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TOWARDS AN EFFICIENT TAX LEGISLATIVE ENVIRONMENT: REVISITING THE JUDICIAL CHALLENGES OF THE VAT & TAT TRIBUNALS, AND OTHER LAWS

Introduction

On 25th May 2009, the Ibadan Judicial Division of the Court of Appeal held that the VAT Tribunal was not an administrative Tribunal since appeals from it did not lie to the Federal High Court (FHC), and further, that the establishment of the VAT Tribunal was null and void, being inconsistent with the 1999 Constitution of the Federal Republic of Nigeria (as amended) ("CFRN").[2] On 10th March 2017, the Lagos Judicial Division of the Court of Appeal affirmed that the jurisdiction of the Tax Appeal Tribunal is not in conflict with the exclusive jurisdiction of the Federal High Court over revenue accruing to the Federal Government as provided in the CFRN.[3] More recently, and precisely on 22nd May 2020, the Calabar Division of the Court of Appeal nullified the Taxes and Levies (Approved List of Collection) Act, Cap. T2, LFN 2004 (Taxes and Levies Act) for being inconsistent with the CFRN.[4]

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2 Stabilini Visinoni v. FBIR (2009) 13 NWLR (Pt. 1157) 200.

3 CNOOC Exploration and Production Nigeria Limited & South Atlantic Petroleum Limited v. Nigerian National Petroleum Corporation & Federal Inland Revenue Service (2017) LPELR-43800(CA) ("Appeal 1145"). Earlier, precisely on 3rd December 2013, Justice I. N. Buba had upheld the creation of the TAT in **Nigerian National Petroleum Corporation v. TAT, Suit No. FHC/L/CS/630/2013**.

4 Uyo Local Government v. Akwa Ibom State Government & Anor. (2020) LPELR-49691(CA). Few days before this decision, the Federal High Court sitting in Lagos had held in The Registered Trustees of Hotel Owners and Managers Association of Lagos v. Attorney-General of the Federation & Anor. FHC/L/CS/1082/2019 (delivered on 8th May 2020) that the Taxes and Levies (Approved List of Collection) Act (amendment) Order 2015 was null and void on the ground that the purported exercise of power by the Minister of Finance under the Taxes and Levies Act to amend the Schedule to the Act amounts to a usurpation of the Constitutionally guaranteed powers of the National Assembly to make laws, and therefore, inconsistent with the CFRN.

The establishment of the VAT and TAT tribunals, as well as the enactment of the Taxes and Levies Act were evidently anchored on good intentions of tackling certain "mischiefs" clogging the wheel of tax administration in Nigeria. However, the viability and sustainability of a law must invariably pass through the litmus test of judicial review at some point. The outcome of this judicial review, often, indicates the level of insight, foresight and thoroughness that must have gone into the drafting of the relevant law.

This article briefly reviews the three judicial situations introduced in the first paragraph above, i.e., the establishment of the TAT and VAT tribunals, and the enactment of the Tax and Levies Act. It concludes by highlighting important lessons to be learned therefrom, towards ensuring a better future for the Nigerian tax legislative environment.

Summary of the Facts

Stabilini Visinoni v. FBIR (supra)

The appellant (Stabilini Visinoni), a taxable entity, allegedly failed in its obligation to remit and render its monthly VAT for the months of August 1995 to July 2000 and August 2000 to December 2000 to the respondent, Federal Board of Inland Revenue (FIBR). Thereupon, the respondent brought an action before the-then VAT Tribunal sitting at Ibadan against the appellant, for the sum of ₦363,400,408.00 (sixty-three million, four hundred thousand, four hundred and eight Naira) based on its "best of judgment assessment" of tax due and payable for the months of August 1995 to July 2000 and the sum of 39,256,490.93 (nine million, two hundred and fifty-six thousand, four hundred and ninety naira, ninety-three kobo) for the months of August 2000 - December 2000.

The appellant entered conditional appearance and filed a preliminary objection contesting the jurisdiction of the tribunal to entertain the suit. The tribunal dismissed the preliminary objection and held that it had jurisdiction to entertain the action. The appellant was dissatisfied and filed an appeal at the Ibadan Judicial Division of the Court of Appeal.

CNOOC Exploration and Production Nigeria Limited & South Atlantic Petroleum Limited v. Nigerian National Petroleum Corporation & Federal Inland Revenue Service (supra)

This appeal is, in fact, a "Siamese twin" of a similar appeal.[5] In Appeal 1145, the FIRS served a notice of assessment to education tax on CNOOC which the latter objected to, while in Appeal 1144, the FIRS served notice of assessment to Petroleum Profit Tax (PPT). The NNPC had, on appeal at the Federal High Court stage sought to review the Lagos Zone TAT ruling about Oil Mining Lease (OML) 118 Production Sharing Contract (PSC). NNPC had challenged the jurisdiction of the TAT to determine the dispute on the ground that the dispute involved an interpretation of the contract between parties to the OML 118. The TAT had held that the tax assessment challenged at the TAT were within its jurisdictional remit.

At the FHC and Court of Appeal, NNPC maintained that the TAT erred when it assumed powers that constitutionally and exclusively belonged to the FHC.[6] The FHC eventually held that the jurisdiction of the TAT did not interfere with the exclusive jurisdiction of the FHC but was only an administrative body set up to determine preliminary matters before proceeding to the FHC.

Dissatisfied with the FHC decision, CNOOC filed its appeal at the Court of Appeal.

Uyo Local Government v. Akwa Ibom State Government & Anor. (supra)

By an amended Originating Summons filed at the High Court of Uyo, the Appellant sought a declaration on the legal right of the Respondents to regulate, charge and collect motor park fees/levies from commercial vehicles in Akwa Ibom State. On the other hand, the Respondents challenged the validity of the Taxes and Levies Act as being unconstitutional. At the end of hearing, the court rejected the Appellant's argument and nullified the Taxes and Levies Act for being unconstitutional.

Dissatisfied, the Appellant filed an appeal before the Court of Appeal, seeking *inter alia*, the determination of the constitutionality of the entire provisions of the Taxes and Levies Act by reason of the ouster clause at the beginning of the said enactment.

Decisions

In the ***Stabilini Visinoni*** case, the Ibadan Judicial Division of the Court of Appeal had cause to interpret Section 251(1)(b), CFRN 1999 (supra), which confers exclusive jurisdiction on the FHC in matters involving the revenue of the government of the federation connected or pertaining to the taxation of companies and other bodies established and subject to federal taxation. The Court of Appeal held that the

5 Appeal No. CA/L/1144/2015 – CNOOC Exploration and Production Nigeria Ltd & Ors. v. Nigerian National Petroleum Corporation & Ors. ("Appeal 1144").

6 Section 251(1)(b), CFRN 1999 (supra).

VAT Tribunal is not an administrative body or tribunal since appeals from it did not lie to the FHC but rather, to the Court of Appeal. Ultimately, the Court of Appeal held that section 20 of the VAT Act which created the VAT Tribunal was inconsistent with section 251 CFRN which had solely conferred jurisdiction over disputes bordering on federal revenue exclusively on the FHC.

Meanwhile, in the ***CNOOC*** decision, the Lagos Judicial Division of the Court of Appeal cited with approval, its previous decisions in ***Shell Nigerian Exploration and Production & Ors. v. FIRS & Anor.,***[7] and ***Esso Exploration and Production Nigeria Limited & Anor. v. NNPC***[8] where it carefully outlined the procedure for resolving claims and objections to tax assessment as indispensably involving the TAT as follows:

> *"…Now in Shell Nigerian Exploration and Production & Ors. v. FIRS & Anor, this Court at page 38 held that:*
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> *The procedure for resolving claims and objections such as in the instant matter are spelt out. When an assessment is made and the party is not satisfied, it can serve a Notice of Objection with the FIRS. It can also file a notice of refusal to amend the assessment as desired where it disagrees with FIRS. The party may also then appeal against the assessment to the Tax Appeal Tribunal. If the party is still dissatisfied with the decision of the Tax Appeal Tribunal, then it can approach the Federal High Court, the Court of Appeal and the Supreme Court."*[9]

In the ***Uyo Local Government*** case, the Calabar Division of the Court of Appeal focused on the commencement clause of the Taxes and Levies Act which states thus:

> ***"Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria, 1979, as amended or in any other enactment or law, the Federal Government shall be responsible for collecting taxes and levies listed in Part I, Part II and Part III of the schedule to this Act, respectively."***

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7 (unreported) Appeal No. CA/A/208/2012 delivered on 31st August 2016, p. 38.

8 (unreported) Appeal No. CA/A/507/2012 delivered on 22nd July 2016, pp. 11-12.

9 The CNOOC decision (supra), per Tukur, JCA (pp. 25-27, paras. B-D).

The Court of Appeal then referred to ***Fescum & Co. Ltd. v. FAAN***[10] where the Supreme Court construed "notwithstanding" as a phrase of exclusion which accords the statutory provision to which it is attached preeminence and precedence over and above other provisions of any other enactments. The Court of Appeal eventually held the Taxes and Levies Act as entirely unconstitutional and invalid having regard to the broad nature of the commencement clause which sought to oust the supremacy of the Constitution.

Analysis

It is respectfully submitted that the Court of Appeal was right in each of the cases highlighted above. Firstly, in the ***Stabilini Visinoni case*** which dealt with the validity of the VAT Tribunal, the Court rightly held the defunct section 20 of the VAT Act as unconstitutional, in that it established the VAT Tribunal and empowered it as a superior court of record rather than an administrative body/panel. An administrative panel was defined in ***Iyeghe v. ABU, Zaria*** in the following manner:

> ***"The law is that, generally, a body exercising powers which are of merely advisory, deliberative or investigative nature or character or whose deliberations do not have legal effect until confirmed by another body or which is involved only in making a preliminary decision which is subject to approval by the appointing authority will not be held to be acting in a judicial capacity and it is at best an administrative panel".***[11]

By making the VAT Tribunal a court of record whose decisions are subject to appeal at the Court of Appeal rather than the Federal High Court, the VAT Tribunal was in essence, made a court of coordinate jurisdiction with the Federal High Court – an affront on the Constitution. The VAT Tribunal was therefore rightly declared a nullity.

Secondly and in contrast, the CNOOC decisions mirror what could have become of the VAT Tribunal. The Court of Appeal in this case emphatically upheld the constitutionality and validity of the TAT. How could the TAT be declared valid while the VAT Tribunal is declared invalid and unconstitutional? The answer lies in the drafting process of the respective legislations creating both tribunals. Refusing to ply the harm's way constitutionally, the Federal Inland Revenue Service (Establishment) Act 2007 (FIRSEA) makes the TAT and its decision subject to review/appeal at the

[10] (2015) 14 NWLR (Pt. 1480) 491 at 506-507.

[11] (2015) LPELR-40874(CA), per Habeeb Adewale Olumuyiwa Abiru, JCA (p. 28).

Federal High Court. Undoubtedly, while the drafters of the FIRSEA seemed thoroughly aware of the implication of circumventing the constitutional authority of the Federal High Court, same cannot be said of the drafters of the VAT Act.

Moreover, in supporting the decision of the Court of Appeal in the ***Uyo Local Government*** case, reference can be made to the Supreme Court decision in ***Okumagba v. Egbe***[12] where Bairamian JSC stated thus:

> *"…amendment is the function of the legislature, and the Courts cannot fill a gap which comes to light by altering the words of a regulation to make it read in the way they think it should have been enacted. As Lord Bacon said in his essay on Judicature, the office of a judge is jus dicere, not jus dare – to state the law, not to give law- and the Courts below should not have gone in for 'judicial legislation'."*[13]

The Constitution is undoubtedly, the basis upon which all other laws must derive their lifeblood. As such, where an Act of the National Assembly is drafted in a way that expressly brings the Constitution under its stool, or makes the Constitution subservient, then such law is bound to fail and be declared an illegality.[14] As such, in the presence of such weighty affront to the Constitution, the Court of Appeal had no authority to reconstruct or re-couch the wordings of the Taxes and Levies Act to bring it in line with the Constitution. The damage had already been done and can only be remedied by way of a repeal of the Taxes and Levies Act.

Conclusion

An efficient tax system is characterized by certainty of tax legislation. A deep reflection on this crucial principle would suggest that to achieve certainty of tax laws, the legislative attitude of every tax law-making body ought to feature a high level of historical and legal-cum-constitutional insight, wide-ranged knowledge acquired through consultations with every stakeholder in the tax industry, and most importantly, foresight. The latter reflects more boldly in the process of drafting the relevant enabling statute.

Undoubtedly, the VAT and TAT tribunals, as well as the Taxes and Levies Act all came to being from intelligent and sound economic intentions. However, the legislative attitude of the National Assembly and the objective to be attained are the

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12 (1965) LPELR-25276(SC).

13 Ibid. p. 5, paras. D-E.

14 Section 1(3), CFRN 1999.

ultimate ingredients that distinguish between each of these legal situations (VAT, TAT, and Taxes and Levies Act). While the TAT was established clearly from well researched and considered legal bases, same cannot be said of the provisions that give the VAT tribunal on one hand, and the Taxes and Levies Act on the other hand, their validity and constitutionality.

Rather than engage in hasty drafting of statutes, there should be healthy legislative-judicial interactions. Like the process involved in churning out the latest National Tax Policy[15], extensive and thorough consultations and interactions must be made not only among members of the arms and tiers of government but also with tax law experts.

The take-away becomes self-evident. Good legislative intentions cannot give life and sustenance to Nigeria's emerging tax system. Sound legislative skills-set makes the difference.

For further information on this article and area of law,

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[15] 2017, available here: <https://www.firs.gov.ng/sites/Authoring/contentLibrary/178d5eb9-4bb4-4845-ee02-13ac6b10c2afNational%20Tax%20Policy%20(Revised)%202017.pdf> last accessed on 17th December 2020 at 3:49 pm.