



Death Knell For Tax Appeal Tribunals?

'Taxspectives' by Afolabi Elebiju | Originally published in *ThisDay Lawyer*, 17th May 2011, p.7



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Introduction

On November 25, 2009, the Minister of Finance, acting pursuant to section 59 and 5th Schedule FIRS Establishment Act 2007 (FIRSA), issued the TATs (Establishment) Order 2009 constituting the TAT (Tax Appeal Tribunal) into eight zones – one in each geopolitical zone, Abuja and Lagos respectively. Subsequently, membership of respective Zone TATs was announced and inaugurated, the TAT (Procedure) Rules 2010 was gazetted and the TAT have commenced sitting over tax appeals, and in some cases have started rendering decisions.

However, on May 25 2009, the Ibadan Division of the Court of Appeal (CA, coram Ogunbiyi, Uwa, Fasanmi JJCA) held in *STABILINI VISINONI* (2009) 2 CLRN 269 that section 20 VAT Act (VATA) establishing the VAT Tribunal (VATT) to determine VAT disputes between taxpayers and the FIRS, is unconstitutional. According to the CA, VATT lacked jurisdiction because section 251(1) (a) & (b) of the 1999 Constitution confers exclusive jurisdiction to the Federal High Court (FHC), regarding “civil causes and matters involving the revenue of the government of the Federation” in which a federal party is involved or “connected with, or pertaining to the taxation of companies and... all persons subject to federal taxation.” “The specific jurisdictional conferment on the FHC is sacrosanct. It cannot, regardless of anything which is either contrary or contained in the Constitution or in addition to any further jurisdiction to be conferred upon it by an Act of the National Assembly, be limited.” (p. 279).

What are the implications of *Stabilini* for jurisdiction of the TAT under the FIRSA? The TAT was, amongst other roles, meant to become the successor to VATT- vide section 59 (2) FIRSA provision that the TAT “shall have power to settle

disputes arising from the operations of this Act and under the First Schedule.” VATA is listed in the First Schedule, and indeed by section 68 FIRSA, is amongst, “all existing enactments” the provisions of which “shall be read with such modifications as to bring them into conformity with” FIRSA. Accordingly, “if the provisions of any other law”, including First Schedule enactments, are inconsistent with the FIRSA, they “shall”, to the extent of the inconsistency with FIRSA, be void (68(2)). Furthermore, Paragraph 11 (1) (iv) 5th Schedule FIRSA prescribes that: “the Tribunal [TAT] shall have power to adjudicate on disputes, and controversies arising from the following tax laws... VATA.” Indeed, the TAT Establishment Order transferred all pending proceedings before the Body of Appeal Commissioners (BAC) and VATTs and TATs.

Spot the Difference:

Section 20 VATA provides:

“(1) Any tax, penalty or interest which remains unpaid after the period specified for payment may be recovered by the Board through proceedings in the VATT.

(2) A taxable person who is aggrieved by an assessor made... may appeal to the VATT established in the Second Schedule to this Act.

(3) Appeal from the VATT shall be made to the Federal (sic) Court of Appeal.”

Section 59 FIRSA stipulates:

“(1) A TAT is established as provided for in the Fifth Schedule to this Act.

(2) The tribunal shall have power to settle disputes arising from the operations of this Act and [enactments] under the First Schedule.”

Second and Fifth Schedules of the VATA and FIRSA respectively provide in *pari materia* for zonal operation of the Tribunals, qualifications of potential appointees, their judgements may be enforced as a judgment



of the FHC upon registration of same in the Registry of the FHC, appeals from Tribunal decisions can only be on points of law, etc. Under the FIRSA, taxpayers “aggrieved by an assessment or demand notice... or by any action or decision of the Service under the provision of the tax laws...” may appeal to the TAT, within 30 days, whereas taxpayer appeals to VATT must be made within 15 days, but only to challenge assessments and demand notices. Needless to say, the FIRSA version prevails.

Interestingly, unlike the VATA and FIRSA, the tax appeal process was embodied in substantive provisions in CITA (sections 71-75), PPTA (sections 41/42) and PITA (sections 61-65) pursuant to which appeals lay to the FHC/SHC as the case maybe. Again, they have been modified to the extent of inconsistently with FIRSA.

A key point of divergence was the provision for appeals from VATT to the CA (Para 24, 2nd Schedule VATA, effectively clothing VATT with coordinate, rather than subordinate, jurisdiction to the FHC), while appeals from the TAT lie to FHC (Para 17, 5th Schedule FIRSA, suggestive that TAT proceedings are administrative process subject to appellate oversight of the FHC).

This divergence may be critical in arguing that TAT proceedings do not deprive the FHC of its exclusive jurisdiction guaranteed by the constitution, since TAT decisions would eventually be heard by the FHC. But what if tax disputes end at the TAT, for example where neither party pursues right of appeal to the FHC? Is the constitutional stipulation of exclusive jurisdiction of the FHC on federal revenue and taxation matters not coterminous with FHC's appellate jurisdiction pursuant to FIRSA? Until *Stabilini* is reversed on appeal, the jurisdictional competence of the TAT may be open to challenge. This may not bode well with *pro policy* analysts, concerned that TAT's ‘clearing house’ role on resolution of tax disputes to obviate congestion at the FHC, could be impaired.

Interregnum Issues: Eclipse of BAC/Inauguration of TAT

The interesting question of how tax appeals were to be determined during the almost three year interregnum between section 18(1) CITA (Amendment) Act 2007's scrapping of BAC and inauguration of the TAT is now moot. Many taxpayers filed their appeals to the TAT through the office of the FIRS Chairman. In any event, because the underlying assessments would by operation of law, be held in abeyance upon submission of taxpayer's objection which

kick starts the tax dispute - the Revenue's issuance of notice of refusal to amend the assessment (NORA) is what triggers the tax appeal process - many were content to await the eventual inauguration of the TAT.

My humble view is that if a taxpayer's circumstance (e.g. on VAT, CIT, PPT dispute) had required urgent judicial intervention, it could have validly proceeded to the FHC for relief: *ubi jus, ibi remedium*. In contrast, section 42(2) Lagos PITL vests jurisdiction in the SHC regarding PIT disputes, anytime the BAC is not in existence. Section 59(2) of the erstwhile Federal Revenue Court (FRC) Decree 1979 also provided for direct access to the FRC (predecessor of the FHC) where appeal commissioners have not been appointed.

Administrative Law to the Rescue?

Pending reversal on appeal, if at all, *Stabilini* would seem to be the current law on TAT/ FHC/SHC jurisdiction regarding tax disputes. Those who argue that extenuating arguments in the administrative law arena may save TAT's jurisdiction can point to the BAC's jurisdiction never having been (successfully) challenged, albeit there have been equivalent provisions to section 251 (a) and (b), 1999 Constitution in previous Nigerian Constitutions. The FIRS for obvious reasons is unlikely to, and indeed has not till date, challenged the jurisdiction of the BAC/TAT, so it is taxpayers that could have picked up the gauntlet, as *Stabilini* successfully did regarding the VATT.

Since the FHC jurisdiction pursuant to section 251(1) 1999 Constitution is “to the exclusion of any other court”, it is arguable that since TAT is not a “superior court of record” within section 6, 1999 Constitution, its proceedings is administrative process which does not encroach the FHC's exclusive jurisdiction. Corroborative of this is that TAT (Procedure) Rules 2010 provide that appeals to FHC will be on grounds of law only. Even if the constitutional provisions on FHC jurisdiction became progressively tightly worded over time (section 230(1) (a) 1979 Constitution, section 230(1) as amended by Constitution (Suspension and Modification) Decree No. 107 of 1993 and section 251(1) 1999 Constitution), that does not explain the general acceptance of the defunct BAC's original jurisdiction over tax appeals before same are referred to FHC's appellate oversight.

It has been strongly submitted that the constitutional prescription is exclusive original jurisdiction for the FHC, rather than, appellate jurisdiction from TAT decisions: both are mutually exclusive. Accordingly, if

TAT exercises original jurisdiction on tax disputes – its decisions could be overturned, because it is trite law that proceedings no matter how well conducted by a tribunal without jurisdiction, is a nullity.

Conclusion

It may well be that TAT proceedings constitute administrative adjudication - pursuant to the doctrine of exhaustion requiring administrative recourse before access to court - and therefore, not offensive to the exclusive jurisdiction conferred on FHC by section 251(1) 1999 Constitution. If however *Stabilini* is upheld, taxpayers whose appeals are pending at the TAT can, in appealing to the FHC, seek extension of time within which to file such appeal- on the ground that appeal was originally within time at the TAT.

Several other tax litigation issues may emerge in due course, pursuant to FIRSA provisions. For example Para 23, 5th Schedule FIRSA suggests that CA may be the final court for tax disputes, seemingly inconsistent with section 233, 1999 Constitution on appeals to the Supreme Court (SC) – either as of right or with leave. Another is that obviously in Nigeria's federal context, the TAT established by the Ministerial Order would not be competent to determine non-FIRS PIT disputes. This is moreso that that BAC dissolved by CITTA only has jurisdiction on tax disputes involving FIRS, not States' Internal Revenue Service (SIRS). In the States, the operation of BACs to determine tax disputes involving SIRS remains unaffected; albeit States may feel free to rebrand them as State TATs.

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