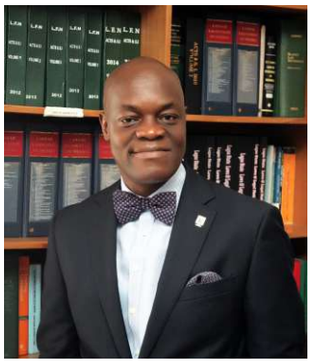
TAT Suspension:
FG Losing Mileage

'Taxspectives' by **Afolabi Elebiju** | Originally published in *ThisDay Lawyer, 21st May 2013, p.14*



a.elebiju@lelawlegal.com

One recent tax landscape event bears reflection: tenure expiration of Commissioners of the Tax Appeal Tribunal (TAT) and consequent suspension of TAT's sitting across Zones. Apparently the TAT has not yet resumed sitting, stalling many pending tax appeals. Happening after adoption of the National Tax Policy (NTP), this evinces a pre-TNP problem of "*lack of specific policy direction on tax matters in Nigeria…*" (NTP, p.5) and detracts from NTP-consistent "*vision to make taxation the pivot for the development of the Nigerian economy*" (Omoigui-Okauru, 2011). It is also a seeming re-enactment of the undue delay between creation of the TAT in 2007, and its inauguration in 2010. This examines issues arising from this avoidable interregnum in the tax dispute resolution process.

The 'First Interregnum'

Although the Body of Appeal Commissioners (BAC) was abolished and replaced with the TAT by the *FIRS (Establishment) and CIT (Amendment) Acts* in April 2007, the Minister of Finance (MOF) only issued the *TAT Establishment Order* pursuant to *Para 1(2), 5th Schedule FIRSEA* on 25th November 2009; and gazetted on 2nd December 2009. Public notices in print media followed, in February 2010. The *TAT (Procedure) Rules* was gazetted in September 2010, and TAT commenced sitting in October 2010. Meanwhile, 'new' tax appeals gathered dust in FIRS' offices; pending BAC matters were also stayed.

Upon inauguration, TAT was confronted with piles of tax appeals. Olalekan Sowande's review of ***HESNL v. FIRS*** (*The Guardian, 30/10/2012*) recounts the appeal was filed in April 2009, first heard at Bauchi Zone in November 2010, and (apparently upon transfer to Lagos), first heard by Lagos Zone in April 2011. TAT delivered its decision in September 2012. My deduction is that the same judgment could have been rendered two years earlier (in September 2010), if TAT Lagos Zone was in place when the appeal was filed in April 2009. Also the 'opportunity' to dispatch cases to Zones that had no apparent connection with tax disputes, and then having same transferred to appropriate Zones upon application by taxpayers, would not have arisen, thereby saving precious time.

Despite TAT's start-up status and attendant challenges, the erstwhile Minister overly delayed to inaugurate the TAT, given government's avowed desire for quick resolution of tax disputes so that in appropriate cases, outstanding taxes can be promptly realized. Currently, a variant of the same scenario is playing out whereby the tenure of TAT Commissioners was allowed to run out without timeously renewing tenure of deserving Commissioners/appointing new ones for those retiring, in a seamless manner. After all, *Para 4, 5th Schedule FIRSEA* stipulates that a "*Commissioner shall hold office for a term of three years, renewable for another term of three years only…*"

Constraining Tax Jurisprudence?

Another reason why the current interregnum is its constraining effect, depriving the tax community of the benefit of the TAT's intellect. Clearly, the TAT has markedly contributed to Nigerian tax jurisprudence since its inauguration, evidenced by delivery of forward looking, pragmatic judgments: this trend should continue.

In ***OANDO SUPPLY & TRADING v. FIRS*** *[2011] 4TLRN 113*, the TAT held that FIRS cannot dangle the Sword of Damocles over an aggrieved tax payer - by failure to issue Notice of Refusal to Amend (NORA) taxpayer objection, within reasonable time. Such default will not only be deemed a NORA, entitling taxpayer to appeal to the TAT; indeed *5th Schedule FIRSEA*, does not make a NORA a condition precedent to tax appeal in appropriate cases. A 'decision' or 'action' of the FIRS is enough for aggrieved taxpayers to approach the TAT. See *Taxspectives, ThisDay Lawyer, 6/9/2011 (p.vii)* for fuller discussion.

In ***HESNL v. FIRS,*** *[2012] 8 TLRN 15*, the TAT held that FIRS is bound by Terms of Settlement and Non-Prosecution Agreement between

the Federal Government and the appellant's non-resident affiliate. Neither can FIRS base its decision to disallow expenses or treat penalty paid as "taxable" income/profits on the ground that such was paid to settle bribery charges against the affiliate, absent evidence that HESNL paid the penalty on the affiliate's behalf or that either of them sought to deduct same for Nigerian tax purposes.

TAT's verdict in ***FIRS v. GENERAL TELECOMS*** *[2012] 7TLRN 108* (presumably under appeal), involved an exponential marshaling of *raisons d'être* for TAT's existence. The Respondent challenged TAT's jurisdiction relying on CA decision in ***STABILINI v. FBIR*** *[2009] 1 TLRN 1* and ***CADBURY v. FBIR*** *[2010] 2 TLRN 16*, which the TAT admirably distinguished in dismissing the challenge. Space constrains discussion of TAT's detailed analysis in *General Telecoms* here; see Taxspectives' review, *"TAT: Is Jurisdiction Still in Doubt?"* in *ThisDay Lawyer, 14/08/2012*.

In ***SNEPCO &Ors v. FIRS*** *[2012] 8 TLRN 59*, and 'sister' cases, the TAT affirmed 'taxpayer status' of PSC contractors, as having locus to challenge tax assessments on their contract areas, independently of NNPC, the leaseholder. This trailblazing view accords with community reading of relevant provisions of FIRS, PPT and PSC Acts. The TAT also refused the invitation to interpret the 2012 FHC decision, ***FIRS v. NNPC & 4 Ors****[2012] 6 TLRN 1*, and 'sister cases' that tax disputes are not arbitrable (an undisputed point), as meaning that TAT's hearing of tax appeals approximates to encroachment on FHC's exclusive jurisdiction on matters involving Federal revenue, enshrined in *section 25(1)1999 Constitution*. See for example, ***EEPNL & ANOR. v. FIRS*** *[2013] 9 TLRN 140*. Whichever way one views TAT decisions, their enrichment of recent tax discourse is incontrovertible.

States to the Rescue?

Another dimension is State Governments' omission to institute their TATs based on the view that FIRSEA empowers only the MOF to constitute TATs. Such is a mockery of fiscal federalism; after all, *"Nigeria operates what is generally known as a federal tax system"* (Omoigui-Okauru, 2011). What could reasonably underlie discontinuation of the old order whereby State/Federal BACs functioned side by side, adjudicating tax disputes involving Federal/State tax authorities?

Nothing could be more absurd than a Lagos resident taxpayer challenging LSIRS' PIT assessment (or CGT/stamp duties) at the Lagos Zone of the (Federal) TAT. The resultant overburdening of TATs and lengthening of tax dispute queues imposes sub-optimality on TA's relatively quick adjudicative procedure.

My thesis is that the FIRS Act is to be read such that Commissioners of Finance (COF) can take equivalent actions (as the MOF) to set up State TATs. If this is not attractive, then the apparent legislative oversight could be cured by amending FIRSEA to declare States' right to set up TATs (as in the BAC days). This promotes better specialization - State TATs will deal more with PIT and other 'State' taxes, while regular TATs deal more with CIT, PPT and 'Federal' taxes.

Intuition and appellate decisions in ***SHITTU v NACB*** *[2001] 10 NWLR (Pt.721), 331;* ***WILBROS v. A-G AKWA IBOM*** *[2008] 5 NWLR (Pt.1081), 484* instruct us that FHC/SHC will only have jurisdiction over 'Federal' and 'State' tax disputes respectively. Healthy competition should engender higher standards of performance, whilst the FHC/SHCs will be relieved (at least generally) of trying tax disputes at first instance. States where appeals are filed at SHCs lose the benefits of the 'first bite at the cherry' that TAT represents.

This may also be a good time to consider resolving questions about TAT's competence to determine tax disputes. The Supreme Court could settle the issue, vide *Stabilini* and *Cadbury* appeals. Alternatively - since delivery time of the SC decisions cannot be predicted – ongoing constitutional amendment proposals should include redrafting *section 251(1)1999 Constitution* to make clear that TAT adjudication does not infringe FHC's exclusive jurisdiction.

Conclusion

If Government is mindful about the time value of money, there might have been some effort to quantify what the 2007-2010 interregnum cost the public till, and obviate recurrence. Taxpayers do not (generally) make any payments on tax liabilities being challenged at TAT, but upon losing their appeals and notwithstanding that they are further appealing, are obliged to pay chargeable tax determined by the TAT within a month thereof (*Para 16(3), 5th Schedule*).

The current interregnum prejudices FIRS because time stops running for tax collection enforcement purposes during the pendency of TAT proceedings. It also deprives FIRS of potential exercise of TAT's discretion (where appropriate) to order that taxpayer/appellant deposits, pending determination of the appeal, the lesser of chargeable tax for preceding year, or 50% of the disputed tax amount and an additional 10% of the deposit pursuant to *Para 15(7), 5th Schedule*. Failure to comply renders the taxpayer liable to pay the entire tax amount and loss of right of further appeal. The interregnum thereby disenables a major leverage that would have been available to the Revenue.

The present interregnum is hamstringing a key reform policy objective - improved efficiency of tax administration, and should therefore be immediately subject to MOF's intervention. During suspensions, government loses mileage from ongoing expenditure incurred on the TAT (e.g. salaries of TAT staff). Going forward and taking a cue from *Para5, 5th Schedule*, MOF can take steps on tenure renewal three months before expiry of current tenures, so that for eligible Commissioners, there would be no gaps leading to suspension of TAT sittings. That same 'quick action' but due process-complaint approach, should inform MOF's exercise of removal powers (on grounds of Commissioner's gross misconduct or incapacity) pursuant to *Para 5(2)*.