

THE TAX DISPUTES
AND LITIGATION
REVIEW

SIXTH EDITION

Editor
Simon Whitehead

THE LAWREVIEWS

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AND LITIGATION
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This article was first published in March 2018
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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-912228-16-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

BUSTAMANTE & BUSTAMANTE LAW FIRM

CHEVEZ RUIZ ZAMARRIPA Y CIA, SC

DDTC CONSULTING

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PREFACE

The objective of this book is to provide tax professionals involved in disputes with revenue authorities in multiple jurisdictions with an outline of the principal issues arising in those jurisdictions. In this, the sixth edition, we have continued to add to the key jurisdictions where disputes are likely to occur for multinational businesses.

Each chapter provides an overview of the procedural rules that govern tax appeals and highlights the pitfalls of which taxpayers need to be most aware. Aspects that are particularly relevant to multinationals, such as transfer pricing, are also considered. In particular, we have asked the authors to address an area where we have always found worrying and subtle variations in approach between courts in different jurisdictions, namely the differing ways in which double tax conventions can be interpreted and applied.

The idea behind this book commenced in 2013 with the general increase in litigation as tax authorities in a number of jurisdictions took a more aggressive approach to the collection of tax; in response, no doubt, to political pressure to address tax avoidance. In the UK alone we have seen the tax authority vested with broad new powers not only of disclosure but even to require tax to be paid in advance of any determination by a court that it is due. The provisions empower the revenue authority, an administrative body, to compel payment of a sum, the subject of a genuine dispute, without any form of judicial control or appeal.

Over the past year, the focus on perceived cross-border abuses has continued with action by the European Commission on past tax rulings in Ireland, Luxembourg and Belgium and the BEPS reaching a crescendo in the announcement of a 'diverted profits tax' to impose an additional tax in the UK when it is felt that a multinational is subject to too little corporation tax even in an EU context. The general targeting of cross-border tax avoidance now has European legislation behind it with the passage this year of the second Anti-Tax Avoidance Directive. The absence of much previous European legislation in direct tax has always been put down to the need for unanimity and the way in which Member States closely guard their taxing rights. The relatively speedy passage of this legislation (the Parent–Subsidiary Directive before it took some 10 years to pass) and its restriction of attractive tax regimes indicates the general political disrepute with which such practices are now viewed.

These are, perhaps, extreme examples, reflective of the parliamentary cycle, yet a general toughening of stance seems to be felt. In that light, this book provides an overview of each jurisdiction's anti-avoidance rules and any alternative mechanisms for resolving tax disputes, such as mediation, arbitration or restitution claims.

We have attempted to give readers a flavour of the tax litigation landscape in each jurisdiction. The authors have looked to the future and have summarised the policies and approaches of the revenue authorities regarding contentious matters, addressing important

questions such as how long cases take and situations in which some form of settlement might be available.

We have been lucky to obtain contributions from the leading tax litigation practitioners in their jurisdictions. Many of the authors are members of the EU Tax Group, a collection of independent law firms, of which we are a member, involved particularly in challenges to the compatibility of national tax laws with EU and EEA rights. We hope that you will find this book informative and useful.

Finally, I would like to acknowledge the hard work of my colleague Ibar McCarthy in the editing and compilation of this book.

Simon Whitehead

Joseph Hage Aaronson LLP

London

February 2018

NIGERIA

Etigwe Uwa, Adeyinka Aderemi, Eberechi May Okoh and Munachiso Michael¹

I INTRODUCTION

Tax disputes in Nigeria are primarily resolved by the courts and the Tax Appeal Tribunal (TAT). The Constitution of the Federal Republic of Nigeria, 1999 (as amended) and the Taxes and Levies (Approved List for Collection) Act, LFN 2008 provide for the assessment and collection of taxes by the federal, states and local governments. The jurisdiction of the courts over tax disputes derives from whether the taxes are federal, state or local government taxes. Jurisdiction for taxes administered at both the federal and state levels, such as stamp duties, is determined by the legal personality of the taxpayer and for individuals, their place of residence.

The Federal High Court (FHC), states' High Courts and TAT are vested with jurisdiction to hear and determine tax disputes. Appeals from the TAT lie to the FHC, appeals from the FHC and states' High Courts lie to the Court of Appeal, while appeals from the Court of Appeal lie to the Supreme Court, which is the apex and final court in the country.

Nigerian laws also provide administrative channels for resolution of tax disputes before resort to litigation. A taxpayer challenging an assessment may write an objection to the tax authority giving reasons for the challenge. The tax authority either upholds the objection and quashes the assessment or rejects the objection. Where the tax authority rejects the objection, it will issue a notice of refusal to amend (NORA) to the taxpayer. The aggrieved taxpayer may within 30 days, file an appeal at the TAT or other relevant court. It is noteworthy that these administrative channels do not bar an aggrieved taxpayer from proceeding to the TAT or the courts, pending the exhaustion of the administrative process.²

Tax disputes have been held by the Nigerian courts to be outside the purview of arbitration and other alternative dispute resolution mechanisms. The Court of Appeal in the case of *SNEPCO & 3 Ors v. FIRS*,³ recently upheld the decision of the FHC that disputes over company taxation are exclusive to the FHC and, thus, not arbitrable as they pertain to the revenue accruing to the sovereign government.

In the course of prosecuting a civil dispute, where evidence of possible criminality is discovered, details of same will be forwarded to the Department of Public Prosecution for necessary actions.

Remedies available on tax disputes could include quashing the contested assessment, damages, cost of action, penalties, interest, fine, etc.

1 Etigwe Uwa and Adeyinka Aderemi are partner and Eberechi May Okoh and Munachiso Michael are senior associates at Streamsowers & Köhn.

2 *Oando Supply & Trading Limited v. FIRS* (2011) 4 TLRN 113.

3 *SNEPCO & 3 Ors. v. FIRS and Anor* CA/A/208/2012. Judgment delivered on 31 August 2016.

The Nigerian government formally launched the Voluntary Assets and Income Declaration Scheme (VAIDS) in June 2017, an initiative designed to encourage voluntary disclosure of previously undisclosed assets and income for the purpose of payment of all outstanding tax liabilities. Taxpayers who take advantage of the scheme will enjoy waivers on penalties and interest that would otherwise have accrued. The scheme ends in March 2018.

II COMMENCING DISPUTES

Tax disputes can be commenced either by the taxpayer or by the relevant tax authority (RTA).

A taxpayer who objects to a tax assessment may within 30 days of receiving notice of the assessment, apply by notice of objection to the federal or state Inland Revenue Service (depending on whether it is a federal or state tax) urging the RTA to review the tax assessment along the lines of the objection raised. Where the RTA agrees with the objection, the assessment will be amended accordingly. However, where the RTA disagrees with the objection, it shall issue a NORA.⁴ Upon a NORA being issued against a taxpayer's objection, the aggrieved taxpayer shall within 30 days of receipt of the NORA file an appeal at the TAT or file an action at the relevant federal or state High Court.

Generally, an action may be commenced at the High Court either by a writ of summons, originating summons or an originating motion or petition. A writ is used where the facts are in dispute and the case is most likely to be contentious. The writ is filed along with a statement of claim setting out the plaintiff's claims and reliefs sought in detail. Where the facts are not in substantial dispute, an originating summons is used. An action may also be commenced by originating motion or petition where expressly provided by statute.⁵

To commence proceedings before the TAT, the appellant shall file a notice of appeal in Form TAT 1 in the zone of the TAT where the facts of the case took place. The notice of appeal must contain the grounds of appeal; whether the whole or part only of a decision is contested; the exact nature of the relief sought; the names and addresses of all parties directly affected by the appeal; and the address for service on the appellant and respondent. The notice of appeal must be filed concurrently with the list of witnesses, witnesses' sworn written statements on oath and copies of every document to be relied on at the trial.

All processes filed are to be served personally on the respondent, unless an order for substituted service is granted by the Tribunal. Upon receipt of the filed documents, the respondent has 30 days within which to file its opposition in Form TAT 3 if any. Proceedings at the TAT are to be held in public, and the onus of proving its case rests on the appellant.⁶

The Tribunal may, after hearing both parties, confirm, reduce, increase or annul the assessment or make any such order as it deems fit.⁷

Either party aggrieved by the final decision of the TAT may appeal to the FHC by giving notice in writing to the secretary to the TAT, within 30 days of the service of the TAT's final decision on the party. Failure to appeal within this set time will mean the assessment and demand notices become final and conclusive, or in the case of an action against a decision of the RTA, it means the decision of the TAT is final and conclusive on the issue pending appeal.

4 Section 69 Companies Income Tax Act Cap. C21, Laws of the Federation of Nigeria, 2010.

5 Olumide K Abayomi, Tax Litigation in Nigeria and a Review of Recent Nigerian Court Decisions in Taxation (2014) *Research Journal of Finance and Accounting*.

6 Section 15, Fifth Schedule, FIRS Act.

7 Ibid.

Statutes of limitation do not apply to appeals brought before the TAT,⁸ save the provisions relating to time within which to appeal after a NORA and to appeal from a decision of the TAT. Also, statutes of limitation do not apply to actions filed by RTA for recovery of any tax.

Other than tax returns, there are no other procedures for claiming tax reliefs or exemptions as reliefs or exemptions can only be claimed if they apply at the time of filing the returns.

Possible triggers of tax disputes include:

- a* information garnered by the RTA during periodic audits;
- b* information delivered by bankers to the Federal Inland Revenue Service (FIRS) as provided by law: The law requires bankers to make quarterly returns to the FIRS specifying details of transactions of 5 million naira or above for individuals and 10 million naira and above for corporate bodies;
- c* periodic returns filed by taxpayer;
- d* assessment or additional assessment by RTA; and
- e* the mention of any differences for different types of taxes:
 - personal tax: Disputes relating to personal income tax may be commenced before customary courts, magistrates' courts, state High Courts, the TAT or the FHC, depending on the jurisdiction of the court, the amount of tax involved and whether the action is against the federal or state tax authority;
 - corporation tax: companies income tax (CIT) is a federal tax and all disputes relating to its payment are commenced before the TAT or FHC;
 - wealth taxes: Individuals are not taxed on their net wealth as a separate tax in Nigeria. Property taxes, withholding tax on dividends and capital gains taxes are charged on companies or individuals. Commencement of tax disputes would depend on the taxpayer and the tax base;
 - partnerships: Disputes arising out of partnership taxes may be commenced before customary courts, magistrates' courts, state High Courts, the TAT or the FHC, depending on the jurisdiction of the court, amount of tax involved and whether the action is against the federal or state tax authority;
 - indirect taxes: Indirect taxes in Nigeria comprise value added tax (VAT) and customs and excise duties. As with federal taxes, disputes are commenced at the TAT and FHC; and
 - stamp duty: Disputes over stamp duties may be commenced before the state High Courts, the TAT or the FHC depending on whether the duties accrue to the federal or state government.

III THE COURTS AND TRIBUNALS

In practice, administrative channels within the RTA are usually the first step for resolution of tax disputes. Unresolved disputes proceed to the TAT or FHC, or where the tax is a state tax, to the state High Court. The High Courts at the federal and state levels, magistrates' courts and customary courts within states have jurisdiction to hear tax disputes. The TAT is the only tribunal set up under the FIRS Act to hear tax disputes over federal taxes on the conditions earlier set out above. We shall provide a description of these courts and their jurisdiction.

⁸ Section 19, Fifth Schedule, FIRS Act.

Customary, magistrates' and state High Courts are the venue for disputes arising from levies and taxes imposed by local government authorities and taxes under state tax laws. Claims below 600,000 naira, lie before the customary court in the state the transaction occurred.⁹ Claims in excess of 600,000 naira but less than 10 million naira may be commenced before the magistrates' court.¹⁰ Claims for taxes imposed by state laws, in excess of 10 million naira are commenced before the state High Courts, which are courts of unlimited jurisdiction. The customary, magistrates' and state High Courts are composed of a single judge for the determination of disputes. Appeals from the decision of the customary or magistrates' courts lie to the state High Courts, while an appeal from a decision of the state High Courts lie to the Court of Appeal.

The Tax Appeal Tribunal is vested with jurisdiction to hear disputes arising from the operations of the FIRS, which includes: the Companies Income Tax Act (CITA), Petroleum Profits Tax Act, Personal Income Tax Act (PITA), Capital Gains Tax Act and (Value Added Tax Act (VAT Act),¹¹ and any other federal Acts. The jurisdiction of the TAT over PITA is restricted to the taxation of persons employed in the Nigerian army, Nigerian navy, Nigerian air force, Nigerian police force, officers of the Nigerian foreign service and persons resident outside Nigeria who derive income or profit from Nigeria. The TAT is composed of tax commissioners appointed by the Minister of Finance. The TAT has eight zones each headed by a chairman and four commissioners. The proceedings of the TAT are conducted by a minimum of three commissioners, and where there is need for a full panel of the Tribunal, five Commissioners.¹² Most tax disputes are resolved at the TAT. Appeals from the decision of the TAT lie as of right to the FHC on questions of law.

The FHC has exclusive jurisdiction in any dispute pertaining to taxation of companies, bodies established or carrying on business in Nigeria and all other persons subject to federal taxation.¹³ The FHC has a single jurisdiction across the federation and is composed of a single judge. An action may be commenced before the FHC at first instance once its jurisdiction is rightly invoked. Appeals lie to the FHC from the decision of the TAT on questions of law. It is equally possible to apply to the FHC to quash the directive or decision of the TAT through the prerogative writs of *certiorari*, prohibition and *mandamus*. Appeals from the decision of the FHC lie to the Court of Appeal.

The Court of Appeal has appellate jurisdiction over tax disputes from the FHC and state High Courts. Tax appeals lie as of right to the Court of Appeal where they are final decisions, the ground of appeal involves questions of law alone and questions as to the interpretation of the Constitution.¹⁴ In all other cases, leave of court must be obtained to appeal.¹⁵ The Court of Appeal is composed of not less than three justices. Appeals from the Court of Appeal lie to the Supreme Court.

The Supreme Court is the apex and final court in Nigeria. Tax appeals from the decisions of the Court of Appeal lie to the Supreme Court as of right where they are on questions of law alone and on questions as to the interpretation of the Constitution. The Supreme Court

9 See, e.g., Section 20(1) of, and First Schedule to, the Customary Courts Edict.

10 Section 28(2) of the Magistrates' Court's Law of Lagos State (2011).

11 Fifth Schedule, Federal Inland Revenue Service Establishment Act, 2007.

12 Section 2, Fifth Schedule FIRS Act.

13 Section 251(1)(b) 1999 Constitution (as amended).

14 Section 241 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

15 Section 242 of the 1999 Constitution (as amended).

is duly constituted if it consists of not less than five justices, provided that in cases involving the Court's original jurisdiction¹⁶ or actions relating to the interpretation of the Constitution, the Court shall be constituted by seven justices.¹⁷

In the authors' experience, time spent on litigating tax disputes increases with each level of appeal. Tax disputes at the TAT are resolved in a much shorter time (sometimes within the year of commencement) than the higher courts. The Supreme Court takes the longest, with appeals taking over five years to be resolved.

The various court hierarchies and the TAT are independent of the tax authorities, and their decisions are equally binding on the tax authority as well as on the taxpayer.

IV PENALTIES AND REMEDIES

Tax disputes are usually civil matters, but may also be quasi-criminal, or criminal matters.

The remedies and penalties available in tax disputes are as follows.

i Criminal penalties: what they are and where they are available

Under CITA, any person guilty of an offence against the Act or who contravenes or fails to comply with the provisions of the Act shall be liable on conviction to a fine of 20,000 naira. Where such offence is the failure to furnish a statement or information or to keep records required, a further sum of 2,000 naira for each and every day the failure continues and in default of payment to imprisonment for six months.¹⁸

Offences under the Act include: failure to comply with the requirements of a notice without sufficient cause; failing to answer to a notice or summons; knowingly making any false statement or false representation; and aiding, abetting, assisting or inducing another person to make false return or statement or to keep false accounts or unlawfully refuse or neglect to pay tax.¹⁹

The above provisions are replicated in the PITA.²⁰

ii Civil liability and administrative penalties: what they are and where they are available

Civil sanctions under the Nigerian Tax Acts take the form of administrative penalties and civil liability²¹ such as the following.

- a* The RTAs are empowered to raise assessments according to the best of their judgement (BOJ) where returns are not filed.²²
- b* Additional assessments may be raised by the RTA within the year of assessment or within six years of the expiration thereof if it opines that a taxpayer has not been assessed or has been assessed at a less amount than that which ought to have been charged.²³

16 Disputes between the Federal Government, States and National Assembly. Section 232 of the 1999 Constitution (as amended).

17 Section 234 of the 1999 Constitution (as amended).

18 Section 92 CITA.

19 Section 94 CITA.

20 Sections 94–96 PITA.

21 MT Abdulrazaq (2016) *Taxation System in Nigeria*: Gravitas Legal and Business Resources Ltd, pp. 225–226.

22 Section 65(3) CITA; Section 54(3) PITA.

23 Section 66 CITA; Section 55 PITA.

- c* If any income tax charged by any assessment is not paid within two months, an interest sum equal to 10 per cent of such tax shall be added thereto.²⁴
- d* Monetary fines as prescribed by law may be imposed on the taxpayer by the RTA. Where an assessment has become final and conclusive and a demand note has been served upon the taxable person, if payment of the tax is not made within the time limited by the demand note, the RTA may, for the purpose of enforcing payment of the tax due:
- distraint the taxpayer's goods or other chattels, bonds or other securities;
 - distraint any land, premises or place in respect of which the taxpayer is the owner; and
 - recover the amount of tax due by sale of anything so distrained.²⁵
- e* Where income tax assessed has been sued for and recovered in a court of competent jurisdiction, the full cost of the action may be recovered from the person charged as a debt due to the federal government of Nigeria.²⁶
- f* Damages are equitable remedies which are imposed at the discretion of the court. They may be awarded in favour of the taxpayer or the RTA depending on the nature of the claim.

V TAX CLAIMS

i Recovering overpaid tax

The Nigerian tax laws provide that taxpayers may at any time, not later than six years after the end of the year of the assessment complained of, make an application in writing to the RTA for relief of excess tax paid by reason of some error or mistake in the return, statement or account made.

The RTA may give by way of repayment of tax such relief as appears to be reasonable and just²⁷ or if it disagrees with the application refuse to repay the overpaid tax. The taxpayer may file an appeal at the TAT, or an action at the relevant high court having jurisdiction, and claim the overpaid tax.

Where the RTA agrees with the application or a decision of the court is reached ordering a repayment of the overpaid tax, the RTA shall give a certificate of the amount of the tax to be repaid under any of the provisions of statute or under any order of a court of competent jurisdiction and upon the receipt of the certificate, the accountant general of the federation or relevant state shall cause repayment to be made in conformity therewith.²⁸ In practice, the excess sum paid is treated as tax credit for the taxpayer against any future payment.

ii Challenging administrative decisions

Administrative decisions can be challenged by taxpayers where such decisions depart from the law. Taxpayers have brought claims against the RTA and have been awarded judgments in their favour.

24 Section 32 FIRS (Establishment) Act 2007.

25 Section 86 CITA; Section 104 PITA; Section 33 FIRS (Establishment) Act.

26 Section 87 CITA; Section 78 PITA.

27 Section 90 CITA, Section 83 PITA.

28 Section 91 CITA, Section 84 PITA.

Where a taxpayer challenges an administrative decision on the basis that one or more taxpayers received a waiver, the peculiarities of each case would determine the outcome. It must be noted that the government sometimes offers a tax amnesty to taxpayers owing interest and penalties. As such, taxpayers who leverage on such windows may enjoy a flexible payment plan that may not be open to other taxpayers who did not participate in the amnesty programme. No cause of action will be sustainable on the basis of the differential treatment.

In the case of *SEDCO Forex International Incorporated v. FIRS*²⁹ the taxpayer challenged the decision of the RTA to disallow the deduction of recharges paid by a foreign company. The court in refusing the taxpayer's contention and in pronouncing on the reliance on the doctrine of legitimate expectation, held that to benefit from the doctrine, there must be fairness and openness of dealings; thus, a person must have made full disclosure or displayed utmost good faith in the transaction. The doctrine cannot stand where it conflicts with a clear statutory provision. The court held that the taxpayer's action must fail as recharges are not allowable deductions when calculating a foreign company's income tax, as opposed to when calculating a Nigerian company's income tax.

iii Claimants

Tax claims are brought by the taxpayer or the RTA. Thus, a tax claim can only be brought by the person who bears the economic burden of the charge. Thus, where a taxpayer is aggrieved by a tax assessment or demand notice, the *locus standi*³⁰ to enforce the relief sought rests on the taxpayer as he bears the economic burden.

The above rule is not different in indirect tax situations like VAT. The party on whom the economic burden to pay the tax rests is the party with the *locus standi* to bring the tax claim. The court in the case of *Vodacom Business Nig Ltd v. FIRS*³¹ was called upon to determine whether supplied satellite-network bandwidth capacities were VATable and on who the VAT was chargeable. The court held that the service fell within the description of VATable goods and services under the Act and that the taxable person was the consumer of the said goods and services, in this case the Nigerian company.

Where the tax was paid in consideration other than money, a decision in favour of the taxpayer will be based on the market value of the consideration.³²

VI COSTS

Recovery of costs varies from court to court. The FIRS Act provides that parties to an appeal at the TAT shall bear their own costs.³³

However, it is noteworthy that the various tax acts provide that tax may be sued for and recovered in court by the tax authority with full cost of the action claimed from the taxpayer and charged as a debt due to the government.³⁴

29 (2015) 18 TLRN 42.

30 Legal standing to institute an action.

31 (2016) 23 TLRN 72.

32 Section 5(3) VAT Act.

33 Section 22, Fifth Schedule FIRS Act.

34 Section 87 CITA, Section 78 PITA.

At the High Courts, Court of Appeal and Supreme Court, costs follow events. Imposition of costs is at the discretion of the court and the court is required to exercise that discretion judicially and judiciously in the interest of justice between the parties.

VII ALTERNATIVE DISPUTE RESOLUTION

The decision of the Court of Appeal in the case of *SNEPCO & 3 Ors v. FIRS & Anor*³⁵ is to the effect that tax disputes are not arbitrable as they relate to the revenue of the federation and, thus, fall under the exclusive jurisdiction of the FHC. The court held that where an arbitral tribunal sits on a tax dispute, the award of the tribunal will be unenforceable for conflicting with the express provisions of the Constitution.

Curiously, the same court in the case of *Statoil (Nig) Petroleum v. NNPC*³⁶ earlier held that once parties have agreed to arbitrate their disputes, the courts are not to interfere with same, even where the dispute relates to tax issues. However, it is instructive that tax disputes are usually between the RTA and the taxpayer and not between private individuals.

We consider the *SNEPCO* decision a better judgment in the instant regard.

VIII ANTI-AVOIDANCE

The Nigerian tax laws provide general anti-avoidance provisions under different statutes with the intention of curbing the penchant for taxpayers to take advantage of loopholes in tax laws to minimise the tax payable.

An anti-avoidance provision is contained in Section 22 of CITA.³⁷ The said provision states that:

Where the Board is of the opinion that any disposition is not in fact given effect to or that any transaction which reduces or would reduce the amount of any tax payable is artificial or fictitious, it may disregard any such disposition or direct that such adjustments shall be made as respects liability to tax as it considers appropriate so as to counteract the reduction of liability to tax affected, or reduction which would otherwise be effected, by the transaction and any company concerned shall be assessable accordingly.

In the case of *Addax Petroleum Services Limited v. FIRS*,³⁸ the court identified Section 30 of CITA as an anti-avoidance provision. The said Section provides that where in any assessment year, the trade or business of a company produces either no assessable profits or the assessable profits are less than might be expected to arise from that trade or business, or where the true amount of the assessable profits of the company cannot be ascertained, the RTA may, in the case of a Nigerian company, assess and charge it to tax on such fair and reasonable percentage of the turnover of the trade or business as the RTA may determine; and in the case of a foreign company which has a fixed base, permanent establishment, sales outlet, dependent agent or executes a single contract involving surveys, deliveries, installations or construction

35 *SNEPCO & 3 Ors v. FIRS and Anor* CA/A/208/2012. Judgment delivered on 31 August 2016.

36 (2014) 15 TLRN 1.

37 With corresponding provisions in Section 17 PITA and Section 20 Capital Gains Tax Act.

38 (2013) 9 TLRN 136–138.

in Nigeria, assess and charge the foreign company to tax on a fair and reasonable percentage of that part of the turnover as may be attributable to the fixed base, permanent establishment, sales outlet, dependent agent or single contract.

The court in the *Addax* case above held that the mischief rule of interpretation of statutes was tailor made for tackling tax avoidance provisions of statute; however, if the provisions are clear, the literal rule should be adopted.

Nigeria recently hosted the African Tax Administration Forum in September, 2017. Nigeria is very receptive of the BEPS proposals, and the FIRS has already incorporated some of the principles in its audit procedure. For instance, the FIRS is scrutinising transactions between Nigerian subsidiaries and their foreign related parties, especially those located in tax-friendly jurisdictions. The aim is to ensure that these entities actually provide the services contracted and are not simply letter-box companies. The Nigerian tax authority may, however, not be able to penalise any established case until the tax laws are amended, unless it can prove that the transactions are artificial or fictitious.³⁹

IX DOUBLE TAXATION TREATIES

Nigeria has concluded double taxation treaties (DTTs) with over 22 different countries of the world; however, for a treaty between Nigeria and any country to have the force of law, it must be enacted into law by the National Assembly.⁴⁰ To this end, only countries whose DTTs with Nigeria have been enacted into law by the National Assembly can rely on the provisions of such treaties. Some countries whose DTTs have been enacted and, thus, taken full effect include: Belgium, France, the Netherlands and the United Kingdom. Where companies' resident in these countries derive profit from Nigeria, they will be chargeable to withholding tax on the rate prescribed in their DTT with Nigeria, usually 7.5 per cent, while companies from other countries are chargeable to withholding tax at 10 per cent.

In the case of *Saipem Contracting Nig Ltd & 2 Ors v. FIRS & 2 Ors*,⁴¹ the plaintiffs (which comprised a Nigerian, a Dutch and a French company) commenced an action via originating summons against the FIRS claiming among others that by virtue of the provisions of the Nigerian tax laws and the DTTs between Nigeria and France and Nigeria and Netherlands, the second and third defendants were not liable to pay VAT, withholding tax and CIT under their contract with the third defendant (Shell). The court upon hearing the arguments of parties held that a DTT is not meant to give the tax that is due to one country to another, but to ensure that the same income is not taxed twice by two different countries and that there was nothing before it to show that the transaction in question had suffered tax in another tax jurisdiction. In determining the taxes payable by the plaintiffs, the court held that they were liable to tax under CIT and to withholding tax on profits to be paid to them by Shell, while not liable to be charged VAT as VAT is a consumption tax paid by the consumer of the taxable goods and services and considering the plaintiffs were not the consumers of the service in question, they were, therefore, not liable to pay VAT.

39 <https://home.kpmg.com/content/dam/kpmg/pdf/2015/11/tnf-nigeria-beps-nov18-2015.pdf>.

40 Section 12(1) Constitution of the Federal Republic of Nigeria, 1999 (as amended).

41 (2014) 15 TLRN 76.

X AREAS OF FOCUS

The Nigerian tax authorities in their drive to boost the country's economy through improved tax collection, have targeted non-resident companies (NRC), especially international oil companies.

To this end, enforcement of the Income Tax (Transfer Pricing) Regulations No. 1 of 2012 has been a focal point for the FIRS as they readily work to find that NRCs either have fixed bases, permanent establishments, sales outlets or dependent agents in Nigeria so as to subject their Nigerian income to taxation in accordance with Sections 9, 13 and 30 of CITA. The transfer pricing regulations are applied in a manner consistent with the arm's length principle in Article 9 of the United Nations and OECD Model Tax Conventions on Income and Capital; and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. However, where there are inconsistencies between the model conventions and the local legislation, the provisions of the local legislation shall prevail.

The courts have been faced with more cases for and against NRCs on interpretation of transactions entered with Nigerian partners or subsidiaries to determine the accurate tax liabilities that accrue to such transactions. The *Saipem Contracting* case referred to above is an example. Also, in the case of *Global Scansystems v. FIRS*,⁴² when faced with the question of tax treatment of income derived from a single contract involving survey, installation, deliveries and construction, the court held that Section 13(2)(c) of CITA is to the effect that the entire profit from the contract is subject to Nigerian taxation and not just the profit attributable to the foreign company's fixed base. Thus, the Nigerian company is liable to withhold tax on payments to the NRCs for services rendered both within and outside Nigeria under such a contract.

As regards controlled foreign companies (CFC) rules, Nigeria does not currently have any specific CFC rules. It is however very likely that steps are in place to enact same.

VAT is another area of tax focus in Nigeria. It has led to a good number of tax litigation actions. This has raised concerns among tax practitioners on the need for an urgent amendment of the current Act as controversies abound over the interpretation and enforcement of certain provisions of the Act.

XI OUTLOOK AND CONCLUSIONS

On 29 June 2017, Nigeria formally launched VAIDS (the Voluntary Assets and Income Declaration Scheme), an initiative designed to encourage voluntary disclosure of previously undisclosed assets and income for the purpose of payment of all outstanding tax liabilities. Specifically, this initiative is expected to broaden the national tax base, curb tax evasion and discourage illicit financial flows. The scheme commenced on 1 July 2017 and is for a period of nine months, terminating in March 2018. The scheme is applicable to all persons liable to tax in Nigeria. Taxes covered under the scheme include CIT, personal income tax, withholding tax, petroleum profits tax, capital gains tax, VAT, stamp duties, tertiary education tax and national information technology development agency levy.⁴³

42 (2016) 22 TLRN 28–29.

43 <https://www.pwc.com/ng/en/assets/pdf/voluntary-assets-income-declaration-scheme.pdf>.

The federal government has taken a posture that suggests it will come down heavy on citizens who do not make use of this opportunity and remain in default. This means the TAT and courts can expect an increased number of tax disputes to flood in from 2018 when the scheme expires.

Taxpayers who take advantage of the scheme before 31 December, 2017 will enjoy waivers on both penalties and interest, while those who take advantage of the scheme between January and March 2018 will enjoy waivers only on penalties but will be made to pay interest in addition to the tax arrears.

Additionally, it is noteworthy that tax exemptions and waivers exist for businesses granted pioneer status in Nigeria under the Industrial Development Income Tax Relief Act 2004.

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ISBN 978-1-912228-16-4