CHANGING PERSPECTIVES IN THE LAW AND PRACTICE OF TAXATION IN NIGERIA

ESSAYS IN HONOUR OF PROFESSOR M.T. ABDULRAZAQ



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CHAPTER EIGHT

FEDERAL INLAND REVENUE SERVICE (ESTABLISHMENT) ACT, 2007:[455] ISSUES AND CONFLICTS

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INTRODUCTION

Taxation is an ancient matter, it dates back to antiquity.[456] Taxes were levied in ancient Egypt, Roman Empire, Mesopotamiaand other primeval states. Taxation was not unknown in pre-colonial parts of Nigeria where there were central authority such as the Old Oyo Empire, the Sokoto Caliphate, Kanem Bornu Empire and such other states. Taxes were collected on behalf of these primordial and pre-colonial statesby tax-gatherers or tax collecting agencies known by different names. These primordial and pre-colonial states had tax collectors which are called by different names such as scribes, publican, *agbowoode* and *ajele*, and *Hakimi* in Egypt, Roman Empire, Oyo Empire and Sokoto Caliphate respectively.[457] The situation is not too different in modern states; the major distinctions are that tax collection and political structures of modern states are more complex and tax collection is handled by large bureaucratic agencies. National tax collection agencies in modern states include the Canada Revenue Agency, the Internal Revenue Service (IRS) in the United States, Her Majesty's Revenue and

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[455] No 12 of 2007.

[456] Oyesola .O.Animashaun, 'Legal Analysis of the Extent and Limit of the Nigerian State Powers of Taxation' (Unpublished Ph.D. Thesis University of Ilorin, 2016) 125-126.

[457] Ibid.

Customs (HMRC) in the UK, the Australian Taxation Office and the Nigerian Federal Inland Revenue Service[458]

The Federal Inland Revenue Service was created and vested with powers to collect federal revenue and administer the Federal Inland Revenue Service (Establishment) Act. This paper examines the provisions of the Act and the contentious issues particularly provisions of certain parts of the Act which conflict with parts of the extant laws including the Constitution therein and makes appropriate recommendations.

THE FEDERAL INLAND REVENUE SERVICE-THE CENTRAL PUBLICAN

The Nigerian Federal Inland Revenue Service was created in 1943 out of the Inland Revenue Department of British West Africa. Different enabling laws were enacted in order to establish the Federal Revenue Collecting Agency but under different names with varied powers.[459]

The Federal Inland Revenue Service (Establishment) Act2007[460] came into effect on the 16th of April 2007. The Act creates Federal Inland Revenue Service as a body corporate with perpetual succession and a common seal.[461] It is capable of suing or being sued in its own name (hitherto the appropriate party to sue was Federal Board of Inland Revenue). The Act vests it with the administration of taxes specified in the First Schedule to the Act and other Law made by the National Assembly from time to time and other regulations made by the government of the federation and to account for all taxes collected therein.[462]

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[458] available online at www.tat.gov.ng and en.wikipedia.org accessed May 2017

[459] Income Tax Act No 39 of 1958, CITA No. 22 of 1961, Finance (Miscellaneous Taxation Provisions) Act No 4 of 1993, See also Okauru-Omoigui I, *A Comprehensive of Tax History of Nigeria* (FIRS, Abuja 2012) 123-124

[460] Hereafter referred to as FIRSE Act

[461] Section 1(1) of FIRSE Act

[462] Ibid Section 2

THE MAIN PROVISIONS OF THE ACT

The Act is divided into eight sections and five schedules. Part 1 deals with the establishment of Federal Inland Revenue Service (FIRS) and its management board,[463]Part II enumerates the powers and functions of the Board and the Service,[464] Part III deals with management and staff of the service,[465] Part IV deal with financial provision,[466] Part V provide for tax administration and enforcement,[467] Part VI deal with offences and penalties,[468] Part VII contains general provision such as provision on official secretary and confidentiality, powers of the Minister, delegation of powers of the Board etc.[469] Part VIII consists of miscellaneous provisions.[470] The First Schedule consists of the list of taxes and legislations administered by the service. The Second Schedule contains supplementary provisions relating to the Board; the Third Schedule deals with authorization forms to access lands, buildings, books and documents. The Fourth Schedule relates to warrant of distraint and the Fifth Schedule contains provisions on the establishment, jurisdiction, authority and procedure with regards to the Tax Appeal Tribunal.

FEDERAL INLAND REVENUE SERVICE (ESTABLISHMENT) ACT, 2007: CONTENTIOUS ISSUES

The provisions of certain parts of the Act conflict with parts of the extant laws including the Constitution. The combined reading of sections 2, 61 and paragraph 8 of the First Schedule to the Act conferred legal status on information circulars issued by the service as guide to officials, consultants and taxpayers, which is contrary to the court decision in *Halliburton West*

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[463] Section 1-6 of the Act
[464] Section 8-10
[465] Ibid Sections 11-14
[466] Ibid 15-24
[467]Ibid sections 25-39
[468] Sections 40-49
[469] Ibid sections 50-59
[470] Ibid sections 60-70.

Africa Ltd v. Federal Board of Inland Revenue,[471] where the court ruled that additional assessment issued by the Board relying on information circular of 22nd March 1994 is neither a law nor a regulation, hence invalid.

The jurisdiction conferred on the service is said to include the administration of Taxes and Levies (Approved for Collection) Act, which is too vast and indefensible. The Taxes and Levies (Approved for Collection) Act consists of taxes reserved for states and local governments, as well as the federation. The Federal Inland Revenue Service has no constitutional power to administer the taxes reserved for the state and local governments. The taxes listed under Part II to the Taxes and Levies (Approved for Collection) Act includes Pools, Betting and Lotteries, Gaming and Casino Taxes, Road taxes and so on which are within the purview of the state government. Similarly, taxes listed under Part III to the Taxes and Levies (Approved for Collection) Act are reserved for the local government. The jurisdiction purportedly conferred on the Service also includes all regulations, proclamations, government notices or rules issued in terms of this legislation.[472] This is obviously an unconstitutional unification of the tax administration in Nigeria.[473] The issue is being currently contested in *Kaduna State Board of Internal Revenue v Ahmadu Bello University,*[474] where the Kaduna State Board of Internal Revenue pursuant to a Demand Notice TAR/ABU/2007-2012/003 made request for unremitted PAYE/withholding tax deductions amounting to over 6 billion naira for a period covering 2007 to 2012. The State Board of Internal Revenue sued the defendant in the North West Zone of the Tax Appeal Tribunal. The defendant counsel raised a yet to be resolved preliminary objection thus: first, that the state government does not have the power to recover withholding tax which is a federal government administered tax.

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[471] (2006) 7 CLRN 138

[472] 1st Schedule to theFederal Inland Revenue Service (Establishment) Act, Para 8.

[473] Ibraheem AWA and Jegede R.O, 'Federal Inland Revenue Services (Establishment) Act 2007: Centralisation of Tax Administration in Nigeria through the Back Door'; Pedro L, 'Federal Inland Revenue Service Act, 2007' in Fatula (ed.), *Law Revenue and Development: The Challenges of an Emerging Mega-City: Essays in Honour of Babatunde Raji Fashola (SAN)* p 471.

[474] TAT/NWZ/KD/PAYE/WHT/001/14/TAT/NWZ

Second, that the tribunal lacks jurisdiction by virtue of the provisions of sections 249 -251 of the 1999 Constitution and 7(a), 15 & 16 of the Kaduna State Tax (Recovery and Revenue Generation) Task Force Edit Cap 150 Laws of Kaduna State. Third, that in case of appeal insofar as this is concerns state revenue where does the appeal lie? Is it the Federal High Court as provided by the FIRS (Establishments) Act or another court, for which no provision is made for, in the extant law setting up the Tribunal? It is trite that the Federal High Court has no jurisdiction where state revenue is concerned.[475]

S 8(1) of the FIRSE Act appears to have wiped out the assignment of taxing power in the federation to the different tiers of government. It provides that:

> The service shall:
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> a. assess persons including companies chargeable with tax;
>
> b. assess, collect, account and enforce payment of taxes as may be due to the **governments** or any of its agencies. (Emphasis mine)
>
> c. collect, recover and pay to the designated account, any tax under any provisions of this Act or any other enactment or law.

'governments' here is defined in the interpretation section of the Act to include the government of a state,[476] the Act regarded the State Board of Internal Revenue as a clerical outfit created to assist FIRS in the issuance of tax identification number to taxable persons residing in the respective states.[477]

Another contentious part is section 68 of the Act which provided that:

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[475] Section 251 of the CFRN 1999

[476] Section 8(q) FIRSE Act.

[477] Pedro L, Federal Inland Revenue Service Act 2007 in Fatula (ed.), *Law Revenue and Development: The Challenges of an Emerging Mega-City: Essays in Honour of Babatunde Raji Fashola (SAN),* (NBA, Ikeja 2010) 472

> 1. *Notwithstanding the provisions of this Act, the relevant provisions of all existing enactments including, but not limited to, the laws in the first schedule shall be read with such modifications as to bring them in conformity with the provisions of the Act.*
>
> 2. *If the provisions of any other law including the enactment in the first schedule are inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the provisions of the other laws shall to the extent of the inconsistency be void.*

The literal interpretation of this is that the provisions of all other Laws including the Constitution, which contradicts the provisions of this FIRSE Act stand repealed to the extent of its inconsistency?! We maintain that these sections are likely to be declared null and void by the court as it seeks to take away from the state governments the power vested in them by the 1999 Constitution. Sections 2 and 25 of the FIRSE Act are likely to suffer a similar fate. Furthermore, Section 26(2) of the FIRSE Act provides that '....an officer not below the rank of Chief Inspector of Taxes or its equivalent may act in any case stipulated.....without giving any of the required notice set out in this section.' The implication of this is that it is likely to lead to an abuse of the right of taxpayers by the tax officials.

Section 59 (1) of the Act provides for the establishment of Tax Appeal Tribunal, it abolished the Body of Appeal Commissioners (BAC) and the Value Added Tax Tribunal (VAT-T) established under the Companies Income Tax Act[478] and Value Added Tax[479] respectively. Section 59 of FIRSE Act is in conflict with section 251 of the Constitution, the relevant part of the Constitution state thus:

> *251. (1) Notwithstanding anything to the contained in this Constitution and in addition to such other jurisdiction as may*

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[478]Section 71 CITA CAP C21 LFN 2004.
[479] Section 20 VATA Cap VI LFN 2004.

be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters -

(a) relating to the revenue of the Government of the Federation in which the said Government or any organ thereof or a person suing or being sued on behalf of the said Government is a party;

(b) connected with or pertaining to the taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal taxation;

(c) connected with or pertaining to customs and excise duties and export duties, including any claim by or against the Nigeria Customs Service or any member or officer thereof, arising from the performance of any duty imposed under any regulation relating to customs and excise duties and export duties;

(d) connected with or pertaining to banking, banks, other financial institutions, including any action between one bank and another, any action by or against the Central Bank of Nigeria arising from banking, foreign exchange, coinage, legal tender, bills of exchange, letters of credit, promissory notes and other fiscal measures:

Provided that this paragraph shall not apply to any dispute between an individual customer and his bank in respect of transactions between the individual customer and the bank;

(e) arising from the operation of the Companies and Allied Matters Act or any other enactment replacing the Act or regulating the operation of companies incorporated under the Companies and Allied Matters Act;

The said section 59 of the FIRSEA limits the constitutional power of the Federal High Court, it is therefore unconstitutional. In *StabiliniVisioni Limited v FBIR,*[480] the Court of Appeal declared the VAT Tribunal unconstitutional, violating section 251(1) of the 1999 Constitution. The VAT Tribunal was a predecessor of the Tax Appeal Tribunal.[481] Similarly, in *TSKJ Contruces Internationals SociadadeUnipessoal LDA v Federal Inland Revenue Service,*[482] the Federal High Court declared the Tax Appeal Tribunal as an unconstitutional and illegal body thereby mandated the Minister of Finance to disband the Tribunal. There was a similar decision in *Cadbury Nig. Ltd. v the Federal Board of Inland Revenue.*[483]However, in *NNPC v Tax Appeal Tribunal & others,*[484] the Federal High Court declares Tax Appeal Tribunal a mere administrative tribunal which does not violate the provisions of section 251(a)(b)(n) and(r) of the 1999 Constitution. The latter decision was affirmed by the Court of Appeal on March 10, 2017, in *CNOOC Exploration & Production Nigeria Ltd. & Anor v. Nigerian National Petroleum Corporation & Anor.*[485] The Court of Appeal upheld the jurisdiction of the Tax Appeal Tribunal (TAT) to determine tax disputes. The appeals arose from disputes over petroleum profits tax and tertiary education tax assessments issued to the Appellants by FIRS the Tax Appeal Tribunal (TAT) made orders joining NNPC as a party in the dispute between the Appellants and FIRS. At the TAT, NNPC objected to being joined as a party and also challenged the jurisdiction of the TAT to hear the dispute; NNPC contended that the dispute was within the exclusive jurisdiction of the Federal High Court. The TAT, however, maintained that it had jurisdiction to determine the dispute but struck out NNPC as a party. NNPC then appealed against the rulings of the TAT, maintaining its earlier stance,*inter alia*that the TAT lack jurisdiction to determine tax matters. The Federal High Court held that the TAT lacked the jurisdiction to hear and determine tax disputes in view of

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[480] Suit No CA/1/125/05; 200913 NWLR(pt. 1157) 200

[481] See *Adisa v Oyinwola and Ors* (2001) 10 NWLR (pt. 674); Okulate *v Awosanya* (2002) 2 NWLR (pt. 646) 533; *Adediran v Interland Transport Ltd* (1991) 9 NWLR (pt. 214) 155; *INEC v Musa* (2003) 3 NWLR (pt. 806) 72.

[482] Suit No. FHC/ABJ/TA/11/2012 TSKJ, Judgment delivered on 30th October 2013.

[483] 2010 2 NWLR (pt. 1179)561

[484] 2014 TLRN (Vol. 13) 39

[485] Appeal Case Nos. CA/L/1144/2015 and CA/L/1145/2015

Section 251(1) of the 1999 Constitution (as amended). Dissatisfied with the judgment of the Federal High Court, the Appellants appealed to the Court of Appeal, "the Appellants counsel, argued that the TAT's jurisdiction to determine tax disputes did not encroach upon the exclusive jurisdiction of the Federal High Court as conferred on it by section 251(1)(a) and (b) of the 1999 Constitution (as amended). The Appellants explained that institution of tax appeals at the TAT before approaching the Federal High Court was merely a condition precedent to approaching the Federal High Court and that in any event, the decisions of the TAT could be reviewed and quashed by the Federal High Court upon an application for judicial review or appeal to that Court. The Court of Appeal agreed with the Appellants' arguments and held that the TAT has jurisdiction to adjudicate over tax-related disputes."[486]

With due respect, we disagree with the decision of this court on the facts earlier advanced above and on the following ground- section 16 (2) of the Fifth Schedule to the FIRSE Act provides that:

> "*An award or judgment of the Tribunal shall, after registration with the Chief Registrar of the Federal High Court be enforced as a judgment of the High Court by the person seeking to enforce the award or judgment.*"

Appeal against the decision of the tribunal lies to the Federal High Court.Section 17 (1) of the Fifth Schedule to the FIRSE Act provides that:

> "*any person dissatisfied with a decision of the Tribunal constituted under this Schedule may appeal against such decision on a point of law to the Federal High Court upon giving notice in writing to the Secretary to the tribunal within 30 days after the date on which such decision was given.*"

The provisions above show that the judgment of the tribunal after registration with the Chief Registrar of the Federal High Court is deemed to be the judgment of the

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[486] See also http://www.vanguardngr.com/2017/04/appeal-court-upholds-tax-appeal-tribunal-jurisdiction-determine-disputes/ accessed May 2017.

latter. In such a case the Federal High Court becomes "*functus officio*",[487] incapable of acting on its own deemed judgment or award. In the Canadian case of *Chandlers v Alberta Association of Architect,*[488] it was held that the rulewas subject to two exceptions: where there had been a slip in drawing up the judgment, and where there was an error in expressing the manifest intention of the court.It is our contention that the last is yet to be heard about *CNOOC Exploration & Production Nigeria Ltd. & Anor v. Nigerian National Petroleum Corporation & Anor* as the likelihood of the Respondents appealing to the Supreme Court is high, where the Supreme Court may take cognizance of the above postulations in arriving at its decision.

Also, the Act in Section 17 (1) of the Fifth Schedule to the FIRSE Actstated above limits the right of Appeal from the tribunal to the Federal High Court. The final appeal lies with the Court of Appeal and on point of law only. The right of appeal is a constitutional right and no Act can abridge, bar or limit it. A party in the exercise of his constitutional right is entitled to place both the fact and law in his case before the Courts on appeal.[489] The non-inclusion of Supreme Court as a court of final arbiter is inappropriate, as appeal would always lie as of right to it from the Court of Appeal unless the Constitution prescribed otherwise.[490]

The Act also confer jurisdiction on the tribunal in taxes that are obviously not within the province of the federal authorities. It is observed that this also *ultra vires* the tribunal's jurisdiction in relation to taxes such as those dealing with state revenue, which obviously lies with the State High Court.[491]

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[487]*Re: St. Nazaire Co.* (1879), 12 Ch. D. 88); *Grillas v. Minister of Manpower and Immigration,* 1971 CanLII 3 (S.C.C.), [1972] S.C.R. 577;

[488]CanLII 41 (S.C.C.), [1989] 2 S.C.R 848

[489]*Lemboye v. Ogunsuyi* (1990) 6 NWLR pt. 155 120; see also Atilola B 'Reflections on the Federal Inland Revenue Services (Establishment) Act 2007' (2010) 1(4) NJBCL 21.

[490] Section 233 CFRN 1999

[491] Section 272 Constitution of the Federal Republic of Nigeria; see also Oladele G.A, 'Constitutionality of Tax Appeal Tribunal in Nigeria' (2010) 1(1) Inns Law Review 33-45