

THE TAX DISPUTES
AND LITIGATION
REVIEW

NINTH EDITION

Editor
David Pickstone

THE LAWREVIEWS

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CONTENTS

PREFACE.....	v
<i>David Pickstone</i>	
Chapter 1 ARGENTINA.....	1
<i>Walter Keiniger</i>	
Chapter 2 AUSTRIA.....	11
<i>Gerald Schachner, Kornelia Wittmann, Nicolas D Wolski and Lucas Hora</i>	
Chapter 3 BELGIUM.....	21
<i>Caroline P Docclo</i>	
Chapter 4 BRAZIL.....	37
<i>Adriano Gonzales Silvério, Filipe da Costa Lessa, Ana Beatriz de Souza Lima Cammarota, Bárbara Baiôco de Magalhães and Jade Bezerra</i>	
Chapter 5 DENMARK.....	47
<i>Jakob Skaadstrup Andersen</i>	
Chapter 6 FINLAND.....	56
<i>Jouni Weckström</i>	
Chapter 7 INDIA.....	69
<i>Mibir Naniwadekar and Suyog Bhave</i>	
Chapter 8 INDONESIA.....	81
<i>David Hamzah Damian and Ganda Christian Tobing</i>	
Chapter 9 IRELAND.....	97
<i>Andrew Quinn, William Fogarty, Kevin Harnett and Robin McDonnell</i>	
Chapter 10 ITALY.....	107
<i>Guglielmo Maisto</i>	

Chapter 11	JAPAN	123
	<i>Masakazu Iwakura and Hiroyuki Yoshioka</i>	
Chapter 12	KENYA.....	138
	<i>John M Ohaga, SC, Isaac Kiche and William Muthee</i>	
Chapter 13	MALAYSIA	150
	<i>Chris Toh Pei Roo</i>	
Chapter 14	MEXICO	161
	<i>Luis Vázquez</i>	
Chapter 15	NEW ZEALAND.....	170
	<i>Geoffrey Clews</i>	
Chapter 16	NIGERIA.....	192
	<i>Etigwe Uwa, Adeyinka Aderemi, Vincent Owbor and Agbada Stephen Agbada</i>	
Chapter 17	NORWAY.....	204
	<i>Thor Leegaard</i>	
Chapter 18	PORTUGAL.....	214
	<i>Diogo Ortigão Ramos and Pedro Vidal Matos</i>	
Chapter 19	SOUTH KOREA	226
	<i>Gyu Chan Shim, Seongjun Joo, Mooyoun Cho and Sungdoo Jang</i>	
Chapter 20	SWITZERLAND	235
	<i>Jean-Blaise Eckert</i>	
Chapter 21	UKRAINE.....	246
	<i>Tetyana Berezhma and Alina Ratushna</i>	
Chapter 22	UNITED KINGDOM	256
	<i>David Pickstone, Victor Cramer, Lee Ellis and Cristiana Bulbuc</i>	
Appendix 1	ABOUT THE AUTHORS.....	281
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	295

PREFACE

It is increasingly common for tax practitioners to be involved in disputes that span multiple jurisdictions. We operate in a global economy. Supply chains cross continents, and the increasing role of technology accelerates the pace at which economic activity becomes divorced from the structures intended to tax it. The pace of economic and technological change potentially increases the gap between the reality of commerce and taxation.

Although supranational agencies such as the European Commission and OECD work hard to keep pace with change, there is an inevitable lag between intention and action. Of late we have seen individual countries start to take unilateral actions, with digital taxation being a prime example. In coming years, a combination of economic developments and unilateral actions by individual countries is likely to further emphasise the importance of double tax treaties and the OECD multilateral instrument.

As the chapters of this book were being written, there were already important changes taking place in the political landscape in the United States and Europe, and in the global economy, that may affect international cooperation on tax and trade.

While tax practitioners must understand their own jurisdiction in detail, it is more important than ever to understand the global environment in which clients operate. It comes as no surprise that the authors of many chapters have identified international tax issues and offshore structures as areas of key focus for their own domestic tax authorities.

Regardless of whether tax authorities increase in cooperation or increase in competition, one thing is certain: they will not stand still. Tax, and particularly the international approach to tax, is a constantly evolving issue.

The purpose of this book is to provide insight into the issues that give rise to tax disputes in different jurisdictions, the procedures for resolving those disputes, and the powers and approach of local tax authorities. It is hoped that it will provide valuable insight into the process, timescale and cost of resolving complex difficulties when they arise across more than one jurisdiction.

We are lucky to have contributions from many leading and impressive tax practitioners across a wide range of jurisdictions. Each provides an up-to-date insight into dealing with contentious tax issues in their jurisdiction. I have enjoyed and learned from reading their contributions and I hope you will do, too.

I would like to thank my colleagues Victor Cramer, Lee Ellis and Cristiana Bulbuc for their valuable assistance in compiling this edition.

David Pickstone

Stewarts

London

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NIGERIA

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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 2004 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 over 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), State High Courts, the Revenue Courts of the various Local Government Councils 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 issues a notice of refusal to amend (NORA) to the taxpayer. The aggrieved taxpayer may within 30 days of receiving the NORA file an appeal at the TAT or other relevant court having jurisdiction over the dispute. It is noteworthy that the available administrative channels for resolution of tax disputes 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 the dispute will be forwarded to the Department of Public Prosecution for necessary actions.

1 Etigwe Uwa and Adeyinka Aderemi are partners, Vincent Owbor is a senior associate and Agbada Stephen Agbada is an associate 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.

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

The Nigerian government formally signed the much-awaited Finance Bill 2019 (now the Finance Act) into law on 13 January 2020. The Finance Act amends some key provisions of the Companies Income Tax Act (CITA), Value Added Tax Act (VATA), Personal Income Tax Act (PITA), Petroleum Profit Tax Act (PPT), Stamp Duties Act and Customs, Excise Tariff Etc. (Consolidation) Act. Some of the prominent amendments effected by the Act include the increase of the VAT rate from 5 per cent to 7.5 per cent, the introduction of digital tax to cover non-resident companies (NRCs) that have no permanent establishment in Nigeria, but derive profits from Nigeria through the provision of digital services and the imposition of excise on certain imported products. The passage of the Finance Act into law introduced some of the most significant changes to the Nigerian tax law regime over the last two decades, and attempts to resolve existing disputes regarding the taxation of the digital economy among other matters.

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 likely to be contentious. The writ is filed along with a statement of claim setting out the plaintiff's claims and reliefs sought. Where the facts are not in contention or where a party seeks interpretation of a statute, agreement or document, an originating summons is advisable for commencing the action. 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 arose. 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' written statements on oath and copies of every document to be relied on at the trial.

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*.

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. 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.

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 the 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 and above for individuals and 10 million naira and above for corporate bodies;
- c* periodic returns filed by a taxpayer; and
- d* assessment or additional assessment by RTA.

Certain differences exist for commencement of disputes over different types of taxes. They include:

- a* personal income tax: disputes relating to personal income tax may be commenced before the Revenue Courts, 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;
- b* corporation tax: companies income tax (CIT) is a federal tax and all disputes relating to its payment are commenced before the TAT or FHC;
- c* 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;
- d* partnerships: partnerships are treated as transparent or flow-through entities for tax purposes in Nigeria and only the individual partners are taxed on their respective shares of the partnership profit. Disputes arising out of taxes on the individual partners may

6 Section 19, Fifth Schedule, FIRS Act.

7 *ibid.*

8 Section 19, Fifth Schedule, FIRS Act.

- e be commenced before customary courts, magistrates' courts, state High Courts, the TAT or the FHC, depending on the jurisdiction of the court, the tax payer, the amount of tax involved and whether the action is against the federal or state tax authority;
- e indirect taxes: indirect taxes in Nigeria include value added tax (VAT) and customs and excise duties. As with federal taxes, disputes are commenced at the TAT and FHC. However, where it involves individuals, the commencement procedure for individuals and partnerships as listed above apply; and
- f 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 and whether they involve individuals, partnerships or corporations.

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.

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 enactment. 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.

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.

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* and prohibition. 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 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 authorities as on the taxpayers.

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 under 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

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).

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.

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

Under the Finance Act, a failure to register for VAT will now be punishable by a fine of 50,000 naira for the first month in which the failure occurs and 25,000 naira for every subsequent month.²¹ Also, the Finance Act provides that a failure to remit VAT within the stipulated time would now result in a sum of 10 per cent per annum (plus interest at the commercial rate) of the amount of tax to be remitted being added to the tax. It may also result in enforcement proceedings being instituted against the defaulting taxpayer.²²

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

Civil sanctions under Nigerian tax laws take the form of administrative penalties and civil liability²³ such as the following:

- a* The RTAs are empowered to raise assessments according to the best of their judgement where returns are not filed.²⁴
- b* Additional assessments may be raised by the RTA within the year of assessment or within six years of the expiry thereof if it opines that a taxpayer has not been assessed or has been assessed at a lesser amount than that which ought to have been charged.²⁵
- 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.²⁶
- 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:

- a* distraint the taxpayer's goods or other chattels, bonds or other securities;
- b* distraint any land, premises or place in respect of which the taxpayer is the owner; and
- c* recover the amount of tax due by sale of anything so distrained.²⁷

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.²⁸

19 Section 94 CITA.

20 Sections 94–96 PITA.

21 Section 35 of the Finance Act.

22 Section 40 of the Finance Act.

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

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

25 Section 66 CITA; Section 55 PITA.

26 Section 32 FIRS (Establishment) Act 2007.

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

28 Section 87 CITA; Section 78 PITA.

Damages are 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 just²⁹ 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.³⁰ 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 RTAs and have been awarded judgments in their favour. Remedies could be varying the assessment, quashing the assessment or damages.

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. The government sometimes offers 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 such differential treatment. The federal government's VAIDS and VOARS schemes are examples of these tax amnesty programmes.

In the case of *SEDCO Forex International Incorporated v. FIRS*³¹ 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 TAT held that the taxpayer's action must fail as recharges are not allowable deductions when calculating a foreign company's income tax.

29 Section 90 CITA; Section 83 PITA.

30 Section 91 CITA; Section 84 PITA.

31 (2015) 18 TLRN 42.

iii Claimants

Tax claims are brought by the taxpayer or the RTA. 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*³² to enforce the relief sought rests on the taxpayer as he or she 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*³³ was called upon to determine whether supplied satellite-network bandwidth capacities were VAT-able and on whom the VAT was chargeable. The court held that the service fell within the description of VAT-able 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.³⁴

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.³⁵

However, it is noteworthy that the various enactments on taxation 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.³⁶

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*³⁷ 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*³⁸ 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.

32 Legal standing to institute an action.

33 (2016) 23 TLRN 72.

34 Section 5(3) VAT Act.

35 Section 22, Fifth Schedule FIRS Act.

36 Section 87 CITA; Section 78 PITA.

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

38 (2014) 15 TLRN 1.

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.³⁹ 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*⁴⁰ 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 permanent establishment or executes a single contract involving surveys, deliveries, installations or construction in Nigeria, assess and charge the foreign company to tax on a percentage of the turnover as may be attributable to the permanent establishment, 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.

In addition, the FIRS issued the Income Tax (Transfer Pricing) Regulations 2018 (TPG) to replace the 2012 Transfer Pricing (TP) Regulations. In the case of *Prime Plasticschem Nig Ltd. v. FIRS*,⁴¹ the taxpayer challenged the FIRS's imposition of additional income tax assessments on a transaction between the plaintiff and a related company pursuant to the 2012 TP Regulations. The additional assessments arose from the transfer pricing adjustments made by the FIRS. The Tribunal, upon hearing arguments of the parties, upheld the FIRS's assessment and dismissed the appeal in its entirety, holding that the plaintiff had failed to provide information that was considered reliable and sufficient to show that its transaction was at arm's length. The decision reinforced the established position of the TP Regulations,⁴² that the burden of proof of the arm's-length nature of a controlled transaction falls on the taxpayer, who must not only be able to provide sufficient information to justify any position

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

40 (2013) 9 TLRN 136–138.

41 Appeal No. TAT/LZ/CIT/015/2017. Available at [prime-plasticschem-nig-ltd-v-firs-new-final-editing.pdf](https://www.itf.net/prime-plasticschem-nig-ltd-v-firs-new-final-editing.pdf) (iitf.net).

42 Paragraphs 6(10) of the TP Regulations.

taken in its TP affairs, but must also disprove any assertions made against it by the FIRS. The TAT's decision in the Prime Plastichem case represents the first major TP ruling in Nigeria since the introduction of the TP Rules in 2012.

IX DOUBLE TAXATION TREATIES

Nigeria has concluded double taxation treaties (DTTs) with over 22 different countries. 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.⁴³ To this end, only residents of countries whose DTTs with Nigeria have been enacted into law by the National Assembly can rely on the provisions of such treaties. In 2018, various DTTs were negotiated, concluded or ratified including the Nigeria–Spain DTT, alongside DTTs with Sweden and South Korea. Also approved were DTTs between Nigeria and Singapore, Ghana and Cameroon. Where companies resident in these countries derive investment income 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. On the other hand, business profits of companies resident in countries with DTTs with Nigeria are only taxable where there is a permanent establishment and the profits are attributable to the permanent establishment.

In the case of *Saipem Contracting Nig Ltd & 2 Ors v. FIRS & 2 Ors*⁴⁴ 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.

X AREAS OF FOCUS

The Nigerian tax authorities in their drive to boost the country's economy through improved tax collection, and particularly in view of the rapid growth of e-commerce in Nigeria, especially the sale of goods and services over the internet, have targeted NRCs operating in Nigeria's digital economy (DE).

To this end, the Nigerian government enacted the Finance Act, which amended the CITA in relation to the determination of the profits of NRCs derived from Nigeria and

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

44 (2014) 15 TLRN 76.

introduced the concept of significant economic presence (SEP) as a basis for determining the profits of NRCs providing digital services and technical, management, consultancy or professional services in Nigeria.⁴⁵

The Finance Act also empowered the Minister of Finance to determine what constitutes SEP in Nigeria in order to give effect to the amendment. In this regard, the Minister of Finance, Budget and National Planning issued the Companies Income Tax (Significant Economic Presence) Order 2020 (the Order). The Order, which became effective on 3 February 2020, defines the concept of SEP as it relates to the taxation of NRCs under the CITA as amended by the Finance Act. The Order essentially provides clarification on the categories of activities carried out by foreign companies operating in the digital space that can effectively trigger CIT liability in Nigeria.

The Order clarifies that a foreign company engaged in digital activity under Section 13(2)(c) of the CITA will be deemed to have SEP in Nigeria (1) if it derives an income of more than 25 million naira from streaming services of digital contents, transmission of data collected about Nigerian users generated from users' digital activity; provision of goods or services other than technical, management, consultancy or professional services; or provision of intermediation services through digital platform that links suppliers and customers in Nigeria; (2) if the foreign company uses a Nigerian domain name (.ng) or registers a website address in Nigeria; and (3) if the foreign company has a purposeful and sustained interaction with persons in Nigeria by customising its digital page or platform to target persons in Nigeria, including reflecting prices, billing and payment options in Nigerian currency.

The Order also clarifies that a foreign company under Section 13(2)(e) of the CITA will be deemed to have SEP in Nigeria in an accounting year if it earns any income or receives payment from a person resident in Nigeria, a fixed base or an agent of a foreign company, provided that such payment is not made to (1) to an employee of the person making payment, (2) for teaching in relation to an educational institution; or (3) by a foreign base of a Nigerian company.

VAT is another area of tax focus in Nigeria, particularly as pertaining to digital goods and services. In addition to the increase of the applicable rate for VAT in Nigeria from 5 to 7.5 per cent, the Finance Act also widened the scope of application of VAT to include intangible goods, and by extension digital products.⁴⁶ Furthermore, Section 33 of the Finance Act expands the scope of when a supply will be deemed to have been made in Nigeria. It provides that a supply of goods anywhere would be subject to VAT in Nigeria, provided that the beneficial owner of the rights in or over the goods is a taxable person in Nigeria and the goods or right thereof is situated, registered or exercisable in Nigeria.

Section 37 of the Finance Act also introduced changes to ensure the registration by NRCs for VAT in Nigeria, as well as for accounting of VAT on invoices issued by NRCs to Nigerian consumers. In this regard, NRCs will be required to register for VAT purposes and include the VAT payable on its invoices to Nigerian consumers. However, upon the failure of an NRC to remit the applicable VAT, the Finance Act requires the recipient of the invoice in Nigeria to self-account for VAT and remit the same to the tax authorities.

45 Sections 13(2)(c) and (e).

46 Section 46 of the Finance Act defines the meaning of 'goods' to include all forms of tangible products (excluding money or securities), but also transferable intangible products, assets or property over which a person has ownership or rights or from which he derives benefits (excluding interests in land).

XI OUTLOOK AND CONCLUSIONS

The enactment of the Finance Act has proved revolutionary in correcting the Nigerian tax framework, which was not originally designed for taxation of the digital economy.

Prior to the enactment of the Finance Act, although VAT was payable on supplies of goods and services by NRCs, its scope did not extend to intangible goods. The Finance Act, however, expands the scope of VAT to capture supplies of goods and services in the digital economy.

Also, prior to the enactment of the Finance Act, an NRC was only taxable in Nigeria, where it was established that it had a commercial presence or business interest in the country, and it had ascertainable profit that was or could be attributable to its in-country presence. However, establishing such physical presence, with the tax applicable to such presence, is usually onerous and contentious. The difficulty associated with establishing local presence and incidences of tax relative thereto, was a beneficial tax shield for NRCs involved in the digital economy. The loophole now appears to have been closed, as the Finance Act adopted the SEP model as its desired method for addressing companies operating in the DE. Furthermore, with the signing into law of the Companies Income Tax Order on Significant Economic Presence on May 2020 by the Minister of Finance, Budget and National Planning on the application of the SEP in Nigeria, the outline of Nigeria's DE has been sketched. Nevertheless, the challenges are far from over as the introduction of digital tax poses challenges of administration and enforcement.

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