

# THE NIGERIAN JURIDICAL REVIEW

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FACULTY OF LAW  
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## DOES NIGERIA FOLLOW THE CONTEMPORARY GLOBAL TREND IN TAX DISPUTE RESOLUTION STRATEGY? \* \*

### Abstract

*The discharge of tax obligation is not by choice. It is compulsorily required by law. Therefore, taxpayers, generally, do not pay taxes with smiles on their faces. Some engage in outright evasion, others misinterpret the law to reduce their tax burdens. Some pay lesser than the amount assessed of them by tax authorities; while others refuse to pay penalties arising from defaults. Tax authorities may not be taxpayer-friendly giving the impression of an enemy that must be battled. In any of these scenarios and/or varied reasons, disputes often arise between taxpayer(s) and tax authorities. The modes of settling such disputes may vary according to countries. But a consistent global trend in the settlement of tax disputes is found to be resort to alternative dispute resolution (“ADR”) strategy. This practice is globally favoured by most advanced economies. Nigeria appears to have been left behind in this strategy. Even the newly established Tax Appeal Tribunal (“TAT”) does not meet the requirements of a specialised court, which is equally encouraged globally. This paper, therefore, advocates for the use of ADR and the establishment of specialised tax courts or specialised tax chambers within the traditional court system for a faster and effective way of settling tax disputes in Nigeria.*

### 1. INTRODUCTION

Disputes relating to ‘tax’ and/or the ‘right tax’ to be paid by taxpayers are, generally, considered ‘tax disputes’. The phrase “tax dispute” appears not to have been ascribed a single definition. However, its meaning can be easily deduced from the examination of the definitions attached to each word making up the phrase: that is, the distinct definitions of “tax” and “dispute” combined will, obviously, assist in understanding what the phrase stands for. It is

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easier to move from the known to the unknown. Thus, the Supreme Court of Nigeria in the case of *Attorney-General of Anambra State v. Attorney General of the Federation*<sup>1</sup> adopted the definition offered by the Black's Law dictionary in the following words:

Dispute in Black's Law Dictionary, 7<sup>th</sup> Edition is defined as a conflict or controversy, especially, one that has given rise to a particular lawsuit. Then as per Belgore, JSC (as he then was) in the case of *Attorney General of the Federation v. Attorney General of 36 States supra*, 'dispute involves acts of argument, controversy, debate, claims as to rights whether in law or fact, varying opinion, whether passive or violent or any disagreement that can lead to public anxiety or disquiet.'<sup>2</sup>

Earlier, the Supreme Court had in *A.G Federation v. A.G Abia & 35 ors*<sup>3</sup> stated that: "... a dispute is by the authority of the case *Air Via Ltd. v. Oriental Airlines Ltd.* (2004) 9 NWLR (Pt. 878) 298, (2004) All FWLR (Pt. 212) 1583 defined as a conflict of claims or rights or demand on one side met by contrary allegations on the other side."

The important words and/or phrases here are: controversy, debate, argument, dispute, disagreement, disquiet, and conflict of claims which exist between two or more persons over certain issue(s) or subject(s). This shows there is no agreement or *consensus ad idem* over the subject matter(s) being contended by the parties. Therefore, the subject of disputation between and/or among parties in opposing sides could be anything under the sun. But here, the subject of interest is "tax". What then is tax? Though the term "tax" appears familiar to most people in modern day government, it is not all that easy to define. Several definitions have been given by different tax experts. Others chose not to define the term at all but concentrate on criticizing the definitions offered by some other people. It is not part of our objective, herein, to examine in detail the different definitions offered by different authors. Nonetheless, it is relevant we look into the views of few tax authorities. Professor Vern

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<sup>1</sup> (2007) 12 NWLR (Pt. 1047) 4 at p. 43.

<sup>2</sup> See also *Air Via Ltd v. Oriental Airlines Ltd* (2004) 9 NWLR 298 @ 325; *A.G. Kano v. A.G. Federation* (2007) 6 NWLR (Pt. 1029) 164 @ 197-198; and *A.G. Abia v. A.G. Federation* (2007) 6 NWLR (1029) 200 at pp. 219-220].

<sup>3</sup> (2005) 9 NWLR (Pt. 931) 625.



Krishna, an authority in Canadian tax law, adopted the definition of “tax” offered by the Canadian Supreme Court in *Re Eurig Estate*<sup>4</sup> when he wrote that: “A “tax” is a compulsory contribution levied on individuals, firms or property in order to fund government operations.”<sup>5</sup> He went on to argue that a levy may qualify as tax no matter how smartly packaged and disguised to look more attractive in name. To demonstrate this, he cited the Canadian Pension Plan and Employment Insurance (“Canada PPEI”) as an example of tax disguised in name to look differently. His reason for describing Canada PPEI as a form of taxation is because it is a compulsory transfer of payments that is based on the taxpayers’ payroll income. Similarly, he classified airport and other security taxes collectible at airports as user taxes.

For Professor John Tiley, a renowned United Kingdom’s Professor of tax law, he failed to define taxation in his book entitled “Revenue Law, 4<sup>th</sup> Edition”.<sup>6</sup> Rather, the distinguished Professor cited the definition of “tax” as offered by the *Oxford English Dictionary* (the “Dictionary”) and then went on to criticize it saying that the definition is limited in its view and scope. He pointed out that it is irrelevant for the definition offered by the *Oxford English Dictionary* to describe the tax base from which taxes could be raised and that such attempt amounts to undue stress by further referring to proportionate instead of progressive taxation. Earlier in 1892, Charles F. Bastable in his book, *Public Finance*, did define tax as: “... a compulsory contribution of the wealth of a person or body of persons for the service of the public powers.”<sup>7</sup>

One thing that is common among all the definitions is that taxation is a compulsory exaction of money by the government or public authority from taxpayers who could be natural or artificial persons. The tax base is not constant, it expands and as such, could touch on virtually anything that yields money or money’s worth.

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<sup>4</sup> [1998] 2 S.C.R. 565.

<sup>5</sup> Vern Krishna, *The Fundamentals of Canadian Income Tax, 8<sup>th</sup> Edition* (Toronto: Thomson Carswell, 2004) p. 12.

<sup>6</sup> See John Tiley, *Revenue Law, 4<sup>th</sup> Edition* (Oregon, US: Hart Publishing, 2000).

<sup>7</sup> Charles F. Bastable, *Public Finance* (New York: Macmillan, 1892) p. 243.

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Having examined the definitions of the two words making up the phrase “tax dispute”, what then is “tax dispute”? The Tax Appeal Tribunal (“TAT”) repeatedly used the phrase “tax dispute” in *Mobil Producing Nigeria Unlimited v. Federal Inland Revenue Service*<sup>8</sup> without offering a clear definition of what the phrase stands for. Nonetheless, the TAT appears to describe tax dispute in relation to the parties involved in it. Thus, it sees “tax dispute” as the “...dispute between tax payer and tax collector...”<sup>9</sup> This definition, obviously, concentrated only on the parties involved in the dispute without describing the subject of the dispute itself. Though tax dispute is generally between taxpayers and tax collectors/relevant tax authorities they are not limited to it. Tax dispute could arise between two individuals; or two distinct tax collecting authorities over who has power to collect what. Putting the two words earlier defined together, it is convenient to say that a “tax dispute” may be any argument, disagreement or controversy between two or among more people regarding the payment and/or discharge of tax liabilities owed government, or the collection of same from taxpayers by tax authorities. The dispute, most of the time, is generally between taxpayer(s) and tax authorities who are authorized under the law to collect taxes in a particular jurisdiction. Sometimes, it could be between tax authorities on which of them is authorized under the law to collect a particular kind of tax.<sup>10</sup> Thus, tax dispute could arise from disagreement or dispute over the right amount of tax payable to tax authorities, and/or when such tax becomes due and payable by taxpayers; or dispute between or amongst tax authorities over who collects what tax(es) from taxpayers. That is, the dispute (regardless of the parties involved) may revolve round a misunderstanding or misinterpretation of facts, law and/or both facts and law relating to tax issues.

It is, therefore, plausible to say that tax dispute arises when there is a disagreement between taxpayers and tax authorities, such as the Federal Inland Revenue Service (the “FIRS”) or a State Board of

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<sup>8</sup> (2012) 6 TLRN 119 at p. 128.

<sup>9</sup> *Ibid.*

<sup>10</sup> See *Attorney-General of Ogun State & 4 Ors v Attorney General of the Federation* (1960-2010) 2 N.T.L.R 902. See also, *Attorney General of Lagos State v. Eko Hotels Limited and Federal Board of Inland Revenue* (1960-2010) 2 N.T.L.R. 809.

Internal Revenue, over the tax liability or otherwise of a taxpayer. The context of this dispute may relate to an inquiry into a return, an audit, or pre-return – which could be founded on pre- or post-transaction basis. Such disputes must be settled one way or the other. The Nigeria's tax dispute resolution system is overtly adversarial and confrontational. It does not use and/or encourage the use of ADR. Even the Tax Appeal Tribunal ("TAT"), established by the *Federal Inland Revenue Service (Establishment) Act, 2007* ("FIRS Act"), is not yet a specialised court. It (the TAT) is confronted with varied challenges, including yet-to-be resolved constitutional/legitimacy questions. The present position of settling tax disputes in Nigeria appears to lag behind the recognised global trend in tax administration. The prevailing global trend is that many countries are moving towards the use of ADR in resolving tax disputes. Most adopt ADR as part of their internal administrative tax dispute resolution mechanisms, simply for the purpose of faster resolution of tax disputes. Some also maintain an in-built ADR mechanism within the court systems. The in-built ADR system is encouraged to be used before resort to litigation, which is generally conducted before specialised tax courts or specialised tax chambers within a general court system.<sup>11</sup> Still, the current TAT cannot be called a 'specialised tax court'. In addition to this problem, there are lots of constitutional and/or legal challenges bedevilling the TAT from discharging its intended functions. Also, our general court system, such as the Federal High Court, or even the State High Court – in cases where they may exercise jurisdiction – do not have specialised tax chambers of the courts for the purpose of handling tax disputes. These problems are considered bellow.

The object of this paper is to reveal one or more common trend(s) followed by most tax revenue yielding countries for effective and quicker resolution of tax disputes. This will help us appreciate if Nigeria is keeping with global trend, despite our local peculiarities and differences, which must be considered by our local tax authorities.

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<sup>11</sup> Litigation here refers to the process of resolving tax dispute through a statutorily provided appeal lodged before an independent tribunals or courts for judicial review. This does not include internal reviews conducted within a tax authority or the recovery of debts by tax authorities.

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To achieve the above objective, this paper is divided into four parts. Already, part one introduced the context of the discussion and the object for which this paper is set out to achieve. The second part considers briefly the tax dispute resolution procedures followed in the United States of America, Australia, New Zealand, Canada, United Kingdom and South Africa. It is intended that this will give readers an idea of the global trend currently followed by most advanced economies in resolving tax disputes in their countries. The trend that must be observed is that these countries encourage the use of ADR and specialised court system. The third part examines briefly the processes followed in Nigeria to resolving tax disputes. It looks at the TAT and the problems that it is currently facing. Here, the paper highlights the legitimacy crisis facing the TAT which appears to render certain aspects of the FIRS Act unconstitutional and unenforceable. It also examines the nature and status of the TAT. In part four, the paper concludes with recommendations urging Nigeria to make a paradigm shift from its current adversarial approach to the global trend of adopting ADR, specialised tax courts and/or specialised tax chambers within the general court system in the resolution of tax disputes.

**2. REVIEW OF TAX DISPUTE RESOLUTION MECHANISMS IN SOME COUNTRIES**

A brief review of tax dispute resolution procedures followed by some countries is hereunder considered. As earlier stated, the purpose of this is to reveal one or more common trends prevalent in tax dispute resolution procedures followed by the countries examined. However, it must be noted that these countries even when they share similar procedure, either in whole or in part, do have their individual differences.

**(a) United States of America**

First, it must be noted that in the 1990s, the United States Congress enacted three relevant statutes: *Administrative Dispute Resolution Acts of 1990, 1996 and 1998* respectively. These statutes mandate all US federal agencies to explore the option of ADR mechanisms in the settlement of disputes emanating from the discharge of their

responsibilities.<sup>12</sup> In response to this, the US Internal Revenue Service (“IRS”) initiated several ADR processes designed to encourage effective resolution of dispute between it (the IRS) and taxpayers.<sup>13</sup> Mediation is the preferred choice of IRS’ ADR programme designed to assist it realise its goal of reducing time, cost, and taxpayer burden often incurred at a greater percentage when settlement of tax dispute is carried out through litigation.<sup>14</sup> Specific IRS’ ADR programmes, which utilises mediation, for resolving tax disputes are the following: Fast Track Settlement (“FTS”), Fast Track Mediation (“FTM”), and Post-Appeals Mediation (PAM).<sup>15</sup> The IRS’ FTS programme gives the Small Business/Self-Employed (“SB/SE”) division of taxpayers the opportunity of resolving their disputes within 60 days. This is done with the assistance of FTS Appeals officials who are specially trained in mediation and dispute resolution techniques. These officials serve as neutral and uninterested mediators. They have delegated authority to settle disputes; *ie* the power to provide settlement in both factual and legal issues whenever the parties fail to reach agreement through mediation technique.

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<sup>12</sup> See United States Office of Personnel Management, “Alternative Dispute Resolution Handbook”, online: US Office of Personnel Management <<https://www.opm.gov/policy-data-oversight/employee-relations/employee-rights-appeals/alternative-dispute-resolution/handbook.pdf>> (Last visited on 9 July 2014).

<sup>13</sup> United States Internal Revenue Service, “Alternative Dispute Resolution”, online: IRS <<http://www.irs.gov/Individuals/Alternative-Dispute-Resolution>> (Last visited on 9 July 2014). See also, Shannon Thomas, “Overview of ADR Options at the IRS” (2007) vol. 10(3) *Journal of Consumer and Commercial Law* 126-129; David Parsly, “The Internal Revenue Service and Alternative Dispute Resolution: Moving from Infancy to Legitimacy” (2007) vol. 8 *Cardozo Journal of Conflict Resolution* 677; and Tonya M. Scherer, “Alternative Dispute Resolution in the Federal Tax Arena: The Internal Revenue Service Opens its Doors to Mediation” (1997) *Journal of Dispute Resolution* 215.

<sup>14</sup> A. Wei, “Can Mediation be the Answer to Taxpayers’ Woes?: An Examination of the Internal Revenue Service’s Mediation Program”, *Ohio State Journal on Dispute Resolution* (2000) vol. 15 No 2, at 552. See also: Leandra Lederman, “Are there Procedural Deficiencies in Tax Fraud Cases? A Reply to Prof. Schoenfeld” (2001) *Indiana Law Review*, Vol. 35, 143 at 143 – 172.

<sup>15</sup> Internal Revenue Service, “Appeals: Introduction to Alternative Dispute Resolution”, online: Internal Revenue Service <<http://www.irs.gov/pub/irs-pdf/p4167.pdf>> (Last visited on 9 July 2014).

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In the same vein, the FTM offers taxpayers and the IRS the opportunity of settling their disputes through mediation midwifed by IRS Appeals officer who acts as a neutral party. Like the FTS process, the IRS' FTM Appeal officials are employed in the IRS' Appeals Division and are specially trained in the use of mediation to resolving disputes between parties. The taxpayer does not have the option of using non-IRS employee as a mediator in the FTM programme. This programme is simply designed to foster early settlement of disputes arising from examinations or IRS collection action. Under the FTM programme issues handled are mainly factual and not legal. The time frame for resolving tax disputes under this programme is generally between 30 to 40 days starting from the initial joint discussion between the FTM Appeals officer and the parties, *i.e.* the taxpayer and IRS. The role of the FTM Appeals officials is mainly facilitative. They assist the SB/SE division and taxpayers appreciate the nature of the disputes between them. This facilitative role of the FTM Appeals official helps parties in dispute arrive at a 'jointly agreeable solution, consistent with applicable law'.<sup>16</sup> The officials may also undertake an evaluative role by recommending to the parties a possible resolution based on informed analysis of the weaknesses and strengths of the parties' cases. The FTM Appeal officials will not pressure either or both of the parties to accept their recommendation. An agreement on any position must be voluntarily reached by the SB/SE division and the taxpayer(s) concerned. One remarkable difference between the FTS and FTM programmes is that while FTS Appeals officials have delegated settlement authority authorising them to offer both factual and legal settlement options if the parties failed to agree, the FTM Appeal officials do not have settlement authority and will not render any decision in relation to any issue. This difference is also true of the PAM.

The PAM programme is used for certain type of cases that are already in the Appeals processes, *i.e.* after the Appeal Office has failed to facilitate agreement and/or resolution between the contending parties. The PAM is available for resolving both factual issues, such as valuation and transfer pricing matters, and/or legal issues as well. There is no dollar limitation as to the nature of tax

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<sup>16</sup> *Ibid.*

disputes that could be resolved via PAM. The use of PAM entails a joint selection of an IRS mediator. The Appeal office undertakes the settlement of expenses incurred in this programme provided the mediator chosen by the parties is an Appeals mediator. If a taxpayer decides to use a non-IRS co-mediator, such taxpayer will bear the burden. The PAM is a non-binding process which uses well trained IRS' Appeals office mediators to assist Appeal Office and taxpayers reach a negotiated settlement. The PAM mediators do not have settlement authority and therefore cannot render decision on any issue whatsoever. The process is very confidential.

Having seen the mediating steps and/or programmes followed by the IRS in resolving tax dispute, it is necessary to once more highlight the appeal processes showing how tax disputes emanate, the steps both the IRS and taxpayers could take to resolve them and the appeal processes that may lead to courts. First, a taxpayer is notified of a tax dispute through an Examination Letter sent to him/her/it by the Examination Division of the IRS. The content of the Examination Letter is likely to be that a particular amount is due as tax from the taxpayer; or that the right amount was not arrived at due to error in the taxpayer's return. Or, it could simply request information on a particular item. The issuance of the Examination Letter triggers the examination process leading to the Examination Division of the IRS prepare an Examination Report, which outlines all proposed adjustments recommended by the IRS. Immediately the Examination Report is complete, a Preliminary Notice of Deficiency ("30-Day Letter"), which comprises of a bill and explanation, is sent to the taxpayer who has 30 days to respond to the letter or notice. A taxpayer is free to appeal against the findings in the Examination Report to the Appeal Division ("Appeals Office"), which is a separate administrative division of the IRS. To initiate an appeal, the taxpayer must file a formal protest letter with the Appeal Office. At the end of the IRS examination, the taxpayer may decide to utilise either the FST or the FTM.<sup>17</sup>

It must be restated once more that the Appeals Office is designed to be an independent IRS office and a neutral body invested with the responsibility of resolving most disputes between a taxpayer and the

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<sup>17</sup> We have earlier discussed the use of these processes above.

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IRS. Where a taxpayer and the IRS fail to resolve their dispute after following the FTM process, the next thing will be to utilise the PAM process. The PAM allows another IRS Appeal officer to mediate between the parties. Once a taxpayer fails to file a protest letter with the Appeals Office, or when settlement could not be reached after filing a protest letter, the IRS could issue a second Notice of Deficiency (this time “90-Day Letter”) signalling the end of every effort to resolve the tax dispute administratively. Immediately after this, the case file is assigned to the District Counsel who prepares for litigation. Depending on the nature of the claim the matter could be taken to Tax Court, District Court or Claims Court.

**(b) Australia**

Just like the United States, the Australian tax objection procedures are governed by statutory rules and Administrative Tax Office procedures.<sup>18</sup> A taxpayer who is dissatisfied with “tax decision”, *i.e.* the initial assessment decision, amended assessment, determination, private ruling or decision of the Australian Tax Office (“ATO”), is entitled and/or expected to formally object (“Tax Objection”) against such decision.<sup>19</sup> There is a timeframe for the objection. The objection must be made to the Commissioner of Taxation (the “Commissioner”) within two years – in the case of most individuals and small businesses; four years – in the case of individuals with

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<sup>18</sup> See: *Taxation Administration Act, 1953* (As amended) (“TAA”); *Administrative Appeals Tribunal Act 1975*; *Tax Laws Amendment (Improvements to Self-Assessment) Act (No 2) 2005*; National Alternative Dispute Resolution Advisory Council, 2003, *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution*, National Alternative Dispute Resolution Advisory Council, Commonwealth of Australia, at p 4 <[http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/\(960DF944D2AF105D4B7573C11018CFB4\)~1Report8\\_6Dec.pdf/\\$file/1Report8\\_6Dec.pdf](http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(960DF944D2AF105D4B7573C11018CFB4)~1Report8_6Dec.pdf/$file/1Report8_6Dec.pdf)> (Last visited on 9 July 2014).

<sup>19</sup> See: Australian Tax Office, “Evaluating Alternative Dispute Resolution in Tax Dispute”, online: Australian Government <[https://www.ato.gov.au/General/Correct-a-mistake-or-dispute-a-decision/In-detail/Avoiding-and-resolving-disputes/Alternative-Dispute-Resolution/Evaluating-alternative-dispute-resolution-in-taxation-disputes/?page=1#Our\\_next\\_step](https://www.ato.gov.au/General/Correct-a-mistake-or-dispute-a-decision/In-detail/Avoiding-and-resolving-disputes/Alternative-Dispute-Resolution/Evaluating-alternative-dispute-resolution-in-taxation-disputes/?page=1#Our_next_step)> (Last visited on 9 July 2014); Australian Tax Office, “ATO Plain English Guide to Alternative Dispute Resolution”, online: Australian Government <<https://www.ato.gov.au/About-ATO/About-us/In-detail/Key-documents/ATO-plain-English-guide-to-alternative-dispute-resolution/>> (Last visited on 9 July 2014; and Melinda Jone and Andrew J Maples, “Mediation as an Alternative Option in Australia’s Tax Disputes Resolution Procedure” (2012) Vol. 27 *Australian Tax Forum* 525.



more complex affairs, companies, superannuation and approved deposit funds (“ADFs”); or 60 days – in case of all other cases – of the taxation decision. Generally, the timeframe for lodging objections depends largely on the type of tax decision and the nature of taxpayer to which the objection relates.<sup>20</sup> Where a taxpayer fails to file objection within the time provided, s/he is allowed to file a written request to the Commissioner praying for leave to deem the late objection as having been filed within time and should be treated as such. If the request made is rejected, the taxpayer is further entitled to apply to the Administrative Appeals Tribunal for review of the decision.

A tax objection is managed by a designated objection officer. However, the Commissioner is required to make an “objection decision” over the complaint or objection filed by a taxpayer against the decision of ATO. The Commissioner’s decision comes in the form of ‘Notice of Decision’ which may in whole or in part allow and/or disallow the objection. Though it appears there is no statutory time limit within which the Commissioner must come up with a decision over the objection filed before him/her, the ATO has set a 56-day limit for finalisation of objection that do not arise from a private binding request; and 14-day limit for further information request. If the Commissioner fails to make an objection decision within 60 days of the date of lodging the objection; or the day the Commissioner receives information, via a written notice, relating to the objection, the taxpayer is entitled to give the Commissioner a written notice requesting him to make a decision. If the Commissioner fails to make an objection decision within 60 days after the notice, the effect of such failure will be that the objection has been disallowed by the Commissioner. This will entitle the taxpayer to seek a further review of the tax objection before external and independent body outside the ATO; *i.e.* the Administrative Appeals Tribunal (“AAT”) or the Federal Court. It must be noted that ATO, AAT and the Federal Court at their levels all encourage the use of early dispute resolution

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<sup>20</sup> Section 14ZW TAA.

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("EDR") and alternative dispute resolution ("ADR"), particularly mediation, in the settlement of disputes brought before them.<sup>21</sup>

ATO on its parts strives to keep faith with its *Practice Statement Law Administration 2009/9 Conduct of Tax Office Litigation* (PSLA 2009/9),<sup>22</sup> which states that "...the Tax Office recognises and supports the use of ADR as a cost effective, informal, consensual and speedy means of resolving disputes. This extends to using ADR to deal with only part of a dispute, or to deal with procedural ... matters in relation to a dispute."<sup>23</sup> Also the Model Litigant Policy under the *Financial Management and Accountability Act, 1997*, which binds all agencies in Australia, requires "... agencies to endeavour where possible to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution where appropriate."<sup>24</sup> Indeed, ATO is mandated under the Model Litigant Policy to first consider other methods of dispute resolution, such as ADR before heading to court.<sup>25</sup>

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<sup>21</sup> Australian Inspector-General of Taxation, "Review into the Australian Taxation Office's Use of Early and Alternative Dispute Resolution", online: Australian Government <[http://www.igt.gov.au/content/reports/ATO\\_alternative\\_dispute\\_resolution/ADR\\_Report\\_Consolidated.pdf](http://www.igt.gov.au/content/reports/ATO_alternative_dispute_resolution/ADR_Report_Consolidated.pdf)> (Last visited on 9 July 10, 2014). See also: PricewaterhouseCoopers, "Increasing Use of Alternative Dispute Resolution in Income Tax Dispute", online: PWC <<http://www.pwc.com.au/tax/taxtalk/assets/monthly/pdf/Alternative-Dispute-Resolution-Mar13.pdf>> (Last visited on 9 July 2014)

<sup>22</sup> See: Australian Tax Office, *Practice Statement Law Administration 2009/9, Conduct of Tax Office Litigation*, para 22. Similar sentiments are outlined in Australian Tax Office Practice Statement Law Administration 2007/23, *Alternative Dispute Resolution* (PSLA 2007/23), online: <<http://law.ato.gov.au/atolaw/view.htm?DocID=PSR/PS200723/NAT/ATO/00001&PiT=99991231235958>> (Last visited on 9 July 2014).

<sup>23</sup> *Ibid* at paragraph 19 (PSLA 2007/23). The ATO Practice Statement, especially paragraphs 9-11, outlines when the use of ADR may or may not be appropriate. It (the rule) observes that the ADR processes could be classified either as facilitative, advisory or determinative (paragraph 22).

<sup>24</sup> ATO, *supra* at note 6 paragraph 21 (PSLA 2009/9).

<sup>25</sup> Attorney-General's department, *Legal Services Directions 2005, Appendix B*, Australian Government, para 5.1, online: <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(339383A93E59A076831A75961C22D2A2\)~LegalServicesDirections2005\\_May2011.pdf/\\$file/LegalServicesDirections2005\\_May2011.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(339383A93E59A076831A75961C22D2A2)~LegalServicesDirections2005_May2011.pdf/$file/LegalServicesDirections2005_May2011.pdf)> (Last visited on 9 July 2014).

In compliance with its statutory and policy obligation to ensure that alternative dispute resolution is encouraged and, in fact, seen as the first line of action, ATO has come up with different initiatives. For instance, ATO's "risk-based indicator tool" requires its staff to assess whether the use of ADR in each case would be beneficial and as such must be pursued. This forms part of their case management system. In addition to this initiative, there is "A Dispute Resolution Network", which is a group of experienced ATO officers, who are always available to "...assist case officers in determining the various avenues of dispute resolution that might be used at any stage on a dispute."<sup>26</sup>

At the Administrative Appeals Tribunal ("AAT"), ADR is also encouraged. The AAT's object in using ADR, especially mediation, is to assist parties reach a negotiated settlement of their case(s). The mediator has no advisory or determinative role. Rather, s/he performs a facilitative role in guiding or assisting the parties discuss their disputes in a more objective manner leading them through possible options for resolution of their disputes. However, where the parties in the course of mediation reach an agreement in writing, the AAT can base its decision on the agreement or simply issue a consent decision based on the mutual agreement reached by the parties. However, if the parties fail to resolve their dispute through mediation, the matter will go into hearing before the AAT. Parties are not allowed to use information disclosed during mediation at hearing, except if they agree. The essence is to encourage people come honestly to mediation proceedings. Also, the mediator who

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<sup>26</sup> Inspector General of Taxation, *Review into the underlying causes and the management of objections to Tax Office decisions – A Report to the Assistant Treasurer* (the 2009 Review), online: Australian Government, Commonwealth of Australia, <<http://www.ag.gov.au/cca>> at para 6.58 (Last visited on 9 July 2014). See also, Australian Tax Office, 2011, *Annual Report 2010-11*, Australian Government, Commonwealth of Australia, p 105, <<http://www.ato.gov.au/content/downloads/cr00295453ar1011.pdf>> (Last visited on 9 July 2014). This includes reference to "a new National Tax Liaison Group dispute resolution sub-committee to help identify best practice in dispute and litigation management." See also J. Granger, "ATO law expertise: Evolution or revolution?", *Australasian Tax Teachers Association Conference 2012*, online: Australian Tax Office <<http://www.ato.gov.au/content/00305541.htm>> (Last visited on 9 July 2014).

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midwifed the mediation can still sit over hearing of the matter except any of the parties objects to it.

Same as the AAT, the Australian Federal Court employs ADR in resolving tax disputes brought before it. In some occasions, especially on appeals on question(s) of law, a taxpayer may appeal against the Commissioner's objection directly to the Federal Court. The Federal Court considers mediation more acceptable by the parties, if they will reach an agreement, than an imposed decision from the court. Same as in AAT, mediation before the Federal Court is presumed to assist "...parties to identify and assess options and negotiate an agreement to resolve their dispute".<sup>27</sup> The Registrar of the court generally conducts mediation before this court. But external lawyers may also be used by the parties to conduct such mediation. If disputes are not settled through mediation, the case will naturally proceed to trial.

**(c) New Zealand**

New Zealand equally encourages the use of ADR in resolving tax disputes. Dispute resolution procedure in New Zealand starts from a pre-assessment stage.<sup>28</sup> This stage includes the exchange of two documents, *i.e.* the Notice of Proposed Adjustment ("NOPA") and Notice of Response ("NOR").<sup>29</sup> The next stage is the conference stage which affords the taxpayer and Inland Revenue the opportunity "to try to resolve the differences in relation to facts, laws and legal arguments."<sup>30</sup> In April 2010, New Zealand adopted some

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<sup>27</sup> Federal Court of Australia, *How are Federal Court cases managed?*, p 2, online: Federal Court of Australia <<http://www.fedcourt.gov.au>> (Last visited on 9 July 2014).

<sup>28</sup> Justice Susan Glazebrook, "Taxation Disputes in New Zealand", being a paper delivered at the Australasian Tax Teachers Association (ATTA) conference on January 22, 2013.

<sup>29</sup> Nsatax, "NSA on Tax", online: nsatax <<http://www.nsatax.co.nz/site/nsatax/files/2004%20TaxBrief//NSA%20on%20Tax%20-%20August%202004.PDF>> (Last visited on 9 July 2014)

<sup>30</sup> Inland Revenue, "SPS 11/05: Disputes resolution process commenced by the Commissioner of Inland Revenue", *Tax Information Bulletin*, Vol 23 No 9, paragraph 140; and Inland Revenue, "SPS 11/06: Disputes resolution process commenced by a taxpayer", *Tax Information Bulletin*, Vol 23 No 9, para 171, <<http://www.ird.govt.nz/resources/5/0/50acd80048fe8bf681c4bb3b74528e99/tib-vol23-no9.pdf>> (Last visited on 9 July 2014).

administrative changes which, in this case, offers taxpayers the opportunity of having conference meeting(s). This is attended by a facilitator who is a senior Inland Revenue officer without previous involvement in the dispute. The facilitator is expected to have sufficient technical knowledge both in the subject of dispute and mediation that s/he is competent to lead the conference meeting. Typically, this kind of facilitated conference involves the facilitator promoting structured discussion between Inland Revenue Officers and the taxpayer. However, the conference facilitator is not responsible for whatever decision that is taken by the parties to tax dispute. The only decision in relation to the dispute that a facilitator is responsible is the determination of when the conference phase has come to an end. The facilitation of conference is not compulsory. Parties can decide to deal directly with their opponents without a trained facilitator. However, the tax authorities traditionally give the parties the option of a facilitator at the conference stage. It is left for the parties to accept or decline. It must be noted that a facilitated conference is a limited mediation albeit not really labelled so.

#### **(d) Canada**

Like other countries, the Canadian tax regime is based on self-assessment, which allows taxpayers to declare their incomes and estimate their tax liabilities. The Canadian Revenue Agency (“CRA”) under the authority of the Minister of National Revenue (the “Minister”) verifies incomes declared by taxpayers and then issues an initial assessment. The assessment could confirm or vary the income declared by a taxpayer via his/her return. Still like other countries, Canada ensures that taxpayers are reasonably honest in filing their returns.<sup>31</sup> This is done through a random selection of taxpayers’ files for audit.<sup>32</sup> Also, a taxpayer suspected of concealing

<sup>31</sup> Chris Jaglowitz, “Mediation in Federal Income Tax Disputes,” online: Canadian Forum on Civil Justice <<http://cfcj-fcjc.org/>> (last visited on 9 July 2014).

<sup>32</sup> See: Office of the Auditor General of Canada, “Auditing Small and Medium Enterprises – Canada Revenue Agency”, online: Office of Auditor General of Canada <[http://www.oag-bvg.gc.ca/internet/docs/parl\\_oag\\_200903\\_03\\_e.pdf](http://www.oag-bvg.gc.ca/internet/docs/parl_oag_200903_03_e.pdf) > (Last visited on 9 July 2014. For the use of random tax audit programmes amongst Organisation for Economic Co-operation and Development (OECD) countries, including Canada, see: OECD, “Use of Random Audit Program”, online: OECD <<http://www.oecd.org/tax/administration/33818547.pdf>> (Last visited on 9 July 2014).

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information from the CRA could be subjected to audit. Once a taxpayer's file is audited and fraud, dishonesty, carelessness, negligence or falsehood is discovered to have affected a taxpayer's return, CRA will issue a reassessment of the taxpayer's return. A taxpayer who is not satisfied with the initial assessment or reassessment is free to dispute or object such assessment or reassessment. A taxpayer does this by sending his/her/its written objection to the Appeal Branch of CRA. A trained appeal officer considers the taxpayer's objection. The appeal officer consults and/or negotiates with the taxpayer to see if an agreeable resolution could be arrived at. After this, the appeal officer could either grant or deny the taxpayer's objection. The appeal officer's review of the objection and initial assessment or reassessment is considered to be impartial, objective and timely. It is impartial in the sense that the Appeal Branch of the CRA is independent of the CRA. Its officers though employees of the CRA are not bound to agree with the initial assessment or reassessment of taxpayers. Indeed, there is *Taxation Operation Manuals*, which is the guideline that must form the basis of appeal officers' decisions. According to the *Taxation Operation Manuals* "...the primary factor governing the decision is the assessment itself i.e. whether it is based on ascertainable facts supported by proper evidence and whether it is in accord with the law and Departmental policy."<sup>33</sup> Whoever is dissatisfied with the decision of an appeal officer is free to apply to the courts for judicial review. However, it must be noted that research has shown that Appeal Branch of CRA's use of ADR, especially mediation, in resolving tax dispute is highly impressive and extraordinary. It is reported that about 95% of 50,000 to 55,000 objections filed before the Appeal Branch of CRA are resolved annually; leaving only about 3,000 to 4,000 for judicial review at the Tax Court of Canada.<sup>34</sup>

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<sup>33</sup> Revenue Canada, *Taxation Operation Manuals* (Ottawa: The Department) (looseleaf), s. 7011.8(1), cited in Janice A. McCart, "The Art of the Deal, Pt. 2: Audit and Appeals" (1994) *Can. Tax Found.* 31:1 at 31:14.

<sup>34</sup> Barbara A. Burns and Ian S. MacGregor, "Resolving Tax Disputes: A Justice Perfective" (1994) *Can. Tax Found.* 33:1-2. The authors attribute the success rate of resolving tax dispute at the Appeal Branch of CRA to "an impressive use of ADR." This finding is corroborated by Deen C. Olsen, "Alternative Dispute Resolution" (1997) *Can. Tax Found.* 12:1 at 12:7.

At the Tax Court of Canada, a petitioner has two choices on how s/he may proceed to ventilate his or her grievances before the court. First, the taxpayer may decide to file his/her appeal through the Informal Procedure. This allows petitioners to represent themselves personally. Under this procedure, filing fees are not paid and the application of legal or technical rules of evidence is suspended. But the option of Informal Procedure is only open to litigants or petitioners who are involved in a disputed amount that is equal to or less than twelve thousand Canadian dollars (Can. \$12,000) per assessment. In all other cases, however, the General Procedure applies. Under this, taxpayers may elect to represent themselves but hearing here is more formal and legal. Filing fees are paid and general/technical rules of evidence are applicable. The taxpayer, if not satisfied with the ruling of Tax Court of Canada, is free to further appeal to the Federal Court of Appeal and subsequently to the Supreme Court of Canada.

#### **(e) South Africa**

On 11 July 2014, the South African Revenue Service (“SARS”) published new rules which now regulate the procedure for filing objections, appeals against assessment, decisions subject to objection and appeal. It also covers the procedure for conducting alternative dispute resolution, the conduct and hearing of appeals, and application on notice before a Tax Court.<sup>35</sup>

The new tax rules is relevant any time a taxpayer disagrees with an assessment or decision of the SARS. Under the South African tax rules, a discontent taxpayer has limited period within which s/he is expected to lodge an objection against an assessment or decision relating to his/her returns. The new rules allow taxpayers to file objections electronically so as encourage quick and fast resolution of disputes. There is prescribed time for filing objections. The general

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<sup>35</sup> See, Nicole Paulsen and Gigi Nyanin, “New Tax Dispute Resolution Rules – the Wait is Finally Over”, online: Tax Students in Administration <<http://taxstudents.co.za/new-tax-dispute-resolution-rules-wait-finally/>> (Last visited on 9 July 2014); and PricewaterhouseCoopers South Africa, “Synopsis Tax Today, July 2914”, online: PricewaterhouseCoopers, South Africa <<https://www.pwc.co.za/en/assets/pdf/synopsis-july-2014.pdf>> (Last visited on 9 July 2014)

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rule is that objections are filed within 30 days from the date of assessment. Taxpayers have the right to request from SARS the reason(s) that informed its decision. If such request is made, SARS must respond within 30 to 45 days from the receipt of the request. A taxpayer is mandated to deliver a notice of objection to SARS within 30 days from the date the reasons were communicated. Once the objection is delivered, SARS explores ADR mechanism, especially mediation, in resolving the dispute between it (SARS) and a discontent taxpayer. Based on the outcome of the negotiation, SARS must within 60 days from the date it received a taxpayer's objection disallows or allows the taxpayer's objection. A taxpayer who is dissatisfied with the disallowance of his or her objection can appeal further to the South Africa's Tax Board or Tax Court within 30 days from the time s/he receives the notice of disallowance of the objection.

**(f) United Kingdom**

Her Majesty's Revenue and Custom ("HMRC"), the body charged with collection of taxes in the UK, has always pursued transparent and accessible tax system since its inception in 2005.<sup>36</sup> Its goals include, to: minimize the scope of disputes and pursue non-confrontational means of resolving disputes; resolve tax disputes consistently with HMRC's considered view of the law; cost-effectively resolve tax cases; settle for the full amount in cases HMRC believes are strong and that tribunals or court will not decide otherwise; and concede rather than pursue "weak or non-worthwhile cases."<sup>37</sup>

This principle appears to be in compliance with a formal pledge entered into by government departments and agencies in UK committing themselves to settle disputes through ADR. The preferred form of ADR could be either mediation or arbitration

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<sup>36</sup> Her Majesty's Revenue and Custom, "Delivering our Vision: HMRC Business Plan Update 2013-14", online: HMRC <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/223806/3718\\_HMRC\\_Business\\_Plan\\_update\\_2013-14\\_accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/223806/3718_HMRC_Business_Plan_update_2013-14_accessible.pdf)> (Last visited on 9 July 2014)

<sup>37</sup> Her Majesty's Revenue and Custom, "Tax Disputes: Alternative Dispute Resolution (ADR)", online: HMRC <<https://www.gov.uk/tax-disputes-alternative-dispute-resolution-adr>> (Last visited on 9 July 2014)



depending on which of them would be most suited for a particular tax dispute in question. Litigation is generally a last resort. This formal pledge was published on 23 March 2001. Also, in UK, the *Solicitors Regulation Authority Code of Conduct, 2011* mandates solicitors to educate their clients of the option of settling their disputes through ADR.

Based on the above, HMRC's officials use mediation to resolve tax disputes that come before them. In February 2013, HMRC published Taxpayers' Charter which sets out the rights and responsibilities of taxpayers in a single accessible document. Earlier in 2007, HMRC published a guideline which sets out guidance on how tax disputes between taxpayers and HMRC should be resolved. This guideline is known as Litigation and Settlement Strategy ("LSS"). It was further reviewed in 2011.

When a taxpayer files a return, HMRC may confirm or vary the returned amount. A variation of the amount returned by a taxpayer could be followed by an inquiry to tax returns filed by the taxpayer for one or several years. But a discontent taxpayer is entitled to file an appeal before the Tax Chamber of First-tier Tribunal. Further appeals could go to the Tax and Chancery Chamber of Upper Tribunal, the Court of Appeal and the Supreme Court on points of law. Complex tax cases may be taken directly to the Tax and Chancery Chamber of Upper Tribunal and then to the last court without first initiating it through the Tax Chamber of First-tier Tribunal.

It must be noted that the tribunals and courts mentioned above still give room for settlement of disputes through ADR. That is, the opportunity to settle tax disputes through mediation is not foreclosed simply because the matter has gone to tribunal or court.

### **(g) Common Ground amongst the Countries Reviewed**

The object of this paper is not to criticize what may seem to be obvious lapses in the settlement of tax disputes in the countries examined. Rather, attention is focused to what appear to be common or similar amongst them. One thing that is common amongst the countries is that all of them adopt ADR in resolving tax disputes. First ADR, especially mediation, is used within the tax authorities and outside it – *i.e.* in tribunals and courts – to resolve tax disputes.

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The use of ADR in settling tax disputes encourages speedy and negotiated settlement of disputes. It appears to satisfy both taxpayers and tax authorities. This is unlike court decisions which must be taken whether or not the parties like it. Again, all the technicalities involved in courts, whether specialised or general, are avoided. Indeed, successful use of ADR reduces the number of cases going to court. Another similar trend is that virtually all of them make use of tax courts or tax chamber within a general court system. After resolution of tax disputes has failed within a tax authority, aggrieved taxpayers take their cases to either administrative tax tribunals or straight to tax courts or tax chambers within a general court system for resolution of the complained tax matter. Almost all the countries examined, including South Africa, make use of specialised tax court. Australia does not have a specialised tax court, but it makes use of specialised tax chambers within a general court system. The main purpose of adopting specialised tax court is to ensure that experts conversant with tax matters decide tax disputes. Generalist judges are not in the best position to give sound judgment in tax disputes. However, where specialised tax courts are not set up, specialised tax chambers within a general court system is used. Both approaches achieve the same result.

The identified common practices amongst the countries examined represent the global trend in the settlement of tax dispute. It is now left to finding out practices in Nigeria and whether or not such comply with the global trend of settling tax dispute. As pointed out above, the countries examined have their individual differences. It is expected that Nigeria will, obviously, have its own peculiarities. Regardless, questions will be asked as to whether or not Nigeria, in the least, follows the common global trend identified above. Does Nigeria make use of ADR in the settlement of tax disputes? Does it use specialised tax courts or specialised tax chambers within a general court system? Answers to these questions clearly reveal itself in the next following section.

### **3. REVIEW OF TAX DISPUTE RESOLUTION IN NIGERIA**

Tax assessment and associated disputes in Nigeria could come before the Federal Inland Revenue Service (“FIRS”) – the body

charged with the responsibilities of collecting taxes due to the Federal Government of Nigeria, especially taxes owed and payable by companies, residents of Abuja, Police men and women, soldiers, and members of diplomatic corps<sup>38</sup>; or State Board of Internal Revenue, that is, the body responsible for tax collections in every State in Nigeria.<sup>39</sup> Of all the tax authorities in Nigeria, only the (“FIRS”) and maybe the Lagos State Internal Revenue Service (“LIRS”) have a clearly, fairly and consistent tax administrative system. As a result, this paper will focus on tax dispute resolution procedure followed by the FIRS.

### **(a) Tax Dispute Resolution Procedure in Nigeria**

Like in the countries earlier examined, self-assessment is used and encouraged in Nigeria. Therefore, a taxpayer (whether corporate or individual) may first examine himself/herself/itself and then files his/her/its returns to the FIRS.<sup>40</sup> FIRS then assesses the taxpayer and issues demand notice. A taxpayer aggrieved with FIRS’ assessment, or demand notice may within 30 days from the issuance of the assessment or demand file a Notice of Objection in writing demanding that the assessment be reviewed and revised. The FIRS is expected to further review the taxpayer’s compliance with the law. It could do any of the following: agree with the taxpayer’s objection, or refuse to amend the initial assessment. In the latter case, the FIRS normally issues a Notice of Refusal to Amend (“NORA”) to the taxpayer. Within 30 days after receiving the NORA, the taxpayer may file an appeal to the Tax Appeal Tribunal (“TAT”) for review of the FIRS’ position. Further appeal from the TAT lies before the Federal High Court, then Court of Appeal and finally the Supreme Court.

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<sup>38</sup> See, Section 2 of the *Personal Income Tax Act, 1993* (as amended). See also *Taxes and Levies (Approved List for Collection) Act*; and section 8 of the *Federal Inland Revenue (Establishment) Act, 2007*.

<sup>39</sup> Each state government has its own State Board of Internal Revenue. For instance, in Lagos and Enugu States, we have Lagos States Board of Internal Revenue and Enugu State Board of Internal Revenue respectively.

<sup>40</sup> See, sections 41 and 44 of the *Personal Income Tax Act, 1993* (as amended); and sections 53 and 55 of the *Companies Income Tax Act, 2007* (as amended).

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Recently, in *Oando Supply & Trading Ltd. v. Federal Inland Revenue Service*<sup>41</sup> several issues affecting tax dispute resolution procedure in Nigeria, especially as it concerns companies, were treated by the TAT. Some of the issues discussed are: whether or not in tax cases the *Federal Inland Revenue Service (Establishment) Act, 2007* is superior to any other legislation; whether or not there is a timeframe within which FIRS is expected to issue NORA; and whether or not the issuance of NORA is a condition precedent to commencing an appeal before the TAT.

In answer to the above issues, the TAT held that:

- i) Section 68(1) of the *Federal Inland Revenue Service (Establishment) Act, 2007* provides for the superiority of the *Federal Inland Revenue Service (Establishment) Act, 2007* over any other legislation in relation to tax matters, especially as it concerns appeals to TAT.
- ii) There is no specific timeframe provided by the FIRS Act within which the FIRS is mandated or expected to issue NORA. However, in the absence of such provision, “reasonable time” must be adhered to by the FIRS. As a result, 90 days from the day the FIRS receives a taxpayer’s Notice of Objection is sufficient for the issuance of NORA. If FIRS fails to issue NORA within this period, it is assumed to have rejected the taxpayers Notice of Objection.

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<sup>41</sup> (2011) 4 TLRN 113 – 130. The facts of this case are as follows: in 2010 the Respondent (FIRS) served the Appellant (Oando Supply & Trading Ltd.) Notices of Additional Assessment for the 2006, 2007 and 2008 years of assessment. The Appellant filed a Notice of Objection against the Respondent’s Notices of Additional Assessment via a letter dated 26<sup>th</sup> May 2010. For over six months since the Appellant sent its Notice of Objection to Respondent there was no NORA or any response at all from the Respondent regarding the Notice of Objection. As a result, the Appellant appealed to the TAT against the Notices of Additional Assessment issued to it. In a swift response, the Respondent filed a preliminary objection seeking the Appellant’s suit be struck out or dismissed because NORA has not been issued; and without the NORA any action brought by the Appellant in relation to the Notices of Additional Assessment remains unripe. In effect, the Respondent challenged the jurisdiction of the TAT to entertain the suit when NORA which it considered a conditional precedent to the commencement of the suit was not issued.

- iii) The FIRS Act does not require that FIRS issues Notice of Refusal to Amend before an aggrieved taxpayer approaches the TAT. Therefore, any statute providing for the issuance of NORA as a condition precedent that must be met before a suit is commenced by an aggrieved taxpayer is null and void to the extent of its inconsistency with the provisions of the FIRS Act.

From the above, it is clear that an aggrieved taxpayer does not need to wait for NORA to be issued before s/he or it can approach the TAT. It is enough that the taxpayer sends a Notice of Objection to the tax authority.

Again, it is clear from the above that tax dispute resolution in Nigeria is quite distinct from other countries we examined earlier. There is no room for exploring ADR in the settlement of tax dispute. Both the FIRS and different States' Board of Internal Revenue in Nigeria are not statutorily mandated by legislation to explore the use of ADR in the settlement of tax disputes that come before them. TAT also does not explore the use of ADR. Same is true of the Federal High Court and State High Courts in areas they have jurisdiction. It is therefore evident that no form of ADR is formally explored by the FIRS, TAT or any of the courts with jurisdiction to handle tax matter in resolving tax dispute.

The case of *Oando Supply & Trading Ltd. v. Federal Inland Revenue Service*<sup>42</sup> does not present FIRS in good light. For over six months after the taxpayer had filed its Notice of Objection, FIRS refused and/or ignored issuing NORA, but was confident enough to challenge a suit brought by the aggrieved taxpayer on the ground that it ought to have received NORA before heading to TAT. This is frustrating and discouraging for an institution that wants speedy settlement and resolution of TAT disputes. Now, in this case, the FIRS is constituting itself a clog in the wheel of its own progress. However, it must be noted that the TAT's decision in this matter is commendable. This notwithstanding the TAT is bedevilled with lots of constitutional challenges that have not been resolved. Therefore, the next question is: what is the constitutionality of the Tax Appeal Tribunal?

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<sup>42</sup> *Oando Supply & Trading Ltd.*, above note 41.

**(b) The Constitutional Status of TAT**

Since the establishment of the TAT, serious constitutional questions have trailed it. Many have challenged it on the ground that it is unconstitutional; while others have defended its constitutionality. First, section 59 of the *Federal Inland Revenue Service (Establishment) Act, 2007* establishes the TAT in the following words:

- (1) A Tax Appeal Tribunal 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 under the First Schedule.

The Fifth Schedule to the FIRS Act provides in paragraph 1(1) as follows:

Pursuant to section 59(1) of this Act, there shall be established a Tax Appeal Tribunal (hereinafter referred to as “the tribunal”) to exercise the jurisdiction, powers and authority conferred on it by or under this Schedule.

The above provisions—especially section 59 of the *FIRS Act*—provide for the establishment of the TAT. It is therefore not in doubt that the TAT is a direct creation of the *FIRS Act*. Indeed, the TAT is empowered to adjudicate disputes emanating from the following tax laws:

- (i) *Companies Income Tax Act, Cap. C21 LFN, 2004.*
- (ii) *Petroleum Profits Tax Act Cap. P13 LFN, 2004*
- (iii) *Personal Income Tax Act Cap. P8, 20 LFN, 2004*
- (iv) *Capital Gains Tax Act CAP. C1 LFN, 2004*
- (v) *Value Added Tax Act Cap. V1 LFN, 2004*
- (vi) *Stamp Duties Act, Cap. S8 LFN, 2004*
- (vii) *Taxes and Levies (Approved List for Collection) Act, Cap. T2 LFN, 2004*
- (viii) All regulations, proclamations, government notices or rules issued in terms of these legislation; and
- (ix) Any other law for the assessment, collection and accounting of revenue accruable to the Government of the Federation as may be made by the National Assembly

- from time to time or regulation incidental to those laws, conferring any power, duty and obligation on the service.
- (x) Enactment or Laws imposing Taxes and Levies within the Federal Capital Territory.
  - (xi) Enactment or Laws imposing collection of taxes, fees, and levies collected by other government agencies and companies including signature bonus, pipeline fees, penalty for gas flared, depot levies and licences, fees for Oil Exploration Licence (OEL), Oil Mining Licence (OML), Oil Production Licence (OPL), royalties, rents (productive and non-productive), fees for licences to operate drilling rigs, fees for oil pipeline licences, haulage fees and all such fees prevalent in the oil industry but not limited to the above.

The TAT is established to serve as a specialised tribunal with the jurisdiction to settle tax disputes emanating from any of the above legislation. Being a specialised tribunal, it is assumed that tax disputes will be settled with dexterity and speed. However, the problem is that constitutional questions are being raised against the TAT. First, the TAT is established by section 59(1) of the FIRS Act and the Fifth Schedule to the same Act. And, secondly, section 59(2) gives the TAT the power to settle disputes arising from the operations of the Act and to administer laws listed under the First Schedule to the FIRS Act. In the immediate preceding paragraph, we have shown the list of legislation listed in the First Schedule to the FIRS Act. It is obvious that the powers conferred on the TAT centres on the resolution of disputes involving the imposition and collection of taxes, and/or government revenues. All the legislation listed deal with different tax regimes through which the Nigerian governments, especially the Federal Government, raise revenues. This appears to bring the powers of the TAT in conflict with the powers conferred on the Federal High Court to exercise exclusive jurisdiction over matters relating to the revenue of the Government of the Federation. In relation to revenues of the Federal Government or any of its agencies, and/or taxation payable to the Federal Government, section 251 of the Constitution confers exclusive jurisdiction on the Federal High Court as follows:

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- (1) Notwithstanding anything contained in this Constitution and in addition to such other jurisdiction as may 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.

From mere literal reading of the quoted passage, it is not in doubt what the intention of the drafters of the Constitution is. Indeed, section 251 of the Constitution clearly confers exclusive jurisdiction on the Federal High Court whenever civil causes and matters relating to the revenue of the Government of the Federation; taxation of companies or other bodies established for carrying on business in Nigeria; and/or persons liable to federal taxation are involved.<sup>43</sup> An ordinary glance at the statutes and/or laws mentioned in the First Schedule to the FIRS Act will reveal the referred legislation or laws deal with the revenues of the Government of the Federation and taxation of persons liable to federal taxes in accordance with each of the statutes listed therein. Therefore, it is safe that the greater percentage of the subject covered by the statutes mentioned in the First Schedule to the FIRS Act relates to issues exclusively tried in the Federal High Court. In fact, it was based on this ground that the former Value Added Tax Tribunal was declared void and unconstitutional by the Court of Appeal in *Stabilini Visionini Ltd v.*

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<sup>43</sup> See, *NURTW & Anor. v RTEAN & Ors* (2012) LPELR – 7840 (SC). In this case, the Supreme Court held that for a Federal High Court to exercise the jurisdiction conferred on it by section 251 of the Constitution, the following conditions must co-exist: (1) the parties or party involved in the dispute must be the Federal Government or any of its agencies; and (2) the subject matter of litigation must fall within paragraphs a-s of section 251 of the Constitution. This means that the exercise of exclusive jurisdiction under section 251 of the Constitution by the Federal High Court involves a combination of parties and subject matters as stated above. See also: *Obiuwenbi v. CBN* (2011) 2-3 SC (Pt. 1) 46; *NEPA v. Edegbero* (2002) 18 NWLR (Pt. 798) p. 79; and *Oloruntoba-Oju v. Abdul-Raheem & 3 Ors* (2009) 5-6 SC (Pt. 11) p. 57.



*Federal Board of Inland Revenue*.<sup>44</sup> The Court held that the jurisdiction conferred on the VAT Tribunal by the VAT Act was in conflict with the provision of section 251 of the Constitution and therefore void. As a result, the Court struck down section 20 of the VAT Act which established the VAT Tribunal and, therefore, held that the jurisdiction of the VAT Tribunal conflicted with the one conferred on the Federal High Court by section 251 of the 1999 Constitution.

It is doubtful whether the FIRS Act has avoided the jurisdictional problem faced by VAT Tribunal when it (FIRS Act) established the TAT. Proponents of the TAT have argued that it is merely an administrative tribunal, which cannot be referred to as a “court”: for it is only ‘courts’, save the Federal High Court, that are restricted by section 251 of the Constitution from entertaining any of the matters listed therein. In essence, this proposition takes the view that section 251 of the Constitution does not apply to the TAT because it is not a “court.”<sup>45</sup> In particular, on December 3, 2013, the Federal High Court sitting in Lagos and presided over by Hon. Justice I.N. Buba in *Nigerian National Petroleum Corporation v Tax Appeal Tribunal*<sup>46</sup> disregarded earlier decision delivered on October 30, 2013 by Hon. Justice Adeniyi Ademola in *TSKJ II Construces Internacionals & Anor s Federal Inland Revenue Service*<sup>47</sup> by holding that the powers conferred on the TAT does not conflict with section 251 of the 1999 Constitution because it (TAT) is not a court of law but mere administrative tribunal established to resolve tax disputes. Justice Buba also maintained that appeals from TAT is appealable to the FHC, hence, the FHC is a supervising authority of the TAT through judicial review. He further maintained that the mere fact that legal

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<sup>44</sup> (2009) 13 NWLR 200 CA.

<sup>45</sup> This was actually the argument of the Respondent in *TSKJ II Construces Internacionals & Anor v Federal Inland Revenue Service*, Suit No. FHC/ABJ/TA/11/12. In this case, the Respondent consistently maintained that the TAT is neither a “court” nor “tribunal” contemplated by section 251 of the Constitution; and that it (TAT) is not listed in section 6(5) of same Constitution as a court or tribunal with judicial power. It further contended that appeals from the TAT lies before the Federal High Court and therefore does not compete with the court.

<sup>46</sup> Suit No. FHC/L/CS/630/2013.

<sup>47</sup> *TSKJ II Construces Internacionals & Anor*, above note 45.

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minds, including Senior Advocates of Nigeria, preside over TAT is not enough to transmute it into a court of law.<sup>48</sup>

With due respect, we totally disagree with the decision of Buba J. in *Nigerian National Petroleum Corporation v Tax Appeal Tribunal*.<sup>49</sup> First, the issue borders on the interpretation of section 251 of the 1999 Constitution and the provisions of the TAT. In particular, what is the intention of the drafters of the Constitution when they used this expression: “... the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters”? In this context, the word “court” cannot be given mere literal interpretation. The threshold or test for determining when a person, body, or institution can be classified as a court depends on whether or not such body, person or institution exercises ‘judicial or quasi-judicial power(s)’. Judicial power includes the exercise of coercive power, the power to distrain, compel and enforce the attendance of witnesses or the power to enforce discovery and production of documents.<sup>50</sup> Paragraph 20 to the Fifth Schedule of the FIRS Act provides that:

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<sup>48</sup> Also, proponents of the constitutionality of the TAT in its present form often rely on the authority of *Ajayi v. SEC (2009) 13 NWLR 1 CA*. In this case, the Court of Appeal validates the legality of Investment and Securities Tribunal (“IST”). The case never considered the constitutionality of the IST in the face of section 251 of the Constitution. But even if it does, the jurisdiction of IST does not cover the revenue of the Government of the Federation or taxes payable to the Federal Government.

<sup>49</sup> *Nigerian National Petroleum Corporation v. TAT*, above note 46.

<sup>50</sup> In *Bronik Motors Ltd & Anor. v Wema Bank Ltd* (1983) All N.L.R 272 the threshold to determining when a court or tribunal exercises “judicial power” is lowered to the extent that it is assumed to exist once a court or tribunal is clothed with the power to give a binding decision. See also *Huddart Parker & Co. Property Ltd. v. Moorehead* (1909) 9 C.L.R. 383; and *Senator Adesanya v. The President of the Federal Republic of Nigeria* (1980) 5 S.C. 112 at 163-4. The above provision is more evident when the issue at stake is the determination of right *in rem*: *Kano State Urban Development Board v. Fanz Construction Company Limited* (1990) 4 NWLR (Pt. 172) 1. See also, *The Attorney General of Lagos State v. The Hon. Justice L. J. Dosunmu* (1989) LPELR-3154 (SC) at pages 81-82, paragraphs G-B where Obaseki JSC held that:

Judicial power therefore, means the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects whether the rights relates to life, liberty or property [*Huddard etc. v. Moorehead* 8 C.L.R. 330 at 357,

- (1) The Tribunal may make rules regulating its procedures.
- (2) *The Tribunal shall, for the purposes of discharging its functions under this Schedule, have power to*
  - (a) *Summon and enforce the attendance of any person and examine on oath;*
  - (b) *Require the discovery and production of documents;*
  - (c) *Receive evidence on affidavits;*
  - (d) *Call for the examination of witnesses or documents;*
  - (e) *Review its decisions;*
  - (f) *Dismiss an application for default or deciding matters ex parte;*
  - (g) *Set aside any order or dismissal of any application for default or any order passed by it ex parte; and*
  - (h) *Will do anything which in the opinion of the Tribunal is incidental or ancillary to its functions under this Schedule.*

With utmost respect, it will be unreasonable for any discerning mind to hold that the powers listed above are not judicial powers. They are raw judicial powers akin to that of a court. It is immaterial whatever any name given to the person, body or institution exercising the above powers. Calling such body or institution an 'Administrative Tribunal' is merely to disguise its status and real power. The name given the body or institution is simply immaterial. Therefore, the TAT acts within the realms of court and should be treated as such.

Again, section 251 of the Constitution used the expression "... to the exclusion of any other court..." It did not refer to "appeals." Justice Buba simply attempted to distinguish *Stabilini Visionini Ltd v Federal Board of Inland Revenue*<sup>51</sup> from *Nigerian National Petroleum Corporation v Tax Appeal Tribunal*<sup>52</sup> by holding that appeals from the defunct VAT Tribunal in *Stabilini* used to go to the Court of Appeal; unlike appeals from TAT which goes to the FHC. He seems to hold the view that as long as 'appeals' from TAT lies to FHC, the exclusive jurisdiction conferred on the FHC by section 251 of the Constitution does not matter. We do not agree with this view. The exclusive

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per Griffith, c.] and enforce the decision. *If a body which has power to give a binding and authoritative decision is able to take action to enforce that decision, but then only then, all the attributes of judicial power are present.* [Emphasis added].

<sup>51</sup> *Stabilini Visionini Ltd*, above note 44.

<sup>52</sup> *Nigerian National Petroleum Corporation*, above note 46.

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jurisdiction conferred on the FHC means that no court, body or institution which exercises judicial powers should have the first taste of trying any of the matters listed in section 251 of the Constitution. Only the FHC has such jurisdiction. We therefore agree with the decision of Honourable Justice Adeniyi F. A. Ademola in *TSKJ II Construces Internacionals & Anor v. Federal Inland Revenue Service*<sup>53</sup> wherein the learned judge questioned the constitutionality of the TAT to determine civil causes and matters bothering on the revenue of the Government of the Federation and taxation of persons subject to federal taxes. It held that the powers conferred on the TAT by the FIRS Act and the *Tax Appeal Tribunals (Establishment) Order of November 25<sup>th</sup>, 2009* ("TAT Order") are in conflict with section 251(1)(a)&(b) of the 1999 Constitution. As a result, the FHC declared the TAT unconstitutional for exercising powers in areas only the FHC is authorised by the Constitution to exercise exclusive jurisdiction. This violation is not cured by subjecting the decisions of the TAT to appeals to the FHC. It further held that the argument the TAT is merely an administrative tribunal does not hold ground because the TAT exercises judicial powers which affects the rights of litigants. Finally, the court agreed that just like in the United States, India, China and other countries, there is need for a specialised tax court in Nigeria. The court made reference to the amendment of Constitution to accommodate the National Industrial Court and therefore recommended that the Constitution should be amended to provide for a specialised tax court with appropriate powers specifically provided thereto.

Another constitutional problem facing the TAT is the appointment of Commissioners who serve as judges over tax disputes brought before the tribunal. Paragraph 2(1) of the Fifth Schedule to the FIRS Act empowers the Minister of Finance to appoint TAT Commissioners. These Commissioners exercise judicial powers over tax disputes brought before them. Generally, tax disputes that come before the TAT are between taxpayers on one hand and FIRS, a representative of the Ministry of Finance headed by the Minister of Finance, on the other. This means that the

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<sup>53</sup> *TSKJ II Construces Internacionals*, above note 45.

appointment of TAT's Commissioners by the Minister of Finance violates section 36(1) of the Constitution. This section provides that:

In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and *constituted in such manner as to secure its independence and impartiality*.<sup>54</sup>

The above provision reinforces one of the cardinal principles of natural justice, which is *nemo iudex in causa sua*. This principle of natural justice maintains that a party who is interested in a matter cannot sit as a judge in such matter. This was the decision of the Supreme Court of Nigeria in *Garba & Ors. v. University of Maiduguri*.<sup>55</sup> In *Garba's case*, the Deputy Vice-Chancellor ("DVC") was the Chairman of an investigating panel mandated to look into students' rampage in the university. This involves fishing out the ringleaders and recommending appropriate punishments, such as dismissal from the university. Same DVC was also a victim of the rampage. Garba and his colleagues were found culpable and recommended for rustication and were indeed dismissed from the university. The students appealed against the decision up to the Supreme Court. The court held, in part, that the DVC was a judge in a case that he had interest and therefore nullified the decision of the university authority against the students.<sup>56</sup>

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<sup>54</sup> Emphasis supplied

<sup>55</sup> (1986) 1 NWLR (Pt. 18) 550. See also: *Orugbo v. Una* (2002) 9-10 SC 61; (2002) LPELR-2778(SC)

<sup>56</sup> On this point, Obaseki, JSC at page 48 paragraph B-G of the judgment held that:

"On the issue of likelihood of bias, learned counsel submitted that the fact that the Chairman of the Investigating Panel who was the Deputy Vice-Chancellor and a victim of the rampage raises or leads to real likelihood of bias in his consideration of the appellant's case. ... This submission is incontestable. The Deputy Vice-Chancellor cannot be a witness and a judge all at the same time. The likelihood of bias is a necessary inference from the assumption of the two positions".

It must be noted that one of the reasons which informed the decision of the Supreme Court in reverting the decision to rusticate the student was the criminal element of the offence. The court reprimanded the University for assuming jurisdiction over a criminal matter.

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Appointment of persons to a position of judicial authority must comply with the provisions of section 36 of the 1999 Constitution. The impartiality and/or independence of the Commissioners of TAT who preside over suits commenced by or against the FIRS, an agency of the Federal Government is seriously in doubt and has not complied with section 36 of the Constitution. The implication is that Paragraph 2 of the Fifth Schedule to the FIRS will be struck down if challenged in the court for violating section 36(1) of the Constitution.

Another issue against the FIRS Act is the constitutionality or otherwise of Paragraph 8 of the Fifth Schedule to the FIRS Act. It (Paragraph 8) provides that:

The question as to the validity of the appointment of any person as a Tax Appeal Commissioner shall not be the cause of any litigation in any court or tribunal and no act or proceedings before the Tribunal shall be called into question in any manner on the ground merely of any defect in the constitution of the Tribunal.

The above provision is a clear ouster clause which appears to have fettered the hands of the court from inquiring into the validity or otherwise of the appointment of Commissioners of TAT. However, section 4(8) of the Constitution provides that:

Save as otherwise provided by this Constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law, and accordingly, the National Assembly or a House of Assembly shall not enact any law, that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.

The clause "Save as otherwise provided by this Constitution..." does not apply in this case because there is no provision in the Constitution which empowers the National Assembly to make laws ousting the jurisdiction of the court from entertaining any dispute at all. Obviously, Paragraph 8 of the Fifth Schedule to the Constitution violates and/or is in conflict with section 4(8) of the Constitution.

For all the provisions of the FIRS Act that conflict with any provision of the 1999 Constitution, section 1(3) of same Constitution applies. It [section 1(3) of the Constitution] provides that: "If any

other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.” This means that all the provisions of the FIRS Act that are inconsistent with the Constitution will be declared void to the extent of their inconsistency with the Constitution. When this happens, there will be no TAT in its present form.

### **(c) An Urgent Need for a Specialised Tax Court in Nigeria**

The findings above have pointedly shown that TAT in its present form is faced with lots of constitutional challenges. The Constitution is the *grundnorm* with which the legality or otherwise of any legislation, the establishment of any authority or person and the exercise of any power or failure of it thereof by any person or authority in Nigeria is measured.<sup>57</sup> Bearing this in mind, we have disappointed the proponents of TAT by positing that TAT in its present form will not survive serious legal inquest into its constitutionality. To avoid this, there is need for a constitutional amendment to accommodate the creation of a specialised tax court. A constitutionally recognised tax court is what Nigeria needs now. This will help resolve tax dispute with speed and efficiency. Alternatively, if the Constitution cannot be easily amended to create a specialised tax court, traditional courts like the Federal High Court should create specialised tax chambers within the general court system. In appeals before Court of Appeal and the Supreme Court, experts in tax matters must be drafted into panels that will hear such appeals.

## **4. CONCLUSION**

In this paper, we have seen that the global trends in tax dispute resolution are the use of ADR, specialised tax court or specialised tax chamber within a general court system. The form of ADR most used by tax authorities and the court system is mediation. Most advanced economies and South Africa, a newly industrialised country, use ADR in settling tax disputes. Statistics show that a greater percentage of tax cases are resolved through ADR than litigation. Litigation wastes enormous time and resources for both taxpayers and tax authorities.

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<sup>57</sup> See, section 1 of the *Constitution of the Federal Republic of Nigeria, 1999*.

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The economy of case management favours ADR. Nonetheless, when matters cannot be resolved through ADR, parties may not avoid the court system. It is at this stage that the nature of court system before which tax disputes are presented comes to the fore. A general court system is composed of generalists who unfortunately may be referred to as “Jack of All Trade”. Taxation is one complex legal subject. Its complexity extends to resolving how much money or what portion of a taxpayer’s money belongs to the government. Indeed, taxation demands that justice is done when tax authorities and taxpayers are tangled in conflicting financial claims against one another. Generalist judges do not have the expertise to resolve this kind of dispute. This informs the establishment of specialised tax courts or in the worst case scenario the use of specialised tax chambers within a general court system by different countries in the world. These are the common global trends that we identified.

Unfortunately, Nigeria is found wanting in following the global trends to settling tax disputes. As a result, we recommend that ADR, especially mediation, shall not only be used by FIRS and state tax authorities but also courts when such matters eventually come to them. The Constitution should be amended to accommodate a specialised tax court in Nigeria. Alternatively, specialised tax chambers should be created within the general court system.