

THE TAX DISPUTES
AND LITIGATION
REVIEW

ELEVENTH EDITION

Editor
David Pickstone

THE LAWREVIEWS

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This article was first published in February 2023
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Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK
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www.thelawreviews.co.uk

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ISBN 978-1-80449-151-5

ACKNOWLEDGEMENTS

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

ASHOK PRANSHU & CO

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BPV HÜGEL RECHTSANWÄLTE GMBH

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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 that of taxation.

Although supranational agencies, such as the European Commission and the Organisation for Economic Co-operation and Development, 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 further to emphasise the importance of double tax treaties and the OECD multilateral instrument.

Hot on the heels of the economic impact of the covid pandemic, tax authorities face the compounding impact of the war in Ukraine and hugely increased energy prices. Pressure on government budgets, particularly in the UK, is increasing. In response, the UK and EU have introduced windfall taxes, and the US government has threatened an equivalent. Both the UK and EU are looking closely at compliance as a way to close the tax gap. The UK has increased compliance focus on individuals, and the EU has proposed VAT measures, including a move to real-time reporting and e-invoicing for cross-border businesses, and a single VAT registration across the EU.

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 permanent fixture on the political agenda. The resulting frequent (and sometimes abrupt) changes in key elements of tax law inevitably lead to high-value and complex disputes, which often take many years to resolve.

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 friends and colleagues Victor Cramer, Lee Ellis and Anastasia Nourescu for their valuable assistance in compiling this and previous editions.

David Pickstone

Stewarts Law LLP

London

February 2023

NIGERIA

*Etigwe Uwa, Adeyinka Aderemi, Eberechi May Okoh and Vincent Owbor*¹

I INTRODUCTION

Tax disputes in Nigeria are primarily resolved by the courts and the Tax Appeal Tribunal. 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, State High Courts, the Revenue Courts of the various local government councils and Tax Appeal Tribunal are vested with jurisdiction to hear and determine tax disputes. Appeals from the Tax Appeal Tribunal lie to the Federal High Court, appeals from the Federal High Court and state 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 Tax Appeal Tribunal 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 Tax Appeal Tribunal 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 and 3 Others v. Federal Inland Revenue Service*³ upheld the decision of

1 Etigwe Uwa and Adeyinka Aderemi are partners and Eberechi May Okoh and Vincent Owbor are senior associates at Streamowers & Köhn.

2 *Oando Supply and Trading Limited v. Federal Inland Revenue Service* (2011) 4 TLRN 113.

3 *SNEPCO and 3 Others v. Federal Inland Revenue Service and Another* CA/A/208/2012. Judgment delivered on 31 August 2016.

the Federal High Court that disputes over company taxation are exclusive to the Federal High Court and, thus, are not arbitrable as they pertain to the revenue accruing to the sovereign government.

The Finance Act 2019 and the Finance Act 2020 amend some key provisions of the Companies Income Tax Act, Value Added Tax Act (VATA), Personal Income Tax Act, Petroleum Profit Tax Act (PPT), Stamp Duties Act and Customs, Excise Tariff Etc (Consolidation) Act. Some of the prominent amendments effected by the Acts include the increase of the VAT rate from 5 per cent to 7.5 per cent, the introduction of digital taxes to bring digital revenue derived in Nigeria by non-resident companies that have no fixed base in Nigeria into the tax net and the imposition of excise on certain imported products among other amendments.

II COMMENCING DISPUTES

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

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 relevant tax authority to review the tax assessment along the lines of the objection raised. Where the relevant tax authority agrees with the objection, the assessment will be amended accordingly. However, where the relevant tax authority disagrees with the objection, it shall issue a notice of refusal to amend (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 Tax Appeal Tribunal or file an action at the relevant federal or state high court.

To commence proceedings before the Tax Appeal Tribunal, the appellant shall file a notice of appeal in Form Tax Appeal Tribunal 1 in the zone of the Tax Appeal Tribunal 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.

All processes filed are to be served personally on the respondent, unless an order for substituted service is granted by the Tax Appeal Tribunal. Upon receipt of the filed documents, the respondent has 30 days within which to file its opposition in Form Tax Appeal Tribunal 3. Proceedings at the Tax Appeal Tribunal are to be held in public, and the onus of proving its case rests on the appellant.⁵

The Tax Appeal Tribunal may, after hearing both parties, confirm, reduce, increase or annul the assessment or make any such order as it deems fit.⁶

Either party aggrieved by the final decision of the Tax Appeal Tribunal may appeal to the Federal High Court by giving notice in writing to the secretary to the Tribunal within 30 days of the service of the Tribunal's final decision on the party. Failure to appeal within

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

5 Section 19, Fifth Schedule, Federal Inland Revenue Service Act.

6 *ibid.*

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 relevant tax authority, it means the decision is final and conclusive.

Possible triggers of tax disputes include:

- a* information garnered by the relevant tax authority during periodic audits;
- b* information delivered by bankers to the Federal Inland Revenue Service as provided by law;⁷
- c* periodic returns filed by a taxpayer; and
- d* assessment or additional assessment by relevant tax authority.

Generally, the nature of a tax determines the mode of commencement of disputes.

- a* Personal income tax: Disputes relating to personal income tax may be commenced before the revenue courts, magistrates' courts, state High Courts, the Tax Appeal Tribunal or the Federal High Court. The choice of court depends on the jurisdiction of the court, the amount of tax involved and the nature of the parties.
- b* Company income tax: Company income tax is a federal tax and all disputes relating to its payment are commenced before the Tax Appeal Tribunal or the Federal High Court.
- 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 be commenced before magistrates' courts, state high courts, the Tax Appeal Tribunal or the Federal High Court, depending on the jurisdiction of the court, the taxpayer, 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 Tax Appeal Tribunal and the Federal High Court. However, where it involves individuals, the commencement procedure for individuals and partnerships as listed above apply.
- f* Stamp duty: Disputes over stamp duties may be commenced before the State High Courts, the Tax Appeal Tribunal or the Federal High Court 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 relevant tax authority are usually the first step for resolution of tax disputes. Unresolved disputes proceed to the Tax Appeal Tribunal or Federal High Court, or where the tax is a state tax, to the magistrates' court or state High Court. The High Courts at the federal and state levels, customary and magistrates'

⁷ The law requires bankers to make quarterly returns to the Federal Inland Revenue Service specifying details of transactions of 5 million naira and above for individuals and 10 million naira and above for corporate bodies.

courts within states have jurisdiction to hear tax disputes. The Tax Appeal Tribunal is the only tribunal set up under the Federal Inland Revenue Service Act to hear tax disputes over federal taxes on the conditions earlier set out above.

Customary courts, magistrates' courts and state high courts are the venues for disputes arising from levies and taxes imposed by local government authorities and the state. Claims below 600,000 naira lie before the customary court in the state the transaction occurred.⁸ Claims in excess of 600,000 naira but less than 10 million naira may be commenced before the magistrates' court.⁹ 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 courts, magistrates' courts 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 appeals 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:

- a* the Companies Income Tax Act;
- b* the Petroleum Profits Tax Act;
- c* the Personal Income Tax Act;
- d* the Capital Gains Tax Act;
- e* the Value Added Tax Act (VAT Act);¹⁰ and
- f* any other federal enactment.

The jurisdiction of the Tax Appeal Tribunal over Personal Income Tax Act is restricted to the taxation of:

- a* persons employed in the Nigerian Army; the Nigerian Navy; the Nigerian Air Force and the Nigerian Police Force;
- b* officers of the Nigerian Foreign Service; and
- c* persons resident outside Nigeria who derive income or profit from Nigeria.

The Tax Appeal Tribunal is composed of tax commissioners appointed by the Minister of Finance. The Tax Appeal Tribunal has eight zones, each headed by a chair and four commissioners, and its proceedings are conducted by a panel of three or five commissioners.¹¹ Most tax disputes are resolved at the Tax Appeal Tribunal. Appeals from the decisions of the Tax Appeal Tribunal lie as of right to the Federal High Court on questions of law.

The Federal High Court 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.¹² An action may be commenced before the Federal High Court at first instance once its jurisdiction is rightly invoked. It is equally possible to apply to the Federal High Court to quash the directive or decision of the Tax Appeal Tribunal through the prerogative writs of *certiorari* and prohibition. Appeals from the decisions of the Federal High Court lie to the Court of Appeal.

8 See, for example, Section 20(1) and First Schedule to the Customary Courts Edict.

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

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

11 Section 2, Fifth Schedule Federal Inland Revenue Service Act.

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

The Court of Appeal has appellate jurisdiction over tax disputes from the Federal High Court and state High Courts. Tax appeals lie as of right to the Court of Appeal where they are either final decisions or the ground of appeal involves questions of law alone and questions as to the interpretation of the Constitution.¹³ In all other cases, leave of court must be obtained to appeal.¹⁴ 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 jurisdiction¹⁵ or actions relating to the interpretation of the Constitution, the court shall be constituted by seven justices.¹⁶

In the authors' experience, time spent on litigating tax disputes increases with each level of appeal. Tax disputes at the Tax Appeal Tribunal 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 Tax Appeal Tribunal 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 the Companies Income Tax Act, 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 the offence is the failure to furnish a statement or information or to keep records required, a further sum of 2,000 naira for each day of default of payment, or imprisonment for six months in the event of defaulting on penalty payment.¹⁷

Offences under the Act include:

- a* failure to comply with the requirements of a notice without sufficient cause;
- b* failing to answer to a notice or summons;
- c* knowingly making any false statement or false representation; and
- d* 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.¹⁸

The above provisions are replicated in the Personal Income Tax Act.¹⁹

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

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

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

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

17 Section 92 CITA.

18 Section 94 CITA.

19 Sections 94–96 Personal Income Tax Act (PITA).

Under the Finance Act, 2019, a failure to register for VAT is 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 of default.²⁰ Further, the Act provides that a failure to remit VAT within the stipulated time is liable to a penalty 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.²¹

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 liability²² such as the following:

- a* The relevant tax authorities are empowered to raise assessments according to the best of their judgement where returns are not filed.²³
- b* Additional assessments may be raised by the relevant tax authority 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.²⁴
- 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.²⁵
- d* Monetary fines as prescribed by law may be imposed on the taxpayer by the relevant tax authority.

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 relevant tax authority may, for the purpose of enforcing payment of the tax due:

- a* distrain the taxpayer's goods or other chattels, bonds or other securities;
- b* distrain 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.²⁶

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.²⁷

Damages are remedies which are imposed at the discretion of the court. They may be awarded in favour of the taxpayer or the relevant tax authority depending on the nature of the claim.

20 Section 35 of the Finance Act.

21 Section 40 of the Finance Act.

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

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

24 Section 66 CITA; Section 55 PITA.

25 Section 32 Federal Inland Revenue Service (Establishment) Act 2007.

26 Section 86 CITA; Section 104 PITA; Section 33 Federal Inland Revenue Service (Establishment) Act.

27 Section 87 CITA; Section 78 PITA.

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 relevant tax authority for relief of excess tax paid by reason of some error or mistake in the return, statement or account made.

The relevant tax authority may give by way of repayment of tax or such relief as appears to be reasonable and just²⁸ or if it disagrees with the application, refuse to repay the overpaid tax. The taxpayer may file an appeal at the Tax Appeal Tribunal, or an action at the relevant high court having jurisdiction and claim the overpaid tax.

Where the relevant tax authority agrees with the application or a decision of the court is reached ordering a repayment of the overpaid tax, the relevant tax authority 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.²⁹ In practice, the excess sum paid is treated as tax credit for the taxpayer against any future tax liability.

ii Challenging administrative decisions

Administrative decisions can be challenged by taxpayers where such decisions depart from the law. Taxpayers have brought claims against the relevant tax authorities and have been awarded judgments. 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 amnesties to taxpayers owing interest and penalties. As such, taxpayers who use these windows may enjoy a flexible payment plan that would not have been available otherwise. No cause of action will be sustainable on the basis of such differential treatment. The federal government's Voluntary Assets and Income Declaration Scheme (VAIDS) and Voluntary Offshore Assets Regularization Scheme (VOARS) are examples of these tax amnesty programmes.

In the case of *SEDCO Forex International Incorporated v. Federal Inland Revenue Service*,³⁰ the taxpayer challenged the decision of the relevant tax authority to disallow the deduction of recharges paid by a foreign company. The Tax Appeal Tribunal 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 Tax Appeal Tribunal held that the taxpayer's action must fail as recharges are not allowable deductions when calculating a foreign company's income tax.

28 Section 90 CITA; Section 83 PITA.

29 Section 91 CITA; Section 84 PITA.

30 (2015) 18 TLRN 42.

iii Claimants and related parties

Tax claims are brought by the taxpayer or the relevant tax authority. 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*³¹ to enforce the relief sought rests on the taxpayer as he or she bears the economic burden.

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 Federal Inland Revenue Service Act provides that parties to an appeal at the Tax Appeal Tribunal shall bear their own costs.³³

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.³⁴

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 and 3 Others v. Federal Inland Revenue Service and Another*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 Federal High Court. 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 relevant tax authority and the taxpayer and not between private individuals.

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

VIII ANTI-AVOIDANCE

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

31 Legal standing to institute an action.

32 Section 5(3) Value Added Tax Act.

33 Section 22, Fifth Schedule Federal Inland Revenue Service Act.

34 Section 87 CITA; Section 78 PITA.

35 *SNEPCO and 3 Others v. Federal Inland Revenue Service and Another* CA/A/208/2012. Judgment delivered on 31 August 2016.

36 (2014) 15 TLRN 1.

An anti-avoidance provision is contained in Section 22 of Companies Income Tax Act.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. Federal Inland Revenue Service*³⁸ the court identified Section 30 of Companies Income Tax Act 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 relevant tax authority 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 relevant tax authority may determine, and in the case of a foreign company which has a fixed base 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.

Transfer Pricing is governed by the Income Tax (Transfer Pricing) Regulations 2018 (TPG), which replaced the 2012 Transfer Pricing Regulations. In the case of *Prime Plastichem Nig Ltd v. Federal Inland Revenue Service*,³⁹ the taxpayer challenged the Federal Inland Revenue Service's imposition of additional income tax assessments on a transaction between the plaintiff and a related company pursuant to the 2012 Transfer Pricing Regulations. The additional assessments arose from the transfer pricing adjustments made by the Federal Inland Revenue Service. The Tribunal, upon hearing arguments of the parties, upheld the Federal Inland Revenue Service'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 Transfer Pricing Regulations,⁴⁰ 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 taken in its transfer pricing affairs but must also disprove any assertions made against it by the Federal Inland Revenue Service. The Tax Appeal Tribunal's decision in the *Prime Plastichem* case represents the first major transfer pricing ruling in Nigeria since the introduction of the Transfer Pricing Rules in 2012.

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

38 (2013) 9 TLRN 136–138.

39 Appeal No. Tax Appeal Tribunal/LZ/CIT/015/2017. Available at https://pwcngigeria.typepad.com/files/tat-ruling_tp-case-prime-plastichem-nig-ltd-v.-firs.pdf.

40 Paragraph 6(10) of the Transfer Pricing Regulations.

IX DOUBLE TAXATION TREATIES

Nigeria has concluded double taxation treaties with more than 22 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.⁴¹ Consequently, only residents of countries whose double taxation treaties with Nigeria have been enacted into law by the National Assembly can rely on the provisions of such treaties. In 2018, various double taxation treaties were negotiated, concluded or ratified including the Nigeria–Spain double taxation treaty, including double taxation treaties with Cameroon, Ghana, Singapore, South Korea and Sweden. 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 double taxation treaty 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 double taxation treaties with Nigeria are only taxable where there is a permanent establishment and the profits are attributable to the permanent establishment.

The application of double tax treaties in Nigeria follows the international principle of double tax agreements, which is to avoid both double taxation and double non-taxation. In the case of *Saipem Contracting Nig Ltd and 2 Others v. Federal Inland Revenue Service and 2 Others*,⁴² the plaintiffs (who consisted of a Nigerian, a Dutch and a French company) commenced an action via originating summons claiming among other things that by virtue of the provisions of the Nigerian tax laws and the double taxation treaties between Nigeria and France and Nigeria and the Netherlands, the second and third defendants were not liable to pay VAT, withholding tax and companies income tax under their contract with the third defendant (Shell). The court held that the plaintiffs were liable to pay Nigerian tax because there was no evidence to show that the plaintiffs had paid tax in their countries of residence.

X AREAS OF FOCUS

On 10 June 2021, the Minister of Finance issued the Tax Appeal Tribunal (Procedure) Rules, 2021 which repealed the Tax Appeal Tribunal (Procedure) Rules, 2010. The 2021 Rules introduced some innovative provisions including electronic filing of processes, virtual hearing of appeals and documents-only proceedings. The most fundamental provision of the Rules is Order III Rule 6, which requires taxpayers to pay 50 per cent of the disputed amount of tax into a designated account of the Tax Appeal Tribunal as security for prosecuting the appeal prior to the commencement of an appeal. This provision fetters the right of access of taxpayers to the Tax Appeal Tribunal and increases the cost of prosecuting an appeal.

In *Newton Energy Limited v. Federal Inland Revenue Service*,⁴³ the respondent objected to the competence of the appeal and the jurisdiction of the Tax Appeal Tribunal on the ground that the appellant failed to pay the 50 per cent deposit. In dismissing the objection, the Tax Appeal Tribunal held that Order III Rule 6 of the Rules is inconsistent with Section 15(7) of the Federal Inland Revenue Service (Establishment) Act, 2007, which gives the Tribunal discretion to decide on the amount to be deposited as security where the Tribunal finds that

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

42 (2014) 15 TLRN 76.

43 Appeal No. TAT/LZ/PPT/003/2022.

an appeal is frivolous or vexatious, or the taxpayer has for the year of assessment concerned, failed to submit tax returns in accordance with the relevant tax laws. The Tribunal accordingly voided Order III Rule 6 on account of this inconsistency.

On 1 February 2022, the Honourable Chief Judge of the Federal High Court also issued the Federal High Court Tax Appeal Rules, 2022, which repealed the Federal High Court Tax Appeal Rules, 1992. Amongst other provisions, the Rules require a taxpayer who is appealing a decision of the Tax Appeal Tribunal to deposit the entire judgment sum in an interest-yielding account as a condition precedent to exercising the right of appeal. In our view, this provision is an unjustifiable impediment to the constitutional right of access to court and the right of appeal of taxpayers. It also unreasonably increases the cost of appeals. At the time of writing, there has not been a judicial pronouncement on the constitutionality of the Rules; it is therefore the extant law, but we hope that this requirement to deposit the judgment sum, like the requirement under the Tax Appeal Tribunal Rules, will be voided by the courts.

XI OUTLOOK AND CONCLUSIONS

Commencing from 2019, the Nigerian government has enacted Finance Acts each year. These Acts have introduced several significant changes to the Nigerian tax framework. In keeping with this tradition, the Minister of Finance, Budget, and National Planning, Hajia Zainab Shamsuna Ahmed, has proposed a Finance Bill, 2022, which was presented by the Minister to the National Economic Council on 2 December 2022. According to the Minister, the Finance Bill is anchored on the following five pillars:

- a* tax equity;
- b* climate change;
- c* job creation and economic growth;
- d* tax incentives reform; and
- e* revenue generation and tax administration.

In furtherance of the government's drive to adequately tax the digital economy, the proposed Finance Bill seeks to introduce a cryptocurrency and digital assets tax. The proposed Bill also seeks to introduce, *inter alia*, incentives for the natural gas sector, new deductions on R&D and investment tax credit.

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ISBN 978-1-80449-151-5