a litigant failed to comply with a condition precedent to filing a case, the action would be struck out. This was the case in ***Chief (Mrs.) Victoria Ogundana Adedotun and***

[211] Ibid. P.103.
[212] S.55, FIRS (Establishment) Act, 2007.

Anor. V. Federal Inland Revenue Service (Akure Integrated Tax Office) and Anor[213] in which the Federal High Court dismissed the representative action of the Plaintiffs for failure to give the statutory notice to the FIRS before commencing the action.

As was mentioned earlier in Chapter Two, the issuance of Notice of Refusal to Amend by the FIRS as a condition precedent to filing an appeal before the Tribunal has been dispensed with under paragraph 13, 5th Schedule to the FIRS (Establishment) Act in view of the decision of the Tax Appeal Tribunal in ***Oando Supply & Trading Limited v. Federal Inland Revenue Service***[214] to the following effect:

> It is clear that the Act does not require a Notice of Refusal to Amend to issue from the tax authorities to the taxpayer before the latter can approach this Tribunal for redress. Provisions in other Statutes purporting to stipulate any such condition are inconsistent to the FIRS Act and by operation of section 68 of that Act void.
> Without prejudice to the taxpayer's freedom to explore that aspect of the taxman's in-house review mechanism, it appears to us that the instant case is in accordance with the text of the Act, the former may equally choose to appeal against an assessment. Therefore, an aggrieved taxpayer can appeal to this tribunal without first receiving a Notice of Refusal to Amend from the FIRS. NORA is not a requisite pre-action protocol for proceedings here. Neither section 69 nor 72 of the Companies Income Tax Act governs appeals to this Tribunal.[215]

All that needs to be stated here is that a prospective appellant must be cautions to ensure that all conditions precedent to filing an appeal before the Tribunal are fully complied with to avoid waste of time and resources.

4.2.5 Statute Bar

Sometimes the law provides that action for a defined set of remedies cannot be instituted after a specified period of time. For instance, actions founded on simple contract cannot be instituted

[213] (2011) 4 TLRN. 88.
[214] (2011) 4 TLRN 113.
[215] Ibid. P. 129, per Kayode Sofola, SAN (Chairman, Lagos Zone of the Tax Appeal Tribunal)

after the expiration of six years. Those founded on damages for negligence or slander cannot be instituted after a period of three years.[216] An action is said to be statute-barred where a statute provides for the institution of an action within a prescribed period. The proceedings shall not be brought after the time prescribed by such statute has passed. Any action that is commenced after the prescribed period is statute barred. A very popular limitation law is the Public Officers Protection Act.[217] The effect of Public Officers Protection Act fell for consideration in ***Energy Marine Industrial Ltd. V. Minister of the Federal Capital Territory & Anor***.[218] The FIRS (Establishment) Act provides for the application of the Public Officers Protection Act in the manner below:

> 55 (1) subject to the provision of this Act, the provisions of the Public Officers Protection Act shall apply in relation to any suit instituted against any member, officer or employee of the service.
>
> (2) Notwithstanding anything contained in any other law or enactment, no suit against the Executive Chairman, a member of the Board, or any other officer or employee of the service for any act done in pursuance or execution of this Act or any other law or enactment, or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or any other law or enactment, duty or authority, shall lie or be instituted in any court unless it is commenced
>
> (a) within three months next after the act, neglect or default complained of; or
>
> (b) in the case of a continuation of damage or injury, within six months next after the ceasing thereof.

Time begins to run from the moment the cause of action has arisen, that is, when the facts which are material to be proved to entitle the plaintiff to succeed have happened. The period of limitation is determined by looking at the writ of summons and statement of claim alleging when

[216] Ss. 6, 8 and 9, Limitation Act, CAP. L 67, L.F.N., 2004.
[217] See S. 2, Public Officers Protection Act, CAP.P41, L.F.N., 2004
[218] (2011) ALL F.W.L.R [Pt.576] 604

the wrong was committed which gave the plaintiff a cause of action and by comparing that date with the date on which the writ of summons was filed. If the time on the writ is beyond the period allowed by the limitation law, then the action is statute barred. Agube, J.C.A. explained it better in ***Moses Jiya Dangana v. Governor of Kwara State & Anor***[219] when he adopted with approval the earlier decision of Oputa J.S.C. in Adimora v.Ajufo:

> How does one determine the period of limitation? The answer is simple- by looking at the writ of summons and the statement of claim alleging when the wrong was committed which gave the plaintiff a cause of action and by comparing that date with the date on which the writ of summons was filed. This can be done without taking oral evidence from witnesses…[220]

Once a preliminary objection based on statute of limitation succeeds there would be no need to delve into the substance of the matter, the proper order the court should make is an order of dismissal.[221]

In the case of the Tax Appeal Tribunal, the good news is that "the provisions of any statute of limitation shall not apply to any appeal brought before the Tribunal."[222] This clearly leaves the doors of the Tribunal open for any grievance no matter how long time may have elapsed. Impressive as this may sound, this work perceives some conflict here vis-à-vis section 55 (1) and (2) of the FIRS (Establishment) Act which sets a limitation period of three months. In one breadth, it is provided that an action cannot be instituted against any officer of the Service at the expiration of three months next after the act; default or neglect complained of, in another breadth, it is provided that statute of limitation shall not apply to appeals before the Tribunal.

[219] [2011] ALL F.W.L.R (Pt 593) 1851.
[220] Ibid. P. 1897, paras A-B
[221] Ibid.
[222] Para 19, 5th Schedule, FIRS (Establishment) Act, 2007.

This, it is submitted, is a clear case of legislative inelegance. This apparent conflict needs to be clarified by way of an amendment to sustain the objective of the Tribunal.

4.3 PLACE OF INSTITUTING APPEALS

Under the rules of practice and procedure of the Tribunal, an appeal shall be filed in the zone of the Tribunal from which it emanates in conformity with the Tax Appeal Tribunal (Establishment) Order 2009.[223] However, an appeal commenced in the wrong zone shall not be heard but be transferred upon the direction of the Chairman of the zone where it is commenced to the appropriate zone.[224] In determining the appropriate zone of the Tribunal, regard is had to the nexus between the tax disputes to the zone where the appeal is filed. The location of the corporate headquarters of a company is of no moment in this regard. The Tax Appeal Tribunal was called upon to determine the purport of Order IV Rules 1 and 2 of the Rules in ***Nigerian Agip Exploration Ltd and OANDO OML 125 & 134 Ltd v. Federal Inland Revenue Service***[225] as it affects the determination of the issue whether the location of Corporate Headquarters of a company is relevant in determining the appropriate zone of the Tax Appeal Tribunal to hear a tax appeal. The facts of the case are as follows: the appellant/applicant instituted the action at the Lagos zone against an assessment made by the respondent before the coming into effect of the Tax Appeal Tribunal (Procedure) Rules, 2010. When the Rules entered into effect, the appellant/applicant relied on Order IV Rules 1 and 2 via a motion on notice applied for the transfer of the appeal to the Abuja Zone of the Tribunal on the grounds that:

(a) Both the 1st appellant and the respondent have their respective corporate headquarters in Abuja;

[223] Order IV, Rule 1, Tax Appeal Tribunal (Procedure) Rules, 2010
[224] Ibid. Order IV, Rule 2.
[225] (2011) 4 TLRN. 141

(b) Most of the appellants potential witnesses live in Abuja;

(c) Abuja zone of the Tribunal would be the most convenient forum for the hearing and determination of the appeal; and

(d) The appellants would be out to much expense if the appeal stayed in Lagos.

The respondent through its counter affidavit vehemently opposed the application on the grounds inter alia that the Tax Assessment were issued and served on the Applicant in Lagos and that all necessary documents are in Lagos. Dismissing the application, the Tribunal made the following categorical statement:

> With regard to the 1st Appellant's corporate headquarters being in Abuja, this is not a relevant consideration, as the appellants are business organizations which may in the ordinary course of business have and try to resolve conflicts at various locations, whether by arbitration, litigation or alternative dispute resolution. They have not claimed and cannot claim that all their disputes are resolved in Abuja just because there headquarters is there. We could not help detecting that the 1st Appellant's stationery lists Lagos and Port Harcourt addresses but not an Abuja address. See *Exhibit B* of the respondent's counter affidavit. We draw no conclusion from this observation.
>
> In contrast to the yawning absence of significant connection to Abuja, there is plenty of factual nexus with Lagos, as abundantly demonstrated in the Respondent's counter affidavit, even if we went by the significant connection construct urged us by the appellants themselves.
>
> But we are adopting a geographical root formula, which overwhelmingly favours a Lagos venue.
>
> The appellants' initial instinctive, instructive and intuitive decision to bring the Appeal here was a wise one, and procedurally accurate. We applaud and uphold it.
>
> Convenience, stressed by the Appellants, may be a relevant consideration from the stand point of a party who has a choice of forum. Here there is no choice, Lagos zone is the only forum. Indeed, had the appeal been commenced in the Abuja zone or any other zone of the tribunal, it would have promptly been transferred here, by virtue of the rules invoked by the appellants, and in harmony with the Abuja panel's own *ratio decidendi* in ***chevron***, supra

> An appeal emanates from the zone in which the district or location of the local tax authorities that issued the assessment, took the action, or made the decision appealed is situated.

The Abuja zone of the Tax Appeal Tribunal also reached a similar conclusion in the case of ***Chevron v. Federal Inland Revenue Service***.[226] It is therefore imperative for a prospective appellant to take into account the zone of the Tribunal where the tax dispute emanates in other to avoid the consequential delay that may arise from filing an appeal in the wrong zone.

4.4 COMMENCEMENT OF APPEALS

Any 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 administered by the Service may appeal against such action, decision, assessment or demand notice within the period stipulated hereunder.[227] An appeal under these Rules shall be filed within a period of 30 days from the date on which the action, decision, assessment of demand notice which is being appealed against, was made by the Service. 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.[228]

Apart from aggrieved persons, the Service may also file appeal before the Tribunal. Accordingly, the Rules provides that the Service, if aggrieved in relation to any person in respect of any provisions of the tax laws, may as in rule 2, above, file an appeal at the appropriate zone of the

[226] Appeal No. TAT/ABJ/APP/013/2009.
[227] Order III, Rule 1, Tax Appeal Tribunal (Procedure) Rules, 2010.
[228] Order III, Rule 2.

Tribunal.[229] The provisions of Order III Rules 1, 2 and 3 are akin to Paragraphs 13 and 14, 5th Schedule, FIRS (Establishment) Act. It denotes a marked departure from the defunct Body of Appeal Commissioners (BAC). Under the defunct BAC, only aggrieved tax payers could file an appeal. The Service could only appeal to the Federal High Court on a point of law if it (the Service) was not satisfied with the decision of the BAC. One writer highlighted the implications of this development to include:

> (i) a TAT is now to go beyond the determination of the "amount of total profits" (sic) to consider collections issues, validity of an assessment, interpretation and application of tax treaties or review tax audit or investigation rulings;
>
> (ii) FIRS can now take a taxpayer before the TAT unlike what applied under the BAC process where the provision was made only for the aggrieved taxpayer to appeal to the BAC and the FIRS could only appeal against BAC decision to the Court on point of law…[230]

This confirms yet another mile stone recorded in our tax politic by the introduction of the Tax Appeal Tribunal.[231] A number of issues have also been raised as arising from this new development. Firstly, the reference to 'appellant' here appears to be a mix-up. The taxpayer is no longer the only appellant since the FIRS can as well go on appeal. Secondly, the Schedule to the Act is silent on how the Tribunal may treat an appeal brought before it by the Service.[232]

This research does not share the same view with J.A. Arogundade on the preceding two issues. The word "appellant" is generic and therefore applies to any person who files an appeal before the Tribunal. In fact Order II Rule 1 of the rules of practice and procedure apparently provides a conclusive answer to this question where an 'appellant' is defined to mean "a person who files an

[229] Order III, Rule 3.
[230] Arogundade, J.A., Nigerian Income Tax and Its International Dimension, Spectrum Books Ltd. Ibadan, 2nd Edition (2010) P.364.
[231] Cf: S. 75 (2) Companies Income Tax CAP. C21, L.FN. 2004.
[232] Arogundade, J.A., Op.cit. P. 365.

appeal at the Tribunal under paragraphs 13 and 14 of the Fifth Schedule to the Act, and shall include a legal personal representative of a person entitled to file an appeal or a person appointed under Order 6 to proceed with an appeal on behalf of a person entitled to file an appeal." It is therefore immaterial who the appellant is. Once he files an appeal for any complaint before the Tribunal, that automatically earns him the designation of an appellant. On the second issue, it is submitted that Order III Rule 3 cures whatever defect that paragraph 14 of the 5th Schedule may have occasioned. Admittedly, the Schedule did not state the procedure to be adopted in the event of an appeal by the Service but Order III Rule 3 provides that the procedure shall be "as in rule 2.[233]" In simple terms, the same procedure is applicable both in appeals by tax payers and that of the Service. It is submitted that the Rules have effectively and effectually addressed whatever challenge the Act may have presented as far as these issues are concerned.

4.4.1 Form of Commencement of Appeals

An Appeal before the Tribunal is commenced by way of Notice of Appeal as in Form TAT 1 contained in the First Schedule to the Rules and accompanied by such fees as may be prescribed in the Second Schedule to the Rules.[234] Where an appellant desires to rely on evidence of witnesses at the hearing of an appeal, such appellant shall file the following documents along with the notice of appeal-

(a) list of witnesses to be called at the hearing of an appeal;

(b) written statements on oath of the witnesses; and

[233] CF. Order III Rule 1, 2, and 3.
[234] Order III, Rule 4.

(c) Copies of every document to be relied on at the trial.[235]

The notice of appeal that initiates appeals before the Tribunal is similar to pleadings (writ of summons and statement of claim) as we have it in civil litigations in the regular courts.

This rule, therefore, introduces the concept of front-loading system which forbids springing up of surprise in the determination of tax disputes. Speaking on this score in ***George & Ors v. Dominion Flour Mills Limited,***[236] the Supreme Court noted:

> The fairness of trial can be tested by the maxim. '*audi alteram partem'* – either party must be given an opportunity of being heard. But a party cannot be expected to prepare for the unknown; and the aim of pleadings is to give notice of the case to be met which enables either party to prepare his evidence and argument upon issues raised by the pleadings and saves either side from being taken by surprise. Incidentally, it makes for economy. The plaintiff will and indeed, must confine his evidence to those issues but the cardinal point is the avoidance of surprise.[237]

It is trite that litigation is not a game of 'hide and seek.' Parties must put all their cards on the table for the court to determine the dispute effectually. This is why this particular rule is deserving of commendation.

4.4.2. Service of Processes

In all judicial proceedings, the concept of service is very fundamental. This is because absence of service robs the court of its jurisdiction. The Hon. Justice Ogbuinya captures it better when he wrote:

> One of the cardinal pillars of the rules of natural justice is expressed in the Latin maxim-*audi alteram pertam* that is, let the other party be heard. This rule, which has attained prominence in Nigeria adjudicatory system, has invariably been engraved in our constitution. It is popularly known and abridged to the right to fair hearing. Incidentally, in our adversary system of adjudication, a party cannot

[235] Order III, Rule 5.
[236] (1963) 1 All N.L.R. 71
[237] Ibid. P. 77.

> be given fair hearing unless and until he is served with the processes of court. The law is trite that where service is required, and a party is not served with the necessary court process, the court will automatically be denied the jurisdiction to try the suit in question.[238]

The Nigerian courts have consistently upheld this position of the law as it affects service of court processes. Thus in ***S.G.B.N. Ltd. V. Adewunmi,***[239] the former Chief Justice of Nigeria, ***Katsina-Alu*** emphasized:

> … it is now trite law that failure to serve process, where service is required, is a failure which goes to the root of the case…. Service of process on a party to a proceedings is fundamental. It is service that confers competence and jurisdiction on the court seised of the matter. Clearly due service of process of court is a condition sine qua non to the hearing of any suit. Therefore if there is a failure to serve process where service of process is required, the person affected by the order but not served with the process is entitled ex debito justitiae to have the order set aside as a nullity.[240]

Perhaps in recognition of this, the Rule makes extensive provisions for service of processes filed at the Tribunal. Any notice or process filed at the Tribunal shall have endorsed on it the addresses for service within the zone of all the parties.[241] A notice of process shall be deemed to have been properly served if delivered:

(a) personally to the appellant or his representative;

(b) in the case of a partnership to a partner, or an officer or representative of the partnership;

(c) in the case of a company to a director, or an officer of the company or its representative.[242]

[238] Ogbuinya, O.F. Op. cit. Pp. 204 – 205.
[239] (2003) 10 N.W.L.R. [Pt. 839] 526.
[240] Ibid. Pp.539-540.
[241] Order VII, Rule 1.
[242] Order VII, Rule 2

The Rules also make provision for substituted service. This is in recognition of the fact that there may be circumstances where personal service may be impossible, difficult or too expensive to achieve. Accordingly, where personal service on a party cannot be effected, the Tribunal may on the application of any of the parties order substituted service to be effected by any of the following methods:

(a) advertisement in a newspaper circulating within the jurisdiction of the Tribunal;

(b) delivery of the process to an adult person at the usual or last known place of residence or business of the party; or

(c) delivery of the processes to a person who is an agent of the party; or

(d) pasting the process at a conspicuous part of the last known place of residence or business of the party; or

(e) registered post or courier service.[243]

The Tribunal may however dispense with proof of service where the party served acknowledges receipt of the relevant process.[244] Service of notices and processes can only be effected between the hours of six o'clock in the morning and six o' clock in the evening. Except in some circumstances and as may be ordered by the Tribunal, service shall not be effected on a Saturday, Sunday or a public holiday.[245] In all cases however, where the service of any notice or process has been effected by an officer of the Tribunal or by a party, proof of service as in Form TAT 2 to the First Schedule to the Rules, signed by the officer or party shall on production be prima

[243] Order VII, Rule 3.
[244] Order VII, Rule 4.
[245] Order VII, Rule 5.

facie evidence of service.[246] It remains to be added that any notice, summons or other documents required or authorized to be served or service of documents on the Service under the provisions of the Act or any other law or enactment may be served by delivering it to the Executive Chairman or by sending it by registered post addressed to the Executive Chairman at the principal office of the Service.[247]Again, all notices, documents, other than decisions of the Tribunal, may be signified under the hand of the Secretary.[248] It is hoped that litigants before the Tribunal will do well to comply with the rules of service of processes.

4.4.3. Mode of Entering of Appearance

Upon being served a Notice of Appeal together with the frontloaded documents, a respondent shall within 30 days after the service of the notice of appeal on him enter appearance by delivering to the Secretary a respondent's reply as in Form TAT 3 to the First Schedule to the Rules acknowledging receipt of the notice of appeal and stating therein whether he contests the appeal.[249] A 'Reply' to the notice of appeal is akin to Statement of Defence in the regular civil litigation at the Courts. If the respondent contests the appeal, he shall state his reasons for doing so.[250] Furthermore, a respondent who desires to rely on evidence at the hearing of the appeal shall file along with the respondent's reply-

(a) list of witnesses to be called at the hearing of the appeal;

[246] Order VII, Rule 6.
[247] S. 56, FIRS (Establishment) Act, 2007.
[248] Ibid. Para 15(4), 5th Schedule.
[249] Order VIII, Rule 1.
[250] Order VIII, Rule 2.

(b) written statements on oath of the witnesses; and

(c) copies of every document to be relied on at the hearing.[251]

The respondent must also ensure that all the processes filed are duly signed either by himself or his legal practitioner, chartered accountant or adviser.[252] It does appear that the Rules do not make it mandatory for a party to file witness statement on oath and front load documents sought to be relied upon at hearing. He will only be required to do so if he intends to rely on evidence of witnesses at the hearing of the appeal. Upon receipt of the respondent's reply and relevant documents, the Secretary shall record the appearance in the Cause Book, stamp the copies of the respondent's reply with the official stamp showing the date on which he received the documents and deliver a copy to the appellant or person representing him at the hearing.[253] As soon as this exchange of processes is concluded, the Tribunal becomes *dominous litis* over the appeal. For the purpose of discharging its functions in that behalf, the Tribunal shall have power to:

(i) summon and enforce the attendance of any person and examine him on oath;[254]

(ii) require the discovery and production of documents;

(iii) receive evidence on oath;

(iv) call for the examination of witnesses or documents;

(v) review its decisions;

(vi) dismiss an application for default or deciding matters ex parte;

[251] Order VIII, Rule 3
[252] Order VIII, Rule 4.
[253] Order VIII, Rule 5.
[254] Witness Summons is in Form TAT 6.

(vii) set aside any order or dismissal of any application for default or any order passed by it ex parte; and

(viii) do anything which in the opinion of the Tribunal is incidental or ancillary to its functions.[255]

In effect, the Tribunal enjoys wide powers in the discharge of its functions.

4.4.4. Default of Appearance

If on the day of hearing or on the adjourned date, the appellant does not appear and is not represented, the appeal may be struck out.[256] However, when an appeal has been struck out owing to the non-appearance of the appellant, the Tribunal may, if it thinks fit, direct the appeal to be relisted for hearing.[257] The application for re-listing may be made by notice of motion.

On the other hand, if on the day of hearing or on any adjourned date, the appellant appears, the Tribunal may whether the respondent appears or not, proceed to the hearing or further hearing and determination of the appeal and shall give its decision according to the merits of the appeal.[258] However, where an appeal has been heard in default of the appearance of the respondent and any decision has been given, the Tribunal may entertain an application from the respondent to set aside such decision and to re-hear the appeal.[259] Any decision or order obtained where one party does not appear at the hearing may be set aside by the Tribunal upon such terms as may seem just, upon an application made within 14 days or such longer period as the Tribunal

[255] Para 20(2), 5th Schedule, FIRS (Establishment) Act.
[256] Order IX, Rule 1.
[257] Order IX, Rule 2.
[258] Order IX, Rule 3.
[259] Order IX, Rule 4.

may allow for good cause shown.[260] These are some of the instances where the Tribunal would be called upon to exercise its discretionary powers. It therefore follows that a party cannot just have any of the applications granted just for the asking. He must demonstrate good cause to warrant the exercise of the Tribunal's discretion in his favour.

4.5 EFFECT OF NON-COMPLIANCE WITH THE RULES OF THE TAX APPEAL TRIBUNAL

Non-compliance with the Rules may occur in a number of instances. A party who desires to rely on evidence at the hearing may fail or neglect to file witness statement on oath and other frontloaded documents along with the notice of appeal as required. He may also fail to properly endorse the notice of appeal with addresses of the parties within the zone as required amongst others. What then is the position of the Rules in the event of these omissions?

The solution to these problems is found in Order XXIII of the Tax Appeal Tribunal (Procedure) Rules, 2010. The stance of the Rules is that an irregularity resulting from failure to comply with the provisions of these Rules or any direction issued by the Tribunal before a decision is given or an error of a clerical nature shall not of itself render the proceedings void.[261] Accordingly, the Tribunal may, upon the irregularity being brought to its attention, give such direction as it deems fit to cure the irregularity before delivering its decision.[262] It is obvious that the Tribunal can only exercise its curative powers any time before it delivers its decision. Once it delivers its decision, it becomes *funtus officio* and can only cure typographical errors and not any radical error.

[260] Order IX, Rule 5.

[261] Order XXIII, Rule 1.
[262] Order XXIII, Rule 2.

In summary, it is now abundantly clear that an aggrieved tax payer or the Service must pause to consider a number of preliminary issues before proceeding to file an appeal before the Tribunal if he does not want his appeal to be struck out in *limine*. It has also been demonstrated that appeals are filed in the zone where the dispute arose and not necessarily according to the convenience of the appellant or where he has his head office or residence. We have also examined the form of commencement of appeals and the documents to be front-loaded in instances where one desires to rely on evidence at the hearing of the appeal. This chapter has also extensively examined the practice and procedure of the Tribunal as it relates to service of processes, entry of appearances, default of such appearance and the effect of non-compliance with the Rules. It is hoped that litigants who would have cause to approach the Tribunal in search of reliefs would do well to follow the rules.

CHAPTER FIVE

5.0 INTERLOCUTORY APPLICATIONS IN THE TAX APPEAL TRIBUNAL

5.1 INTRODUCTION

In all judicial processes, either one or both of the parties thereto or any other person who claims to have sufficient interest in the suit may have need to make one application or the other to the court before the court proceeds into full hearing of the substantive matter. Such applications are generally referred to as interlocutory applications as they are made to the court in the course of pending proceedings. Interlocutory applications could be for extension of time, amendment of processes, joinder of parties, amongst others. It needs also to be mentioned that there are some interlocutory applications such as motion for stay of execution and stay of proceedings, installment payment of judgment sums which are made after judgment. The focus in this chapter will be on interlocutory applications generally ranging from mode of making applications to the Tax Appeal Tribunal, types of motions, affidavits in support of motions and written addresses. Other issues to be discussed are computation of time, dates and adjournments, amendment of processes, consolidation of appeals, the circumstances and procedure for consolidation of appeals at the Tribunal. The issue of discontinuance of appeal and the presentation of cases by the parties, determination of appeal and enforcement of decisions, amongst others will also occupy the front burner here.

5.2 MODES OF APPLYING TO THE TAX APPEAL TRIBUNAL

The Tax Appeal Tribunal (Procedure) Rules, 2010 makes for applications to the Tribunal. It provides in clear terms that an application may be made at any stage of the proceedings.[263] An application may be made orally or in writing by any party giving reason(s) for the prayer(s) sought.[264] However, where the Tribunal considers it necessary, it may order written addresses to be filed by the parties.[265]

Going by the rules, an application to the Tribunal may be made orally or in writing. While the nature of oral application is sufficiently certain, application in writing does not seem to enjoy the same degree of certainty. The questions may be: would the written application be in the form of a Letter (formal or informal) addressed to the Secretary of the Tribunal or the Presiding Chairman of the Tribunal? Or would it take the form of a Petition or Motion? Unlike other rules of court, the Tax Appeal Tribunal Rules did not specify by what mode written applications may be made to the Tribunal. For instance, the Federal Capital Territory High Court Procedure Rules specifically provides that: "where by these Rules, any application is authorized to be made to the court or a Judge in chambers or a Registrar, the application may be made by motion."[266] This leaves no one in doubt as to how written applications are to be made.

Notwithstanding the apparent lacuna, the general practice is that where an application is to be made in writing, same ought to be made by Motion. This view is supported by the description of a motion as an application, usually in writing made to a court for the grant of an order in terms of

[263] Order XI, Rule 1.

[264] Ibid. Rule 2.
[265] Ibid. Rule 3.
[266] Order 7 Rule 2(1) High Court of the Federal Capital Territory Abuja (Civil Procedure Rules) 2004; See also Order 26, Rule 2(1) Federal High Court (Civil Procedure Rules)2009,

the prayers sought in the application.[267] This being the case, we shall attempt a closer examination of Motions for ease of comprehension.

5.3 TYPES OF MOTIONS

Motions are generally divided into two types namely, Ex parte Motion and Motion on Notice.

5.3.1 Ex parte Motion

A motion ex parte is one brought to the court without notice to the other party to the suit. Even where the affected party is present in court, he is precluded from joining issues with the applicant or filing a counter affidavit even though the facts as presented by the applicant are altogether false.[268] A motion ex parte does not contain an address for service. If the other party is in court whether by coincidence or otherwise, he can only be seen but not heard in the determination of ex parte applications. The Supreme Court specified two circumstances under which an ex parte motion may be made in the case of ***Leedo Presidential Motel Limited V. Bank of the North:***[269]

1. When, from the application, the interest of the adverse party will not be affected. Under this circumstance, application for substituted service, leave to issue or serve a process, is made ex parte as no interest of the adverse party will be affected;
2. When time is of the essence to the application. Time may be of the essence to the application where irreparable loss or serious mischief may be occasioned by following the due process of putting the other party on notice. In such

[267] Nwadialo, F. Civil Procedure in Nigeria., University of Lagos Press: Lagos, 2nd Edition (2000) P. 550.
[268] 7-UP Bottling Co. Plc v. Abiola & Sons Ltd (1995) 2 SCNJ 37.
[269] (1998) 7 SCNJ 328

> situations, the application may be made ex parte…. The above circumstances can also be described as a situation of real urgency.[270]

Therefore, a party who seeks the Tribunal to make an ex parte order in his favour must establish the existence of either of the two conditions adumbrated by the Supreme Court.

5.3.2 Life Span of Ex parte Orders

Admittedly, the Tax Appeal Tribunal Rules of practice and procedure does not make provision for ex parte application much less its life span. However, other rules of court are explicit on this point. A party affected by an ex parte order may apply to the court by motion to vary or discharge the order. An ex parte order shall only last for 14 days after the party affected by it has applied for the order to be varied or discharged or last for another 14 days after application to vary or discharge it has been concluded. Where a motion to vary or discharge an ex parte order is not taken within 14 days of its being filed, the ex parte order shall automatically lapse.[271] It is submitted that this practice will aid the administration of justice before the Tax Appeal Tribunal if the Tribunal adopts the same attitude towards ex parte Orders. That way, a party will not be allowed to secure a perpetual order against his adversary through ex parte motions.

5.3.3 Motion on Notice

[270] Ibid., P.353

[271] Order 29 Rule s 11 and 12, Federal High Court (Civil Procedure Rules) 2009; see also Oder 7 Rules 11 and 12 High Court of the Federal Capital Territory Abuja (Civil Procedure Rules) 2004.

A motion on notice, as the name implies, puts the other party on notice of the application before the court. The other party called the respondent, is expected to appear in court on the hearing date to oppose the application if he considers that his interest may be adversely affected by the application.[272] A motion on notice may be served on a non-party to the suit so as to put him on notice where the order sought may affect him. Such person on notice, though not a party to the suit, is described as a 'Party on Notice.'[273] Some rules of court require that there must be at least two clear days between the date of the service of motion on notice and the date of hearing.[274] In fact it has been held that a motion on notice that was filed and moved the same day was not ripe for hearing and an order made thereon was set aside.[275] It remains to be added that a motion on notice need not be personally served on the respondent. It could be served on his Counsel if known and Counsel to Counsel service is also accepted in motions.

5.3.4 Contents of a Motion

Every motion filed at the Tax Appeal Tribunal, be it ex parte or on notice must contain certain essential particulars. The essential particulars are as follows:

a. it must be headed in the Tribunal;

b. it must contain the appeal number;

c. it must have the word 'Between' followed by the names of the Parties;

d. the description of the Parties as Applicant and Respondent;

e. the nature of the motion: either Motion on Notice or Motion Ex parte;

[272] Efevwerhan, D.I. ; Principles of Civil Procedure in Nigeria. Chenglo Ltd. Enugu (2007) P. 159.
[273] Ibid.
[274] Order 7 Rule 7(1), FCT High Court Civil Procedure Rules, 2004.
[275] Loxroy Nig. Limited v. Triana Limited (1989) 12 N.W.L.R. [Pt.577] 252.

f. the particular Order and Rules or law pursuant to which the Motion is brought to the Tribunal;[276]

g. the Notice itself which reads thus: "TAKE NOTICE that this Honourable Tribunal shall be moved on the -------- day of ----------2015 at the hour of 9 O'clock in the forenoon or so soon thereafter as Counsel on behalf of the Appellant/Applicant herein may be heard praying the Honourable Tribunal for the following reliefs";

h. the reliefs sought from the Tribunal;

i. the ground(s) upon which the application is predicated;

j. date of the application;

k. signature, name of the Applicant's Counsel and his address; and

l. the name and address for service on the Respondent.

The foregoing summarizes the contents of a motion. It must be noted that the last item, that is, address for service are usually not included in a motion ex parte. The reason is obvious: they are not served on the opposing party.

5.3.5 Affidavits in Support of Motions

An affidavit is a written statement of fact which the maker swears to be true to the best of his knowledge, information or belief.[277] It is an indispensable component of all types of motions. The rules of practice and procedure of the Tax Appeal Tribunal enjoins every applicant to give

[276] Failure to provide this will however not render the Motion incompetent provided the relief sought is one which the Tribunal can grant. This was the view of the Supreme Court in ***Falobi v. Falobi (1976) 1. N.M.L.R. 169 and Uchendu v. Ogboni (1999) S.C.N.J. 64.***

[277] Josien Holdings Limited v. Lornamed Limited (1995) 1 N.W.L.R. [Pt. 371] 254, 265.

reasons for the prayers sought.[278] The reasons are expressed by way of affidavits deposed to by the applicant himself or any other person authorized to do so on his behalf. Affidavits are sworn before Commissioners for Oath at the Registry of the Tribunal. It is also headed in the Tribunal like the Motion paper. It also contains some particulars such as the full name, trade or profession, residence and nationality of the deponent and other vital information about the deponent.[279]

5.3.6 Counter Affidavits in Opposition to Motions

As a general rule, any respondent/party who desires to oppose a motion is required to file a counter affidavit in opposition. The primary function of a counter affidavit is to challenge the veracity of the facts contained in the affidavit in support of the motion. Failure to file counter affidavit could have dire consequences in that the court would deem all the facts deposed to in the affidavit in support as admitted and the Court would be bound to act on same except where the facts are manifestly false.[280] However, a respondent need not file a counter affidavit if his objection to an application is purely on grounds of law or where the facts when taking together are not sufficient to sustain the prayers of the applicant.[281] The concept of affidavit evidence in

[278] Order XI Rule 2.
[279] See generally, Ss. 107-120, Evidence Act, 2011.
[280] Akagbe v. Abimbola (1978) 2 S.C. 39; First Bank of Nigeria Plc. v. Attorney General of the Federation & 4 Ors. Appeal No. CA/A/263/2005, Judgment of the Court of Appeal, Abuja Division (Unreported) per Akomolafe-Wilson, J.C.A., delivered on Thursday, 7th February, 2013.
[281] Egbugara v. Nigerian Coal Corporation (2007) All F.W.L.R. [Pt.361] 1788, 1789, per Ogebe JCA, (as he then was); Orunola v. Adeoye (1995) 6 N.W.L.R. [Pt.401] 338, 553.

litigations generally as well as resolution of conflicts in affidavits has been extensively discussed elsewhere by some erudite scholars.[282]

5.3.7 Written Address in Support of Motions

Under the rules of practice and procedure of the Tax Appeal Tribunal, written addresses in support of motions are not compulsory. It can only be filed where the Tribunal considers it necessary and consequently orders that it be filed.[283] Written Addresses generally embody the legal argument in support or in opposition to the motion as the case may be. It is submitted here that the Rules should be amended to make written addresses compulsory to save precious judicial time. A situation where the Tribunal would first consider an application before it determines whether or not a written address should be filed would no doubt occasion avoidable delay in the system. This is clearly antithetical to the stated objectives of the Tax Appeal Tribunal.

5.3.8 Hearing of Motions

A motion is heard when same is moved before the Tribunal. Moving a motion simply connotes the action of the applicant's Counsel when he stands on his feet before the Court to restate the contents of the Motion Paper and urges the Court to grant the reliefs sought therein. It is usual to canvass legal argument in support of each relief which is generally done by adopting the written address (where one is filed) as the oral arguments in support of the motion. He may also be obliged some time to adumbrate the contents of his written address. After hearing the arguments on both sides, the Tribunal may grant the reliefs sought or refuse them or may grant some and

[282] Hon, S.T.; S.T. Hon's Law of Evidence in Nigeria (Vol.II). Pearl Publishers, Port Harcourt (2012) Pp. 1046-1112; Dada, J.A.; The Law of Evidence in Nigeria. University of Calabar Press, Calabar (2004) Pp. 271-288.
[283] Order XI Rule 3.

refuse others but not what was never asked for. This is predicated on the general principle that a court is not a Father Christmas.[284]

5.4 COMPUTATION OF TIME, DATES AND ADJOURNMENTS

It is intended to review what the provisions of the Tax Appeal Tribunal (Procedure) Rules, 2010 are with respect to computation of time, dates and adjournments.

5.4.1 Computation of Time

The Rules makes extensive provisions for the computation of Time. It provides thus:

> Where by these Rules or by any order made by the Tribunal, any limited time from or after any date or event is appointed or allowed for the doing of any act or the taking of any proceedings and such time is not limited by hours, the following rules shall apply-
>
> (a) the limited time shall not include the day of the date of the happening of the event, but commences at the beginning of the following day;
>
> (b) the act or proceedings shall be done or taken at the latest on the last day of the limited time;
>
> (c) where the time limited is less than five days, no public holiday, Saturday or Sunday shall be reckoned as part of the time;
>
> (d) when the time expires on a public holiday, Saturday or Sunday, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards not being a public holiday, Saturday or Sunday.[285]

The Parties before the Tribunal shall not by consent enlarge or abridge any time prescribed by the rules for taking any step, filing any document, or giving any notice.[286] The Tribunal may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by the rules, or by any decision, order or direction to do any act in any

[284] Commissioner for Works, Benue State v. Devcom Construction Limited (1988) 3. N.W.L.R. [Pt. 83] 407.

[285] Order X Rule 1.
[286] Ibid. Rule 2.

proceedings. The Tribunal may extend time even though the application for extension is not made until after the expiration of the period.[287] This research believes that the provisions of the Rules on computation of Time are quite explicit and comprehensive.

5.4.2 Dates and Adjournments

The Secretary, upon the direction of the Chairman, shall fix hearing dates for appeals and issue hearing notices as in Form TAT 8 of the First Schedule to the Rules.[288] Regarding Adjournments, the Tribunal may adjourn matters *suo motu* or on the application of the parties.[289] Adjournments are generally at the discretion of the Tribunal. In the words of ***Fasanmi, J.C.A.,*** "Application for an adjournment is not granted as a matter of course. Application for adjournment must be well grounded and convincing before the court can exercise its discretion in favour of the applicant."[290] Once an application for same is made and supported with good cause the Tribunal may exercise its discretion and grant an adjournment.

5.5 AMENDMENT OF PROCESSES BEFORE THE TAX APPEAL TRIBUNAL

The Tax Appeal Tribunal Rules provides that a party may at any time amend the notice of appeal or any other process on such terms as the Tribunal may deem fit.[291] This is consistent with the general position of the law on amendments to the effect that a court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just for the purpose of determining the real question in controversy between the

[287] Ibid. Rule 3(1) and (2).
[288] Order XVI.
[289] Order XVII
[290] Adebayo v. T.S.G. Nig. Limited (2013) All F.W.L.R. [Pt. 666] 555, 565, Para. D.
[291] Order XII Rule 1.

parties.[292] Accordingly, in ***Ajakaiye v. Adedeji[293], Omololu-Thomas, J.C.A***. adopted the earlier dictum of ***Oputa, J.S.C. in Adekeye v. Akin-Olugbade*** with approval and described amendment in the following words:

> An amendment is nothing but the correction of an error committed in any process, pleading, or proceedings at law or in equity and which is done either as of course, or by consent of the parties or upon notice to the court in which the proceedings is pending. The object of courts is to decide the rights of parties and not to punish them for mistakes they may make in the conduct of their cases by deciding otherwise than in accordance with their rights. There is no kind of mistake or error which if not fraudulent or intended to overreach, the court cannot correct if this can be done without injustice to the other party.[294]

The foregoing makes it abundantly clear that a court and by extension, the Tax Appeal Tribunal has the inherent power to order an amendment to the notice of appeal of a party, as long as same will not result in injustice to the other party. In fact the Supreme Court have severally held that an amendment may be allowed after close of case and even on appeal where same is sought for the purpose of bringing the pleadings in line with evidence already adduced during trial.[295] Amendment of processes is a very essential aspect in resolution of disputes as it affords litigants the opportunity to correct any error or mistake they may have made in the course of the proceedings. It also avails the court the opportunity to determine the real issue in dispute between the parties. It is thus heart-warming that the Tax Appeal Tribunal Rules has the provision in its kitty. There seems to be a lacuna here. In most rules of court, there is a provision for endorsement of processes after amendment. For instance, at Order 17 rule 6 of the Federal High Court (Civil Procedure Rules) , 2009, it is provided that "whenever any indorsement or pleading is amended it shall be marked in the following manner:

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[292] Adekeye v. Akin-Olugbade (1987) 3 N.W.L.R. [Pt.60] 214.
[293] (1990) 7 N.W.L.R.[Pt.161] 192.
[294] Ibid. P. 205-206.
[295] Ewarami v. ACB Limited (1978) 4 S.C. 99; Ojah & Ors. V. Ogboni & Ors (1976) 4 S.C. 69; Ebanga v. Usanga (1982) 5 S.C. 103; Edoigiawerie v. Aideyan (2006) 10 N.W.L.R. [Pt.988] 438, 439.

'Amended the …….Day of …… Pursuant to order of (name of Judge) dated the ….. day of …..'". The High Court of the Federal Capital Territory, Abuja (Civil Procedure Rules), 2004 as well as that of Lagos State also has similar provisions.[296] This research believes that there is need for a similar provision to be inserted in the Tax Appeal Tribunal Rules. The essence of this provision comes to the fore in the event of multiple amendments of Processes before the determination of the appeal. It will thus assist or guide the Tribunal and most importantly, the appellate Court to know the particular Notice of Appeal (amongst the series of amended versions) on which the appeal was determined in the first instance. That said, it remains to be added that application for amendment are usually by motion on notice.

5.6 CONSOLIDATION OF APPEALS BEFORE THE TRIBUNAL

Consolidation of Appeals is a process whereby two or more appeals pending before the same Tribunal are by the order of the Tribunal joined and determined at the same time. The actions though separate and distinct, are tried simultaneously in the same proceedings.[297] The Tax Appeal Tribunal rules of practice and procedure makes provision for consolidation of appeals before the Tribunal. The prime objective of consolidation is to save cost and time. Consequently, consolidation will not be ordered unless there is some common question of law or fact bearing sufficient importance in proportion to the rest of the subject matter of the actions to render it desirable that the whole matter be disposed of at the same time thereby preventing multiplicity of actions.[298] Consolidation of appeals will be examined more closely beginning with the circumstances under which it may be ordered.

5.6.1 Circumstances Under which Consolidation may be Ordered

[296] Order 24 rule 6; see also Order 24 rule 6, High Court of Lagos State (Civil Procedure) Rules, 2012.
[297] Afolayan, A.F. and Okorie, P.C. Modern Civil Procedure Law. Dee-Sage Nig. Ltd. Lagos (2007) P.226.
[298] Diab Nasr v. Complete Home Enterprises Nig. Limited (1977) 5 S.C. 1, 11.

The Rules glaringly spells out the circumstances under which consolidation may be ordered by the Tribunal in the manner below:

> Where two or more notices of appeal have been filed-
>
> (a) in respect of the same matter; or
>
> (b) in respect of several interests in the same matter, or
>
> (c) which involve substantially the same issues,
>
> the Tribunal may *suo motu* or upon application made in Form TAT 4 contained in the First Schedule to these Rules by any party consolidate the appeals and hear them together.[299]

The foregoing conditions are akin to those laid down by the Supreme Court in ***Toriola v. Williams***.[300] It thus follows that where any of the circumstances presents itself, the Tribunal may on its own or on the application of any party order that the appeals be consolidated. The Procedure for such application is by motion on notice.

5.6.2 When Consolidation will not be Ordered

Admittedly, the rules did not expressly specify the instances where consolidation may not be ordered by the Tribunal. However, the ready inference would be that where none of the circumstances mentioned in Order XIII exists, consolidation will not be ordered. That notwithstanding, it has been said that consolidation may not be ordered in the following circumstances:

i. if the plaintiff or appellant in one action is the same person as the defendant in another matter and the case does not affect the defendant;

[299] Order XIII.
[300] (1982) 7 S.C. 27

ii. if the plaintiffs cannot be represented by the same Counsel in the consolidated suit;

iii. where there will be likely embarrassment at the trial;

iv. where the different actions are at different stages e.g., pleadings completed in one and not in the other; and

v. where actions are by the same plaintiff or claimant but against different defendants who did not consent to the consolidation.[301]

It remains to be seen whether the Tribunal will be swayed by any of the above considerations to refuse an application for consolidation of appeals pending before it.

5.6.3 Judgment in Consolidated Appeals

The fact that two or more appeals have been consolidated does not rob them of their distinctness. In effect, they retain their separate and individual existence notwithstanding the consolidation.[302] Therefore, a court called upon to deliver judgment on consolidated appeals must deliver judgment on each of the appeals. The court cannot determine one and ignore the other. The Court of Appeal confirmed this position recently in the case of ***Saleh v. Muhammad***[303] when it noted:

> Though the appeals were consolidated and heard together, in law they retain their separate characters and distinct identities for the purpose of determination and decisions therein. Separate decisions in respect of each of them would have to be given by the court even though a decision in one or more of them may eventually affect one or the other of them.

This position must be kept in view at any time the Tribunal seeks to deliver judgment in a consolidated appeal. It is immaterial that the rules did not specifically make provisions for this.

[301] Afolayan, A.F. and Okorie, P.C, Op.cit. P. 227.
[302] Diab Nasr v. Complete Home Enterprises Nig. Limited (Supra)
[303] (2011) All F.W.L.R. [Pt. 581] 1572

5.7 DISCONTINUANCE OF APPEAL

The Appellant may-

(a) at any time before the hearing of an appeal withdraw the appeal by filing a notice of discontinuance as in Form TAT 5 signed by the appellant or his representative stating that the appeal is withdrawn; or

(b) at the hearing of the appeal and with the leave of the Tribunal, withdraw the appeal.[304]

One author had written that once an appeal is filed there is no room for discontinuance on the part of the tax payer or review on the part of the FIRS. In his words:

> Under the old regime, the taxpayer could decide not to pursue an appeal further. Once the notice to this effect is given to the Secretary to the BAC before the commencement of hearing, the revised assessment in this circumstance is deemed agreed. Also, the FIRS could agree to amend an assessment by giving notice to the Secretary before the commencement of hearing. The amended assessment is deemed agreed. The assessment in either case is final and conclusive as determined on agreement. Both provisions have no equivalence in the FIRS Act. This appears to imply that once an appeal is filed there is no room for discontinuance on the part of the taxpayer or review on the part of FIRS.[305]

This view has ceased to be correct if it was ever so, having regard to the provisions of the rules which make ample allowance for an appellant to withdraw or discontinue his appeal if he so desires. It must be added that where an appeal is withdrawn after hearing has commenced, a fresh appeal may not be filed in relation to the same matter except with leave of the Tribunal.[306] In practice, the taxpayer and the tax collector usually continue their negotiations for amicable settlement. Where they are able to resolve the dispute before the commencement or conclusion of the appeal, the appellant may approach the Tribunal for discontinuation of the appeal.

[304] Order XIV, rule 1.
[305] Arogundade, J.A. Nigerian Income Tax and Its International Dimension. Spectrum Books Ltd. Ibadan 2nd Edition (2010) P. 367.
[306] Order XIV rule 2.

5.8 HEARING OF APPEALS

Generally, the Tribunal shall have the power to conduct its proceedings in a manner it deems fit to ensure speedy dispensation of justice.[307] Accordingly, as often as may be necessary, Tax Appeal Commissioners shall meet to hear appeals in the jurisdiction or zone assigned to that Tribunal.[308] However, where a Tax Appeal Commissioner has a direct or indirect financial interest in any appeal pending before the Tribunal or where the taxpayer is or was a client of that Tax Appeal Commissioner in his professional capacity, he shall declare such interest to the other Tax Appeal Commissioners and refrain from sitting in any meeting for the hearing of that appeal.[309] This provision is intended to address the problem of conflict of interest.

The Secretary to the Tribunal shall give seven clear days' notice to the Service and to the appellant of the date and place fixed for the hearing of each appeal except in respect of any adjourned hearing for which the Tax Appeal Commissioners have fixed a date at their previous hearing.[310] The essence of this is to ensure that parties are duly notified of the hearing of the appeal. The words "shall give seven clear days' notice to the 'Service' and to the 'appellant'" used by the draftsman apparently suggest that only Tax payers could be Appellants and not the Service. This is evidently inconsistent with Paragraph 13 and 14, 5th Schedule to the FIRS (Establishment) Act which provides that both the Service and Tax Payers could file an appeal before the Tribunal. The rules also corroborate this position as it defines an 'Appellant' as "a person who files an appeal at the Tribunal under paragraphs 13 and 14 of the fifth Schedule to

[307] Order XV, rule 1.
[308] Para 15(1) 5th Schedule, FIRS (Establishment) Act, 2007.
[309] Ibid. Para 15(2)

[310] Para 15(3)

the Act."[311] It is therefore curios for the draftsman to describe the Service by its name and the Tax Payer as Appellant. This, with respect, is a clear case of legislative inelegance. This research therefore submits that the paragraph should be amended to read thus: "The Secretary to the Tribunal shall give seven clear days' notice to the Appellant and to the Respondent of the date and place fixed for the hearing…" This version will inject the requisite objectivity which is the hallmark of legislative drafting to the affected provision.

All appeals before the Tax Appeal Commissioners shall be held in Public.[312] This stipulation is highly commendable as it is also consistent with the Constitutional guaranty of fair hearing.[313] Where the kernel of appeal is excessive assessment, the onus of proving same is on the appellant.[314] This is also in tadem with the position of the Courts as exemplified in the old case[315] of ***Dick Obi Onuigbo v. Commissioner of Internal Revenue***[316] where ***Idigbe F.J***. as he then was held:

> The onus is on the tax payer to prove that an assessment is excessive and should be reduced. Dealing with the question of burden of proof in income tax cases, the learned editor of Halsbury Laws of England in vol. 20 (3rd Edition) P. 684 Art 1352 (sic) observed as follows:
>
> Upon an appeal against an assessment or surcharge the onus is upon the subject, by lawful and satisfactory evidence to demonstrate to the Commissioners that the assessment ought to be reduced or set aside.

Furthermore, at the hearing of any appeal if the representative of the Service proves to the satisfaction of the Tribunal hearing the appeal in the first instance that:

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[311] Order II, rule 1.
[312] Para 15(5)
[313] S.36(3) Constitution of the Federal Republic of Nigeria, 1999, as Amended Cap. C21, L.F.N., 2004.
[314] Para 15(6); Arogundade, J.A., Op.cit. 365

[315] Decided on December 6, 1963 by High Court of Eastern Nigeria sitting at Aba
[316] (2011) 4 T.L.R.N. 149, 150.

(a) the appellant has for the year of assessment concerned, failed to prepare and deliver to the Service returns required to be furnished under the relevant provisions of the tax laws mentioned in paragraph 11;

(b) the appeal is frivolous or vexatious or is an abuse of the appeal process; or

(c) it is expedient to require to pay an amount as security for prosecution of the appeal, the Tribunal may adjourn the hearing of the appeal to any subsequent day and order the appellant to deposit with the service, before the day of the adjourned hearing, an amount, on account of the tax charged by the assessment under appeal, equal to the tax charged upon the appellant for the preceding year of assessment or one half of the tax charged by the assessment under appeal, whichever is the lesser plus a sum equal to ten percent of the said deposit, and if the appellant fails to comply with the order, the assessment against which he has appealed shall be confirmed and the appellant shall have no further right of appeal with respect to that assessment.[317]

This lengthy provision is intended to cure two principal ills namely:

(i) to dissuade tax payers from filing frivolous appeals; and

(ii) to ensure that the revenue accruing to the government is not blocked or locked-in on account of frivolous appeals.

Whether or not the provision is fair to the tax payer is conceded to be a subject of enormous debate. This research takes the view that it is necessary having regard to the important role of

[317] Para 15(7)

tax in generating revenue for government and the natural penchant of tax payers to avoid or delay payment of taxes.

Again, where upon the hearing of an appeal –

(a) no account, books or records relating to profit were produced by or on behalf of the appellant;

(b) such accounts, books or records were so produced but rejected by the Tribunal on the ground that it had been shown to its satisfaction that they were incomplete or unsatisfactory;

(c) the appellant or his representative, at the hearing of the appeal, has neglected or refused to comply with a notice delivered or sent to him by the secretary to the Tribunal, without showing any reasonable cause;

(d) the appellant or any person employed, whether confidentially or otherwise, by the appellant or his agent (other than his legal practitioner or accountant acting for him in connection with his ability to tax) has refused to answer any question put to him by the Tribunal, without showing reasonable cause the Chairman of the Tribunal shall record particulars of the same in his written decision.[318]

The utilitarian value of this provision will be more profound where there is a further appeal to the Federal High Court pursuant to Paragraph 17. The Federal High vide the record of appeal will have a full view of what transpired at the hearing of the appeal at the Tribunal level. Henceforth, attention will turn on the specifics in the hearing of appeals before the Tribunal.

[318] Para. 15(10)

5.8.1 Presentation of Appellant's Case

The hearing of an appeal shall be commenced by the appellant presenting documents and statements which he intends to rely upon as well as any witness he desires to call.[319] The appellant will open by leading witnesses in evidence-in-chief in proof of his case. After which the appellant's witness shall be examined and in appropriate instances, re-examined before he closes his case.

5.8.2 Presentation of Respondent's Case

When the appellant has concluded, the respondent or his representative may in like manner present any document or statement he intends to rely upon as well as any witness he desires to call.[320] In effect, both the appellant and the respondent are given equal opportunity to present their respective cases at the Tribunal before a decision is given one way or the other.

5.9 EVIDENCE BEFORE THE TAX APPEAL TRIBUNAL

At the hearing of an appeal, the Tribunal shall admit all relevant evidence, oral or documentary, adduced by the appellant or the respondent or any person appearing on their behalf.[321] It would seem that the Tribunal may not be bound by the strict principles of the law of evidence relating to admissibility of evidence such as hearsay evidence and certification of public documents. This

[319] Order XV, Rule 2.
[320] Order XV, Rule 3.
[321] Order XV, Rule 4.

view is hinged on the fact that the Rules lay emphasis on relevancy and not admissibility per se.[322]

The oral examination of a witness during his evidence in chief shall be limited to confirming his written deposition and tendering in evidence all documents or other exhibits referred to in his deposition. Thereafter, the other party may cross-examine the witness who may be re-examined.[323] However, where the Tribunal deems it necessary, it may call upon or, as the case may be, permit any party to produce any additional document or call additional witness or file any affidavit to enable it to issue proper direction or orders.[324] This is consistent with the principle of law to the effect that a trial Judge has the discretion to recall any of the witnesses in the case at any stage of the proceedings including after Counsel's address provided it is exercised in the interest of justice to clarify a point in error. On this score, ***Nnamani J.S.C.,*** poignantly held as follows:

> The second case was a beautiful judgment written by my learned brother Karibi-Whyte J. (as he then was) in which he upheld the undoubted discretion which a trial judge in appropriate cases has to recall a witness or allow an amendment in the interest of justice….The learned Judge was faced with an application to recall a defendant for cross examination at a stage when both parties had closed their cases but counsel had not addressed the Court. He dealt with the discretion of the learned trial Judge in such matters. Granting the application, he relied on the decision of this court in Ogbodu v. Odogha (1967) NMLR 221 in which it was held that the trial Judge has a discretion to recall any of the witnesses in the case and also that the discretion may be exercised at any stage of the proceedings including after counsel's addresses provided it was exercised in the interest of justice to clarify a point of error in the case without which the court might come to an unjust decision.[325]

[322] See Ss. 37, 38 and 104, Evidence Act, 2011.
[323] Order XV, Rule 5 (1) and (2).
[324] Order XV, Rule 6.
[325] Willoughby v. IMB Limited (1987) 1 N.W.L.R. [Pt. 48] 105.

The foregoing notwithstanding, it must be noted that the decision to recall witness or call for additional evidence by the Tribunal should be exercised with great caution regard being had to the interest of justice and the desirability of remaining an impartial arbiter between the parties. This power should only be invoked where it is eminently necessary to clarify a point of evidence which has arisen in the proceedings and the implication of which are well within the knowledge of both parties to the litigation.

5.10 WITNESS SUMMONS/WARRANTS

Where the Tribunal, on application of any party, directs that any person shall be summoned to give evidence, or tender any document, the Tribunal may order the deposit of such amount of money before the issue of a summons, as in Form TAT 6 in the First Schedule to the rules, as will cover the expense of such person in so attending.[326] This is to ensure that adequate provision is made for the attendance of the party subpoenaed to appear before the Tribunal to give evidence. However, where a witness does not appear to a summons, the Tribunal upon proof of service of the summons, a note of which shall be made on the record book, may issue a warrant as in Form TAT 7 in the first schedule to the rules to bring such witness before the Tribunal at such time as may be convenient.[327] This provision is ambiguous. The question is whose time is contemplated here? Is it 'at such time as may be convenient' to the Tribunal or the Person summoned? It is however submitted that it should be such time as may be convenient to the Tribunal and not otherwise. It is consequently hoped that this aspect of the rules will receive the necessary amendment to clarify the ambiguity.

5.11 WRITTEN FINAL ADDRESSES

[326] Order XV, Rule 7(1).
[327] Order XV, Rule 7(2).

The prime object of written addresses by counsel at the close of case by the appellant and respondent is to assist the Tribunal in arriving at a just decision based on the evidence led and the law applicable thereto. Therefore, where the facts of the case is straight forward and not contentious, the Tribunal may dispense with the written final addresses of counsel.[328] Perhaps this explains why the Tax Appeal Tribunal Rules provides that written addresses shall be filed by parties or their representatives at the close of evidence as may be ordered by the Tribunal.[329] This allows the Tribunal to determine whether or not final written addresses should be filed by the parties at the close of evidence. Where addresses are filed, parties or their representatives shall rely upon and adopt their written addresses before a decision. Furthermore, unless otherwise directed by the Tribunal, each party may be given 15 minutes to make oral argument to emphasize and clarify his written address.[330] The Rules omitted a number of details regarding written addresses such as the party to file first, the time within which same may be filed, the contents and the number of copies to be filed.[331] It would seem that the order of the Tribunal may be drawn in such a manner that would cover or specify all of the issues omitted by the rules. That notwithstanding, it will reduce the work load of the Tribunal if the rules are expanded to accommodate the details hitherto omitted in line with the standard provisions as exemplified in the rules of the Federal High Court, High Court of Lagos State and that of the Federal Capital Territory.

5.12 DETERMINATION OF APPEAL

[328] Gwar v. Adole (2003) 3 N.W.L.R. [Pt. 808] 516, 540; Obodo v. Olomu (1987) 6 S.C. 154.
[329] Order XVIII, Rule 1.
[330] Order XVIII, Rule 3.
[331] Cf: Order 36, High Court of the FCT, Abuja Civil Procedure Rules, 2004; Order 22, Federal High Court (Civil Procedure Rules), 2009 and Order 31, High Court of Lagos State (Civil Procedure) Rules, 2012.

The Tribunal may, after giving the parties an opportunity of being heard, confirm, reduce, increase or annul the assessment or make any such order as it deems fit.[332] The Tax Appeal Tribunal had cause to annul an assessment for being uncertain and exempted the appellant from paying USD167.7 million in the case of ***Halliburton Energy Services Nigeria Limited v. Federal Inland Revenue Service.***[333] The facts of the case are briefly as follows: By a notice of assessment dated February 24, 2009, Exhibit HE3, the respondent raised an assessment of USD167,700,000.00 being 30% of USD559,000.000.00 which it described as 'disallowed expenses' and 'profits'. By way of clarification, the respondents sent a covering letter dated February 25, 2009, Exhibit HE4, which read:

"The FIRS notes the fine of $559m payable to US Authorities in lieu of bribes given to Nigerian Officials for operations in Nigeria within your group.

Since the entire bribe would have formed part of the expenses that was charged in the tax returns to FIRS, an amount of $559m is hereby disallowed for tax purposes and the relevant assessment notice for the tax arising therefrom amounting to $167,700,000 is herewith forwarded for your prompt settlement.

You are also required to disclose to this office within 21days from the date of service of this letter, the exact amount given as bribes as aforementioned.

Thank you.

Yours faithfully,

D.D. Ogedengbe

[332] Para 15(8), 5th Schedule, FIRS (Establishment) Act, 2007.
[333] (2012) 8 T.L.R.N. 15.

For: Executive Chairman

Federal Inland Revenue Service."

In annulling the assessment, the Tribunal emphasized thus:

> For tax to be imposed on the sum in question, the law must unambiguously impose the tax on the party sought to be charged with it. The evidence shows that the fine was imposed for the bribery of Nigerian Officials. What the quantum of the bribe was is not in evidence. The respondent speculates that the fine of $559million or "the entire bribe, would have formed part of the expenses that was charged in the tax returns to FIRS." (sic) The basis for this is not clear. If a fine is imposed, it would be unthinkable for such fine to be claimed as an expense to be deducted in tax returns. The Purpose of the sanction, a criminal penalty, surely is a loss imposed on the party unless there is evidence to the contrary, which there is not. We find that the fine is not profit and to the contrary, is a loss. Thus the case the respondent has presented before us is untenable.
>
> In conclusion we hold… the said assessment is defective as being speculative, contradictory and inconsistent with the relevant tax laws…. In the result, the appeal succeeds and the assessment No. PDBA 20 dated 24th February, 2009 raised on the Appellant by the Respondent is hereby set aside.[334]

This is a landmark decision. It demonstrates a tactful and objective evaluation of issues and a firm conclusion guided by sound analyses and understanding of relevant tax laws. This decision is a glaring confirmation that the wisdom behind the establishment of the Tribunal is profound and commendable.

Every decision of the Tribunal shall be recorded in writing by the Chairman and subject to the provisions of paragraph 16, a certified copy of such decision shall be supplied to the appellant or the Service by the Secretary, upon a request made within 30 days of such decision.[335] The decision of the Tribunal shall be given after hearing all evidence and adoption of written addresses by the parties. The decision of the Tribunal may be unanimous or taken by a majority of members and the decision shall be recorded whether it was unanimous or majority decision:

[334] Ibid. P.29.
[335] Para 15(9), 5th Schedule, FIRS (Establishment) Act, 2007.

provided that where there is a tie, the Chairman or presiding member shall have a casting vote.[336] The decision of the Tribunal shall be recorded in a document which, save in the case of a decision by consent, shall be signed by the Chairman and the Secretary shall issue a certified copy of same to a party upon application or to any other interested party.[337] It is submitted that the judgment of the Tribunal is a public document within the contemplation of section 104 of the Evidence Act, 2011 and could therefore be obtained by any person upon application. In the unlikely event that same is denied, one could also call in aid the Freedom of Information Act to compel the Secretary of the Tribunal to make same available to one.

5.12.1 Characteristics of a Valid Decision

A combined reading of paragraph 15(9), 5th Schedule to the Act and Order XIX, Rule 3 discloses a number of characteristics of the decision of the Tribunal namely: (a) it must be in writing; (b) it must contain the reasons; and (c) it must be signed by the Chairman. These characteristics will be examined more closely below.

(a) Must be in Writing

Fundamentally, every Court established under the Constitution shall deliver its decision in writing and not later than ninety days after the conclusion of evidence and final address.[338] Even though the Tax Appeal Tribunal does not fall within the list of courts established by the Constitution, it none the less requires its decisions to be reduced into writing. It therefore follows that the Tribunal cannot deliver oral judgment no matter how well reasoned or considered. This is very commendable as it makes it readily available to all and sundry, for posterity and

[336] Order XIX, Rules 1 and 2.
[337] Order XIX, Rules 3 and 4.
[338] S.294(1), C.F.R.N. 1999 (As amended)

establishes a verifiable precedence of the decisions of the Tribunal. The proper approach in crafting a judgment has been explained by the Supreme Court in the following words:

> The proper approach for any trial court is to first set the claim(s); then the pleadings; then the issues arising from the pleadings. Having decided on the issues in dispute, the trial judge will then consider the evidence in proof of each issue; then decide on which side to believe and this has got to be a belief based on the preponderance of credible evidence and the probabilities of the case.
>
> After this, the trial judge will record his logical and consequential findings of facts. It is after such findings that a trial court can then discuss the applicable law against the background of his findings of facts.[339]

A decision of the Tribunal is expected to embody the foregoing attributes in addition to the requirement of being in writing.

(b) Must contain the Reasons for the Decision

A judgment must contain the reasons that informed the conclusion arrived at by the decision. In deciding which side to believe, the Tribunal will not do so arbitrarily. It must provide a comprehensive reason for electing to believe either side. These reasons are all woven into the body of the judgment. The reasoning must support the conclusion reached. The Supreme Court has however held that if the conclusion reached by the court is correct, it cannot be affected by the fact that it was arrived at on insufficient or even some wrong reasons. It is in law sufficient that the right decision is reached.[340]

(c) Must be signed by the Chairman

[339] Adeyeye & Anor. V. Ajiboye & Ors (1987) 3 N.W.L.R. [Pt. 61] 432, 451; (1987) 7 S.C. 1, 22, per Oputa, J.S.C. See also Oro v. Falade (1995) 5 S.C.N.J. 10.
[340] Lebile v. Registererd Trustees of Cherubim and Seraphim (2003) 2 N.W.L.R.[Pt. 803] 411.

The Act and the Rules also require that the decision of the Tax Appeal Tribunal must be signed by the Chairman. It is not clear whether the Chairman mentioned herein is the Chairman of the Zone or the Chairman who presided over the hearing of the particular appeal. It is however submitted that the Chairman of the Zone should be the preferred option. In other words, every written decision of the Tribunal must be signed by the Chairman of the Zone. This requirement is fundamental as an unsigned judgment is invalid in law.[341] It is hoped that the Tribunal would do well to comply with these fundamental requirements as they render their decisions on a wide ranging tax disputes that will be submitted to them for adjudication.

5.13 ENFORCEMENT OF TAX APPEAL TRIBUNAL DECISIONS

After judgment has been delivered, the next thing that follows is how to enforce the judgment by the victorious party. This is the only way a successful litigant can reap the fruit of his victory before the Tribunal. The rules of practice and procedure provide that the enforcement of a decision of the Tribunal shall be in accordance with the provisions of the Act.[342] This research will, therefore, turn attention to the Act with a view to demonstrating the procedure for the enforcement of the judgment of the Tribunal.

5.13.1 Procedure Following the Decision of the Tribunal

Upon the determination of an appeal by the Tribunal, notice of the amount of the tax chargeable under the assessment as determined by the Tribunal shall be served by the Service upon the taxpayer or upon the person in whose name such taxpayer is chargeable.[343] An award or judgment of the Tribunal shall be enforced as if it were a judgment of the Federal High Court upon registration of a copy of such award or judgment with the Registrar of the Federal High

[341] Awoniyi v. Aleshinloye (1998) 9 N.W.L.R.[Pt.562] 72.
[342] Order XX.
[343] Para 16(1), 5th Schedule, FIRS (Establishment) Act, 2007.

Court by the party seeking to enforce the award or judgment.[344] This is a fantastic development. It clothes the decision of the Tribunal with the strength of the Federal High Court and enforced accordingly. This research believes that this innovation will engender voluntary compliance with the decision of the Tribunal.

Furthermore, notwithstanding that an appeal is pending, tax shall be paid in accordance with the decision of the Tribunal within one month of notification of the amount of the tax payable in pursuance of subparagraph (1) of Paragraph 16.[345] This procedure is to ensure that the State is not denied revenue by the mere filing of appeals. Should this be allowed, litigants, being what they are may usurp the appeal system and deploy same as a means of inordinately delaying the payment of tax if not avoiding it completely. This provision perhaps may be described as a veritable blockade against unscrupulous tax avoidance predators and their cohorts. The State must not be starved of revenue on the simple reason that a party is pursuing his constitutional right of appeal. Doing otherwise will expose the state to economic dilemma which could affect more persons than the taxpayer would possibly imagine. This provision is therefore commendable.

5.14 FEES AND MISCELLANEOUS POWERS OF THE TAX APPEAL TRIBUNAL

[344] Para 16(2), ibid.
[345] Para 16(3)

5.14.1 Fees

Payment of appropriate filing fee is a condition precedent for a court to assume jurisdiction over a matter submitted before it for adjudication. ***Mbaba, J.C.A.*** was explicit on this point when he noted as follows in ***Ibiwoye Anu Ayodeji v. Senator Simeon Sule Ajibola:***

> Of course, by law it is filing fee that vests legitimacy or validity on a court process, except where such fees are waived as in the case of official process filed by government or department of government….
>
> Since the alleged preliminary objection by the 1st and 2nd respondents was not filed separately, I do not therefore think their said objection is competent, to warrant any due consideration by this court. Thus, the preliminary objection, raised by the 1st and 2nd respondents in their brief or argument, without evidence of prior filing of the said notice, is incompetent and cannot be relied upon to question the competence of the said grounds of appeal by the appellants.[346]

It is for this reason that the rules of practice and procedure of the Tax Appeal Tribunal make extensive provisions for the payment of filing fees. It says that the fees set out in the Second Schedule to the Rules shall be payable in respect of matters to which they relate.[347] The second Schedule to the Rules list 26 heads of fees chargeable by the Tribunal for different processes. Granted that the Registrars of the Tribunal do the assessments of the payable filing fees, it is also important for Litigants to familiarize themselves with the applicable fees to avoid under assessment. As a matter of practice, no court will proceed to hear a matter or any application whatsoever once the issue of underpayment of filing fees is discovered except where the court is minded to waive same. It remains to be added that each party to an appeal shall bear its own cost.[348]

5.14.2 Miscellaneous Powers of the Tribunal

[346] (2013) All F.W.L.R. [Pt. 660] 1327, 1345, paras A-C.
[347] Order XXI
[348] Para 22, 5th Schedule FIRS (Establishment) Act, 2007.

As part of its miscellaneous powers, while considering an appeal, the Tribunal may not be confined to the grounds set forth in the notice but may have power to consider any matter arising out of or relevant to the appeal. In doing so, both parties to the appeal shall be given an opportunity to be heard on such matters raised.[349] The Tribunal shall at any stage of the proceedings, issue such directions or orders as it may consider appropriate to meet the justice of the case and in so doing shall place emphasis on substance rather than form.[350] Again, all the Forms applicable in all proceedings before the Tribunal may be used with such modifications as the circumstance may require.[351] Finally, where any matter arises in respect of which no provision or no adequate provisions are made in the Rules, the Tribunal shall adopt such procedure as will in its view do substantial justice between the parties.[352] The cumulative effect of the foregoing is that the Tribunal is provided with sufficient flexibility in the conduct of its business. This is quite good for a touchy issue such as tax as same would, if correctly applied, secure a purposeful resolution of tax disputes.

5.15 APPEALS AGAINST THE DECISION OF THE TAX APPEAL TRIBUNAL

The right to appeal against a decision of a court of law is a constitutional right that must not be impaired or hindered in any manner whatsoever. In fact it is the preservation of the right to appeal that clothes Tribunals like the Tax Appeal Tribunal with Constitutional recognition for respect to the right to fair hearing.[353] In keeping with this Constitutional requirement, the Act provides that any person dissatisfied with a decision of the Tribunal constituted under this Schedule may appeal against such decision on a point of law to the Federal High Court upon

[349] Order XXII, rule 1.
[350] Order XXII, rule 2.
[351] Order XXII, rule 3.
[352] Order XXII, rule 4.
[353] S.36(2)(a), C.F.R.N. 1999 (As amended)

giving notice in writing to the Secretary to the Tribunal within 30 days after the date on which such decision was given.[354] The right of appeal here is apparently circumscribed to a point of law only. It would seem that the Tribunal is considered or assumed to be masters of facts and therefore above error as far as facts of the appeal are concerned. This research senses a serious danger in this present state of the law. This is predicated on the fact that the Tribunal may well misunderstand the facts and consequently arrive at a wrong conclusion in law. An aggrieve litigant on further appeal in such circumstance may not get justice on points of law as the law may as well support the facts albeit misunderstood by the Tribunal. It is therefore submitted that the points (grounds) of appeal should be expanded to include points of facts but with leave of the Federal High Court. That way, the Constitutional right to appeal and fair hearing would not be seen to be impaired inadvertently.[355]

A notice of appeal shall set out all the grounds of law on which the appellant's case is based.[356] Upon receipt of the notice of appeal, the Secretary to the Tribunal shall cause the notice to be given to the Chief Registrar of the Federal High Court along with all exhibits tendered at the hearing before the Tribunal.[357] The Rules of practice and procedure also makes similar provisions.[358] This research believes that Order XXIV[359] of the Tax Appeal Tribunal Procedure Rules is too scanty to be of any meaningful assistance to a party who desires to appeal against the decision of the Tribunal. It merely states that a dissatisfied party may appeal against the decision of the Tribunal on a 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. It fails to

[354] Para 17(1), 5th Schedule, FIRS(Establishment) Act, 2007
[355] The FIRS also has a similar right of Appeal. See Para 17(3).
[356] Ibid. Para 17(2).
[357] Para 17(4)
[358] Order XXIV, rules 1 and 2.
[359] Order XXIV deals with appeals to the Federal High Court.

specify the Form the notice would take and the contents thereof.[360] This is a serious problem that could create an avoidable uncertainty in the exercise of appellate jurisdiction by the Federal High Court. Perhaps a likely remedy to this anomaly may be the exercise of the powers of the Chief Judge of the Federal High Court to make rules providing for the procedure in respect of appeals made under the Act. However, until such rules are made, the Federal High Court rules relating to hearing of appeals shall apply to the hearing of an appeal under the Federal Inland Revenue (Establishment) Act.[361] It is hoped that the Chief Judge of the Federal High Court will make the requisite rules that would supply all the missing information in this regard. It remains to be added that a further appeal against the decision of the Federal High at the instance of either party shall lie to the Court of Appeal.[362]

In summary, it is important for litigants before the Tribunal to be familiar with the various types of interlocutory applications and how to approach the Tribunal for whatever order that may be available to them. Beyond that, it is also important to understand how the hearing before the Tribunal is conducted, the nature of the decisions, how the decisions can be enforced and how one can exercise one's right of appeal where necessary. These are some of the issues that this Chapter has addressed.

[360] Cf: Order 6, Rule 2, Court of Appeal Rules, 2011.
[361] Para 17(5), 5th Schedule, FIRS Act.
[362] Para 23, 5th Schedule.

CHAPTER SIX

6.0 CONCLUSION

6.1 SUMMARY OF FINDINGS

Tax disputes are inevitable having regard to the nature of tax itself and the strict manner in which the courts interpret tax statutes. In fact, tax is outside the ambit of the common law in that it can only be levied where a specific legislation so provides. Beyond that, the inherent problems of our tax system altogether compound the issues thereby making tax disputes a daily occurrence. The only option therefore is to devise a means of having such disputes resolved speedily, cheaply, effectively and effectually. This is the cardinal objective of the Tax Appeal Tribunal as this research has demonstrated. In furtherance of this noble objective, the Tax Appeal Tribunal (Procedure) Rules, 2010 was fashioned to guide proceedings before the Tribunal. Unfortunately, the Rules cannot secure this objective in view of the numerous gaps and contradictions in it. The following findings and observations are made:

a. There is conflict regarding whose responsibility it is to make rules for the Tribunal. The Act empowered the Tribunal as well as the Minister of Finance to make rules regulating its procedures at the same time.[363] This is contrary to the standard practice in rules making powers of the various courts which is usually vested on the head of the Court. For instance, the Chief Justice of Nigeria makes the Supreme Court Rules, the President, Court of Appeal makes the Court of Appeal Rules, the Chief Judge, Federal High Court makes the Federal High Court Rules.[364] One would have expected that the Tribunal

[363] Para 20(1) and Para 21, 5th Schedule, FIRS (Establishment) Act, 2007.
[364] Ss. 236, 244 and 254, Constitution of the Federal Republic of Nigeria (as amended), Cap. C21, L.F.N., 2004

would have been solely vested with the powers to make its own rules of practice and procedure. Perhaps, the many lacuna identified in this research would have been minimal if not totally absent;

b. As part of the findings and observations here, the Minister of Finance is vested with enormous powers. The Minister single handedly appoints both the Chairman and all other Tax Appeal Commissioners that sit on the Tribunal. He also appoints the Secretary to the Tribunal and all the support staff. The same Minister can also remove a Tax Appeal Commissioner on conditions that are too weak to provide any reasonable safeguard for someone who is called upon to act in a quasi-judicial capacity. Even though it is conceded that none of these violates any known Constitutional requirement, it is however, observed that same needs to be circumscribed having regard to the potential negative impression that may be created in the public domain;

c. Another important finding relates to the abolition of Notice of Refusal to Amend (NORA) as a condition precedent to filing an appeal before the Tribunal. This was confirmed when the decision of the Lagos Zone of the Tribunal in ***Oando Supply & Trading Limited v. Federal Inland Revenue Service***[365]was considered. It is however, submitted that it is in the interest of fairness to all the parties to retain NORA as same would afford the Tax authority the opportunity to correct human errors in any assessment that may have been disputed by a tax payer;

d. Another finding is the apparent contradiction between paragraph 13(2) and 13(3), 5th Schedule, FIRS (Establishment) Act. While the one confers jurisdiction on the Tribunal

[365] Supra.

to enlarge time within which an appeal may be filed, the other forecloses such discretionary powers. This is very inelegant and misleading; and

e. The provision for appeal against the decision of the Tribunal smacks of an infraction on the constitutional right to appeal as it limits right to appeal to the Federal High Court on points of law only. The assumption is that the Tribunal is a master of Facts and cannot in any way err as far as issues of facts are concerned. This assumption is baseless having regard to the frailty that bedevils humans generally.

The foregoing summarizes the bulk of the findings made in this work. As evident, there is a lot of lacuna in the rules. It is, therefore, intended to proffer some suggestions and recommendations below.

6.2 SUGGESTIONS AND RECOMMENDATIONS

Following the challenge identified in the rules of practice and procedure of the Tax Appeal Tribunal, the following suggestions and recommendations are proffered:

1. the Federal Inland Revenue Service (Establishment) Act, 2007 should be amended to allow for the Rules of Practice and Procedure of the Tribunal to be made by the Tribunal itself. This will clean up the power contest over Rule making authority between the Tribunal and the Minister of Finance;

2. the powers of the Minister of Finance to solely ‘hire’ and ‘fire’ the Tax Appeal Commissioners and their support Staff should be circumscribed to the ratification of the National Assembly. This will inject the requisite confidence, checks and balances in our

tax system. As it stands, the safeguard provided for the Tax Appeal Commissioners is too weak to shield them from the arbitrary whims of the Minister of Finance. A public officer who is called upon to serve on a quasi-judicial capacity must be provided sufficient shield from arbitrary removal. This is the only way the Tax Appeal Commissioners can do their job without fear or favour. No effort therefore, should be spared in adjusting this anomaly through a bespoke amendment to the Act;

3. the provision of the Act against the requirement for Notice of Refusal to Amend to be issued by the Service (FIRS) as a condition precedent to filing an appeal before the Tribunal needs to be revisited. As mentioned earlier, the assessment complained of may well be a mere human error which the Service can quickly correct upon an objection filed by the taxpayer. To allow the tax payer access to the Tribunal without exhausting the tax man's internal mechanism runs afoul of the decision of the Supreme Court. It is therefore recommended that the Act should be amended to retain NORA as a condition precedent to filing appeals before the Tribunal;

4. the contradiction between paragraph 13(2) and 13(3), 5th Schedule, Federal Inland Revenue Service (Establishment) Act is worrisome. While the one confers jurisdiction on the Tribunal to enlarge time within which an appeal may be filed, the other forecloses such discretionary powers. This is very inelegant and misleading. It is therefore suggested that the affected paragraphs should be amended; and

5. the provision for appeal smacks of an infraction on the constitutional right to appeal as it limits right to appeal to the Federal High Court on points of law only. The assumption is that the Tribunal is a master of Facts and cannot in any way err as far as issues of facts

are concerned. This assumption is baseless having regard to the frailty that bedevils humans generally. It is therefore important for this to be revisited to allow for appeals on points of law; facts or mixed law and facts. At most, the later cases could be with leave of the Federal High Court. This would preserve the full constitutional right of appeal of litigants and make room for a comprehensive review of the decisions of the Tribunal;

6.3 CONCLUDING REMARKS

In conclusion, while this research totally concedes that the idea of a Tax Appeal Tribunal is noble and commendable, it has however, endeavoured to highlight a number of problems affecting our tax dispute resolution system as presently constituted. These problems have the potential of limiting the efficacy of the Tribunal if not timely addressed. It is for this reason that the research has also attempted some suggestions and recommendations on how some of these problems can be tackled.

It is hoped that the relevant authorities will do well to make the requisite adjustments to our tax laws as advocated here in order to reposition the Tribunal and build confidence in our tax system.

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