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Constitutional Impediments to the Effective Review of Tax Cases in Nigeria by a Specialized Tax Court: Lessons from the United States and Canada

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Abstract

The use of experts in the review of tax cases is recognized globally. Nigeria appears to appreciate the importance of this practice. However, several previous attempts to establish tax courts or tribunals have been frustrated due to a lack of constitutional support. In the search for a better model for Nigeria, this article examines the US and Canadian experiences of using specialized tax courts or tribunals to see what lessons Nigeria could learn. The two north American experiments justify the use of tax courts as better alternatives to what Nigeria currently has. In particular, the Canadian experience appears to be more suited to the Nigerian context. Therefore, it is argued that Nigeria's 1999 Constitution should be amended to establish a Tax Court of Nigeria, which should be recognized as a superior court of record.

Keywords

Nigeria, Administrative Tribunal, Tax Appeal Tribunal, tax court and tax experts

INTRODUCTION

The world has accepted specialization and / or the use of experts to solve complex problems in several areas of human endeavour.[1] Virtually all professions have accepted this fact and have continued to move towards specialization in sub-areas of varied disciplines.[2] Globally, specialized courts and / or experts in

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1 Organization for Economic Cooperation and Development (OECD) "The development dimension: Fostering development in a global economy: A whole of government perspective", available at: <https://books.google.com/books?id=N8QZhFEiMkQC&printsec=frontcover#v=on0epage&q&f=false> (last accessed 26 October 2020). In this book, OECD argues (at 38) that: "An essential element of trade liberalization is the gain from specialization."

2 G Weisz "The emergence of medical specialization in the nineteenth century" (2003) 77 *Bulletin of the History of Medicine* 536.

different areas of law (often considered complex and technical) are now deployed in the business of adjudication.[3] Historically, there is evidence that Nigeria recognizes the importance of specialized courts or the use of experts in dispensing justice.[4] One area where this is evident is the deployment of specialists or experts in the field of tax law.[5] Taxation is a complex and technical area of law that is interdisciplinary in nature.[6] It connects with several disciplines, all of which are or should be taken into consideration when tax policies are designed. When it comes to adjudicating tax disputes, experience in tax law and other fiscal subjects, such as accounting and economics, serves a useful purpose.

Apart from the benefit of technical expertise, speed and the fast dispensation of justice in tax cases are additional reasons a country like Nigeria needs a specialized tax court.[7] Traditional or generalist courts in Nigeria are known for dispensing justice at a snail's pace.[8] Although judges in Nigeria are overstretched due to large volumes of cases in their dockets, they are notorious for long adjournments and delays in concluding matters before them.[9] With technical expertise and efficiency in handling tax cases, a tax court is likely to move faster than a generalist court.[10]

In 1973, the Federal Military Government of Nigeria established the Federal Revenue Court of Nigeria (Revenue Court).[11] This court was invested with the authority to handle disputes relating to the revenues of the federal government.[12] This could be called a tax court. After the transfer of power from military to civilian government in 1979, a new legal order was established with the enactment of Nigeria's 1979 Constitution (1979 Constitution), which became

3 L Baum *Specializing the Courts* (2011, The University of Chicago Press) at 1–3; Office of Justice Program of the National Institute of Justice "Problem-solving courts" (20 February 2020), available at: <https://www.nij.gov/topics/courts/pages/specialized-courts.aspx> (last accessed 26 October 2020).

4 C Adekunle and O Onakoya "The Federal High Court of Nigeria: An examination of its territorial jurisdiction vis-à-vis service of court processes" (2016) 21 *The Jurist* 184 at 185; J Sokefun and N Njoku "The court system in Nigeria: Jurisdiction and appeals" (2016) 2/3 *International Journal of Business and Applied Social Science* 1.

5 Federal High Court "History of Federal High Court" (13 June 2019), available at: <http://www.fhc-ng.com/about.htm> (last accessed 26 October 2020).

6 E Maydew "Empirical tax research in accounting: A discussion" (2001) 31 *Journal of Accounting and Economics* 389.

7 S Legomsky *Specialized Justice: Courts, Administrative Tribunals, and a Cross-National Theory of Specialization* (1990, Oxford University Press) at 17. Legomsky argues that speed and / or quick dispensation of justice is one of the rationales for establishing specialized courts.

8 J Agbonika and M Alewu "Delay in the administration of criminal justice in Nigeria: Issues from a Nigerian view point" (2014) 26 *Journal of Law, Policy and Globalization* 130.

9 "Delayed justice: Lawyers, CJN talk" (16 August 2018) *Punch*, available at: <https://punchng.com/delayed-justice-lawyers-cjn-talk/> (last accessed 26 October 2020).

10 Legomsky *Specialized Justice*, above at note 7 at 17–19.

11 Federal Revenue Decree No 13 of 1973.

12 Id, sec 7.

the supreme law of the land.[13] Unfortunately, the Revenue Court was not recognized as one of the superior courts of record listed in section 6 of the defunct 1979 Constitution. Instead, a new court named the Federal High Court (FHC) was established to replace the Revenue Court. The new FHC was invested with broader and / or additional powers, beyond those conferred on the Revenue Court. Specifically, the FHC's jurisdiction extended to virtually all the subjects found in the exclusive legislative list in the second schedule of the 1979 Constitution.[14] Although the FHC was conferred with the power to adjudicate disputes relating to federal government revenue, there were serious jurisdictional objections concerning whether or not it had the exclusive jurisdiction to do so. There was jurisdictional rivalry between the FHC and State High Courts under the 1979 Constitution. Under this regime, a State High Court was considered to exercise an unlimited jurisdiction,[15] notwithstanding that it was a generalist court. Thus, the determination of the status of the FHC within the framework of the 1979 Constitution was not settled before the military struck again in 1983.[16] This change of government ushered in a new legal order.[17] The 1979 Constitution was suspended and military decrees were declared the supreme laws of the land.[18] The 1983 coup d'état was followed by other military interventions in Nigeria's body polity. Democracy finally returned in May 1999 with a new constitution promulgated by the military for Nigerians (1999 Constitution).[19] The FHC's position is retained under the 1999 Constitution; however, it is now given exclusive jurisdiction to hear and determine disputes arising from several of the subject matters listed in the exclusive legislative list.[20] This includes the exclusive power to resolve

13 1979 Constitution, sec 1.

14 Federal Revenue Decree, sec 8.

15 1979 Constitution, sec 236.

16 The government of Alhaji Shehu Shagari, a democratically elected president of Nigeria, was overthrown by General Mohammadu Buhari on 31 December 1983. Buhari's own military regime was overthrown by yet another coup d'état staged by General Ibrahim Babangida on 27 August 1985. The gale of military interventions continued until 29 May 1999. For a brief history of military interventions in Nigeria, see J Olusoji, A Olusanmi and C Nelarine "Military intervention in the Nigerian politics and its impact on the development of managerial elite: 1966–1979" (2012) 8/6 *Canadian Social Science* 45 at 46–47.

17 A regime that governed with military decrees and edicts.

18 Constitution (Suspension and Modification) Decree No 1 of 1984.

19 This is Nigeria's current constitution. It came into force on 29 May 1999. Tunde Ogowewo argues that the 1999 Constitution not only lacks moral authority but also legitimacy since it is a nullity because it is not an act of the people. He, therefore, urges Nigerian courts to annul the constitution in order, among other things, to discourage future coup plotters from overthrowing a democratically elected government only to use a decree in the name of a constitution to white-wash their sins upon leaving power, as is evident in the 1999 Constitution: T Ogowewo "Why the judicial annulment of the Constitution of 1999 is imperative for the survival of Nigeria's democracy" (2000) 44/2 *Journal of African Law* 135.

20 1999 Constitution, sec 251.

disputes relating to the revenue of the Federal Government and / or its agencies.[21] This settles the jurisdictional battles between or among litigants over which court (the FHC or the State High Court) has jurisdiction over these subject(s). However, the FHC remains a generalist court presided over by an individual judge who, in most cases, is not an expert in tax matters. Thus, both the 1979 and 1999 Constitutions reversed the gains of Decree No 13 of 1973, which created a specialized tax court in the Revenue Court.[22] In fact, both constitutions created a super-generalist court in the FHC, which should have improved on the specialist Revenue Court. Thus, instead of making progress in establishing a constitutionally recognized tax court, the two constitutions reversed the gains made in 1973.

Despite the constitutional setback, the Nigerian government still recognizes the need for a specialized court or tribunal in settling tax disputes. So, a Value Added Tax Tribunal (VAT Tribunal) was established to handle disputes over the administration of value added tax, with its decisions appealable to the Court of Appeal.[23] Both the value added tax regime and the VAT Tribunal were creations of the Value Added Tax Decree No 102 of 1993.[24] This decree survived the 1999 Constitution, made possible by the "existing law doctrine" enshrined in the 1999 Constitution.[25] This doctrine preserves all federal and state legislation that was in force before the promulgation of the 1999 Constitution, provided it does not conflict with any part of the constitution. It is important to note that, before the 1999 Constitution came into force (and while the VAT Tribunal subsisted), the military government promulgated the Constitution (Suspension and Modification) Decree No 107, 1993 which, in the main, restored the 1979 Constitution with certain modifications.[26] The relevant part of this modification was the amendment of section 230(1) of the 1979 Constitution, including conferring on the FHC the exclusive jurisdiction to hear and determine civil cases relating to federal government revenue.

Thus, the subject matter in respect of federal government revenue that the VAT Tribunal had been exclusively established to handle (ie value added tax) was one of the subjects that section 230(1) of the 1979 Constitution (as amended by Decree No 107) subsequently conferred exclusively on the FHC

21 Id, sec 251(1)(a).

22 Unfortunately, both the 1979 and 1999 Constitutions were products of the military. Neither is strictly an act of the people. Of note is that Professor Ben Nwabueze has argued that the defunct 1979 Constitution (and, by extension, the extant 1999 Constitution due to the similarities it shares with the making of the 1979 Constitution) was not autochthonous since the people of Nigeria did not give themselves the constitution through democratic participation: B Nwabueze *The Presidential Constitution of Nigeria* (1983, Nwamife Publishers) at 2–6.

23 Value Added Tax Decree No 102 of 1993, sec 24.

24 This decree repealed the Sales Tax Decree No 7 of 1986.

25 See 1999 Constitution, sec 315.

26 One major modification is that it subordinated the 1979 Constitution to military decrees by suspending the supremacy of the constitution: Ogowewo "Why the judicial annulment", above at note 19 at 142.

to adjudicate and / or determine. With this scenario, it appeared that a jurisdictional conflict had been created between the FHC and the VAT Tribunal. In fact, it could be argued that, with the amendment of section 230(1) of the 1979 Constitution by Decree No 107, the jurisdictional status of the VAT Tribunal under Decree No 102 was pre-empted.

However, it seems there was no decided case during the currency of the military regimes where the VAT Tribunal's jurisdiction was questioned on the ground of a conflict between the powers of the VAT Tribunal (as conferred on it by Decree 102) and that of the FHC (as conferred on it by section 230 (1) of the 1979 Constitution, as amended). Obviously, the two decrees were in operation without difficulty, despite the glaring conflict. In principle, it could be said that the seeds of jurisdictional challenge or conflict between the FHC and the VAT Tribunal were sown by the almost simultaneous promulgation of Decrees 102 and 107.

Subject to the provisions of section 315 of the 1999 Constitution, both Decrees 102 and 107 survived the 1999 Constitution in varying degrees. Specifically, it could be argued that, due to the verbatim replication of section 230(1) of the 1979 Constitution (as amended) in section 251(1) of the 1999 Constitution, the military government merely transposed the amendment made by Decree 107 to section 251(1) of the 1999 Constitution.

It was only in 2004 that there was a recorded challenge to the VAT Tribunal's jurisdiction on the basis of section 251(1) of the 1999 Constitution. On 28 January 2004, the Federal Board of Inland Revenue instituted an action against Stabilini Visinoni (Stabilini) at the VAT Tribunal sitting in Ibadan for failure to remit and render monthly accounts of VAT returns collected on behalf of the Federal Board of Inland Revenue from August 1995 to July 2000. On 1 March 2004, Stabilini entered a conditional appearance and then challenged the VAT Tribunal's jurisdiction, among others, to handle disputes relating to federal government revenue. On 21 March 2005, the VAT Tribunal delivered its ruling, holding that it had jurisdiction to adjudicate matters concerning revenue accruing from VAT. Dissatisfied with the VAT Tribunal's ruling, on 30 October 2006 Stabilini applied for leave to appeal out of time. Leave was granted.

However, before the Court of Appeal's determination in *Stabilini Visinoni v Federal Board of Inland Revenue*,[27] the National Assembly enacted the Federal Inland Revenue Service (Establishment) Act, 2007 (FIRS Act) with the key aim of centralizing the administration of federal tax laws. Section 59 of the FIRS Act established the Tax Appeal Tribunal (TAT), with jurisdiction to settle disputes arising from the operations of the FIRS Act and other federal tax legislation listed in the first schedule to the FIRS Act.

The enactment of the FIRS Act by the National Assembly pre-empted the outcome of the decision of the Court of Appeal in *Stabilini*. In particular,

27 (2009) 13 NWLR 201 (pt 1157) 200.

the establishment of TAT sealed the fate of the VAT Tribunal. This position is reinforced by section 68(2) of the FIRS Act, which provides: "[i]f the provisions of any other law, including the enactments in the First Schedule are inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the provisions of that other law shall to the extent of the inconsistency be void."

The VAT Act of 1993 (Decree No 102, 1993) is listed as item 5 in the first schedule of the FIRS Act. Therefore, with the establishment of TAT, the VAT Tribunal ceased to exist and its jurisdiction transferred to TAT and / or was subsumed under it.

On 25 May 2009 and without reference to the recently enacted FIRS Act, the Court of Appeal decided that the provisions of section 20 of the VAT Act, 1993 (formerly section 20 of Decree 102), which established the VAT Tribunal, were unconstitutional because they conflicted with section 251(1) of the 1999 Constitution (formerly section 230(1) of the 1979 Constitution, as amended). Unfortunately, the Court of Appeal's decision has no practical relevance, since the FIRS Act transferred the roles of the VAT Tribunal to TAT and directed that appeals from TAT shall lie before the same FHC,[28] instead of the Court of Appeal[29] as had been the case in the VAT Tribunal era. Perhaps this change was introduced to eliminate the jurisdictional controversy that often arises between the FHC and any other judicial or quasi-judicial body conferred with power to decide any issue or subject relating to any of the items listed in section 251(1) of the 1999 Constitution.

Even with the enactment of the FIRS Act, controversy still trailed the establishment of TAT. Some have argued that TAT is unconstitutional because the jurisdiction conferred on it conflicts with the provisions of section 251(1) of the 1999 Constitution.[30] They also argue that it does not make sense to create a tribunal, constituted by tax experts drawn from different tax specialties, that must still subject its decisions, on appeal, to a generalist court of first instance manned by an individual who may well not have any technical knowledge of tax. Therefore, to arrive at the best options for Nigeria, this article sets out a comparative study of the practices in the United States and Canada, two advanced federal states. This study shows that the Canadian experience, with slight modifications, would be more suitable for Nigeria. To achieve this, it is recommended that the Nigerian Constitution be amended to create a specialized tax court for the country. This court should be invested with exclusive jurisdiction to hear and determine appeals of tax disputes emanating from the administration of federal tax statutes in Nigeria. Appeals against decisions of this tax court, on the grounds of law or mixed facts and law, should lie before the Court of Appeal: Nigeria's penultimate court. The Court of

28 FIRS (Establishment) Act, 2007, fifth sched, para 17.

29 Value Added Tax Act, 2004, sec 24.

30 J Odinkonigbo and J Ezeuko "Does Nigeria follow the contemporary global trend in tax dispute resolution strategy?" (2014) 12 *The Nigerian Juridical Review* 174.

Appeal should be the last court on tax issues except where the ground(s) of appeal is or are constitutional, or the subject of appeal is a criminal matter.

This article is divided into six parts. After this introduction, the article reviews the several failed attempts made by the federal government to establish specialized tax courts or tribunals. The third part examines the rationale for a specialized tax court in Nigeria. To learn from similar federal jurisdictions, the article then examines practices in the USA and Canada. The fifth part proposes the establishment of a tax court of Nigeria following the model of the Tax Court of Canada, with some modifications, since Canada has a regime that appears to be more suited to Nigeria; the US experience appears to be similar to what has existed or is existing in Nigeria, but has not helped the country. There follows a conclusion.

HISTORY OF FAILED ATTEMPTS TO CREATE SPECIALIZED TAX COURTS OR TRIBUNALS IN NIGERIA

Without doubt, Nigeria desires and, in fact, has attempted to establish tax courts or tribunals. However, the problem associated with past attempts is the lack of a proper legal framework for setting up the court or tribunal. This has been the problem facing adjudicative bodies established to tackle tax matters in Nigeria. In particular, constitutional problems have always confronted each of the courts or tribunals that have been set up. Because of constitutional impediments, the courts or tribunals have failed to fulfil the aim for which they were or are established. This article now examines some of the attempts made to establish revenue courts or tribunals and considers why they failed.

Federal Revenue Court of Nigeria under the Federal Revenue Act of 1973 and the Federal High Court under the 1979 Constitution

The Revenue Court is the forerunner of the present FHC. Both the Revenue Court under the Federal Revenue Act of 1973 (formerly, the Federal Revenue Court Decree, 1973) and the FHC under the 1979 Constitution are considered together because they appear to be different only in name and in the nature of the legal framework upon which they operated.

Perhaps buoyed with the desire to ensure that the federal government did not lack the funds it needed to run its affairs and to ensure that cases involving the federation's revenue were resolved timeously and with dispatch, the then military government established the Revenue Court in 1973.[31] In identifying the purpose for which the Revenue Court was created, the Supreme Court of Nigeria in *Jammal Steel Structures Ltd v African Continental Bank Ltd* held that:

31 See Decree No 13 1973, which was later renamed the Federal Revenue Court Act 1973.

> "The true object and purpose of the Federal Revenue Court Decree, as can be gathered from the four corners of it, is the more expeditious despatch of revenue cases, particularly those relating to personal income tax, company tax, customs and excise duties, illegal currency deals, exchange control measures and the like, which the State High Courts were supposed to have been too tardy to dispose of especially in recent years."[32]

Section 7 of the Federal Revenue Court Act provides that the Revenue Court shall exercise jurisdiction over the federal government's revenues, taxation of *companies* and other bodies or persons subject to federal taxation, customs and excise duties, etc. In particular, section 8 states unequivocally that the Revenue Court shall exercise exclusive jurisdiction over these subjects.

Upon the return of democracy in 1979, the 1979 Constitution (a product of the outgoing military administration) established the FHC. Section 230(1) of the 1979 Constitution conferred on the FHC all the powers that the Revenue Court had under section 7 of the Federal Revenue Court Act, save the exclusive power the Revenue Court enjoyed under section 8. Under the same 1979 Constitution, a State High Court was conferred with unlimited jurisdiction to handle any kind of dispute regardless of the parties and / or subject matter involved.[33] This character qualified State High Courts of this era as "super-generalist" courts. With the establishment of a "super-generalist" State High Court and the FHC lacking exclusive jurisdiction under the 1979 Constitution, it appears that the gains made by the Federal Revenue Court Act were lost upon the promulgation of the 1979 Constitution. Even though it could be argued that both sections 7 and 8 of the Federal Revenue Act survived the 1979 Constitution under section 274 of the 1979 Constitution (existing law clause), it is doubtful that these sections would have overridden section 236 of the 1979 Constitution that conferred unlimited jurisdiction on a State High Court.

Indeed, throughout the regime of 1979 Constitution (before the military struck again), there were judicial controversies as to whether or not the FHC under the 1979 Constitution should exercise exclusive jurisdiction over the items listed in section 7 of the Federal Revenue Court Act, despite the existence of section 236 of the 1979 Constitution. The Supreme Court in *Jonah Onyebuchi Eze v Federal Republic of Nigeria*[34] held that the 1979 Constitution restored the pre-1973 powers of a State High Court by conferring on it an "unlimited" jurisdiction.[35] This means that the 1979 Constitution did not recognize the exclusive jurisdiction of the FHC, despite section 230(2) simply renaming the 1973 Revenue Court the "Federal High Court". The implication

32 (1973) LPELR-1595 (SC) at 18, paras B–C.
33 1979 Constitution, sec 236.
34 (1987) LPELR-1193(SC) at 29–30, paras G–F.
35 1979 Constitution, sec 236.

is that matters relating to federal government revenues could be handled by a State High Court under the 1979 Constitution.

The unlimited jurisdiction granted to the State High Court by the 1979 Constitution effectively set back the federal government's efforts to establish a specialized tax court with exclusive power to hear and determine matters relating to the taxation or revenue of the federal government. Thus, the 1979 Constitution, despite the provisions of the Federal Revenue Act, provided litigants the option of bringing their claims before either the FHC or a State High Court, since neither of them had exclusive jurisdiction over federal government revenues. This encouraged forum shopping.

However, as stated earlier, section 230(1) of the 1979 Constitution (as amended) restored the exclusive power of the FHC to hear and determine disputes relating to the revenue of the federal government or any of its agencies. With this, one could say that Decree 107 restored the FHC as a specialized tax / revenue court. Unfortunately, the current 1999 Constitution moves the FHC back to the generalist camp. Although it has the exclusive jurisdiction to hear and determine cases involving federal government revenues, very many non-revenue subjects relating to the items contained in part 1 of the second schedule to the 1999 Constitution (exclusive legislative list) were added to the FHC's exclusive jurisdiction. This raises the question of whether the FHC is a specialized tax court under the 1999 Constitution. This and other related questions are considered next.

The Federal High Court under the 1999 Constitution, the Value Added Tax Tribunal and the emergence of the Tax Appeal Tribunal

The article now examines the FHC under the 1999 Constitution to see whether the court under the 1999 Constitution followed the 1973 or 1979 model. Has there been any positive change, leading to the establishment of a specialized court or tribunal? How effective is the tax court or tribunal? Does it face any serious challenges? The Value Added Tax Tribunal is also considered to find out why it is no longer functional and whether the newly created TAT has satisfied the yearnings of those calling for the establishment of a tax court.

The Federal High Court under the 1999 Constitution

Above, this article reviewed the historical development of the FHC, starting from the Revenue Court era until the present. To reiterate some of the relevant points, it must be noted that, in 1999, the departing military government[36] presented the country with the new 1999 Constitution, known as the Constitution of the Federal Republic of Nigeria, 1999. This constitution re-established the FHC. Unlike the position of the FHC under the 1979 Constitution, section 251(1) of 1999 Constitution, which replicated section 230(1) of the 1979 Constitution (as amended), went beyond the mere

36 The government of General Abdulsalam Abubakar handed over power to the newly elected civilian government of President Olusegun Obasanjo on 29 May 1999.

conferment of jurisdiction to handle cases involving federal government revenues, and clothed the FHC with exclusive jurisdiction in civil causes and matters relating to several issues contained in the exclusive legislative list.[37] The first item covered by section 251(1) relates 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". Had the constitution restricted the FHC's powers to matters of taxation or federal government revenue, it would have remained a specialized court. Rather, the constitution created a generalist court (a clear departure from the 1973 model) with wide powers over several items contained in the exclusive legislative list.

The FHC's exclusive jurisdiction over the subjects listed in section 251 of the 1999 Constitution received judicial recognition in several cases.[38] The general nature of the FHC's jurisdiction, as provided in section 251, was upheld by the Supreme Court in *General Mohammed Garba (rtd) v Mustapha Sani Mohammed and Others*.[39] Indeed, some of the items dumped into the FHC's docket, on their own, merit a specialized court or judges.

Value Added Tax Tribunal and the emergence of jurisdictional conflict with the Federal High Court

As demonstrated in the introduction above, the history of both the VAT Tribunal and the FHC predates the 1999 Constitution. In fact, the VAT Tribunal was first established by section 20 of the Value Added Tax Decree No 102 of 1993. The same year, 1993, that the VAT Tribunal was established the then military government promulgated Decree 107, which amended section 230(1) of the 1979 Constitution to confer on the FHC the exclusive jurisdiction to handle and determine disputes relating to the revenue of the federal government or any of its organs. This pre-empted the VAT Tribunal established under Decree No 102 of 1993. It is, therefore, plausible to say that the seeds of jurisdictional conflict between the VAT Tribunal or any other tribunal succeeding it and the FHC were sown in 1993. Indeed, what is known today as section 251(1) of the 1999 Constitution is traceable to section 230(1) of the 1979 Constitution (as amended), which transmutes into section 251(1) of the 1999 Constitution.

The establishment of the Tax Appeal Tribunal has not filled the gap

As stated above, in its bid to establish a strengthened tax court or tribunal, the National Assembly enacted the FIRS Act. TAT was established by section 59 of the FIRS Act: "(1) A Tax Appeal Tribunal is established as provided for in the

37 1999 Constitution, sec 251.

38 *NNPC and Another v Orhiowasele and Others* (2013) LPELR-20341 (SC); *NDIC v Okem Enterprise Ltd and Another* (2004) LPELR-1999 (SC); *Ntuks and Others v NPA* (2011) LPELR-8876 (CA).

39 (2016) LPELR-40612 (SC) at 62–63, paras D–C.

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."

Section 59(1) of the FIRS Act refers to the fifth schedule, paragraph 1(1) of which provides: "[p]ursuant 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". From this, it is obvious that TAT is a creation of section 59 of the FIRS Act, which empowers TAT to settle disputes emanating from the operation of the act. Specifically, however, section 59(2) empowers TAT to administer and / or handle disputes emanating from the administration of the tax legislation listed in the first schedule to the act. Thus, the first schedule sets out the legislation to be administered by FIRS and, by the authority of section 59(2), TAT will handle disputes arising from the administration of the listed enactments. This means that the adjudication of tax disputes arising from federal tax legislation is centralized and must come before TAT.

Recognising that the co-existence of section 251(1) of the 1999 Constitution and TAT's powers to hear and determine disputes relating to the revenue of the federal government would inspire constitutional challenge, the National Assembly attempted to avoid this, by subjecting TAT's decisions to the appellate review power of the FHC on points of law alone.[40]

Immediately after the establishment of TAT, two different groups emerged. One camp took the position that the adjudicatory powers granted to TAT clearly violate the provisions of section 251(1) of the 1999 Constitution.[41] This group argues that the exclusive powers granted to the FHC under section 251(1) are not appellate, but constitute an original jurisdiction and are therefore not mitigated by the use of the word "tribunal" in describing the newly created judicial or quasi-judicial body (TAT), which exercises judicial powers akin to those exercisable by a court of law; instances of such powers include the authority to issue summons and arrest warrants.[42] On the other hand, those supporting TAT's constitutionality (as yet without any published papers but relying on arguments of counsel in law courts) argue that section 251(1) of the Constitution uses the word "court" and not "tribunal"; and that, since TAT is a mere tribunal, it is an administrative body and should be seen as such.

The later group's position appears to have received judicial endorsement in *CNOOC Exploration and Production Nigeria Limited and Another v Nigerian National Petroleum Corporation and Another*[43] and *FIRS v TSKJ Construcoes Internacional Sociadade Unipersoal LDA*.[44] In these two cases, the Court of Appeal gave judicial approval to TAT's constitutionality. The court reasoned that TAT's establishment and the powers conferred on it by the FIRS Act do not conflict with

40 See FIRS Act, fifth sched, para 17.
41 See Odinkonigbo and Ezeuko "Does Nigeria follow?", above at note 30.
42 Ibid.
43 (2017) LPELR-43800 (CA).
44 (2017) LPELR-42868 (CA).

the provisions of section 251(1) of the 1999 Constitution, since TAT is a mere administrative tribunal and not a court envisaged by that section. The court recognizes that TAT is part of the administrative and / or domestic processes that must be exhausted by any aggrieved party before approaching the FHC.

The constitutionality or otherwise of TAT will remain uncertain until the Supreme Court (the apex court in Nigeria) takes a position on the continuing controversy over TAT's status. For now, the law is that TAT is constitutional. However, let us assume that the Supreme Court had already ruled in favour of TAT. If this were the case, would it have solved the problem of establishing a specialized tax court for Nigeria? The answer is an obvious no. What Nigeria needs is a fully-fledged tax court with the powers of a High Court, not a mere administrative tribunal.

TAX COURT IN NIGERIA: RATIONALE FOR ITS ESTABLISHMENT

Specialization

Specialization is encouraged in all disciplines because it is believed to have several benefits, some of which are examined here. It appears that the judicial arm of government is the only one that is reluctant fully to accept specialization. Judicial specialization is used to describe the departmentalization or creation of specialized court systems designed to hear and determine cases based on subject matter jurisdiction conferred on courts or tribunals with well-trained judges who have acquired expertise (either by training and / or practice) in a particular area of the law.[45] The Nigerian judicial architecture mainly consists of generalist courts and judges.[46] These judges adjudicate cases covering multiple subject areas, provided the disputes brought before them fall within their statutorily prescribed jurisdictions, which most of the time are not circumscribed to a single subject matter. Indeed, generalist judges may be described as Jacks of all trades, since the system considers them knowledgeable enough to preside over cases spanning different subject areas. However, the truth is that no-one knows everything, no matter how guided they are by counsel or expert witnesses, who themselves may be biased in favour of the parties they represent. It is, therefore, not surprising to see that several countries now have dedicated courts designated to hear disputes in certain areas of the law. Apart from the establishment of specialized courts manned by judges, in some jurisdictions, generalist courts are divided into divisions. Each division handles cases relating to a specific area of the law. For instance, a court of first instance could have family, admiralty and probate divisions. This is another method of specialization. However, one common element among generalist courts is that, even if they are divided into divisions, judges are rotated. It is difficult to see a judge who stays permanently in one division

45 I Unah *The Courts of International Trade: Judicial Specialization, Expertise, and Bureaucratic Policy-Making* (2001, The University of Michigan Press) at 7.

46 See Constitution 1999, sec 6(5) for a roll-call of superior courts of record in Nigeria.

until their retirement or elevation to a higher court. This has its own advantages and, perhaps, limitations when compared with a specialist court whose judges, at least during their tenor, are permanently assigned the same kind of case(s). Nevertheless, this type also has its own advantages and disadvantages when compared with the former.

Reasons for judicial specialization

Several reasons are canvassed in support of judicial specialization. The immersion of a judge in a specific area of the law definitely enhances their expertise developed earlier away from the bench or in the course of assigned responsibilities.[47] This expertise obviously leads to sound judicial decisions, especially in complex legal issues in which a traditional judge would seek assistance of counsel, amicus curiae and expert witnesses before she could appreciate the case before her. Reliance on counsel who have already taken sides could be misleading and self-serving since each counsel represents the interest(s) of her client, and most witnesses tend to favour the story lines of the party who calls them. In this situation, a smart lawyer with the aid of clever witnesses called by the party he represents could easily bamboozle a judge into taking a wrong position in a technical area of law and / or fact. That is to show that the qualities of expert witnesses and the counsel representing a party before a generalist judge play major roles in influencing the outcome of a case involving technical issues.[48] An expert judge is not likely to be swayed into taking a wrong position simply because an expert witness and a smart lawyer representing a party's interest have forcefully and persuasively presented arguments, which, though erroneous, support the wrong side of the law.[49]

It is the power of knowledge and expertise that gives expert judges the confidence to stand their ground. Taken too far, some have argued that expert judges grandstand and may often fail to follow judicial precedents, especially when a similar position has previously been taken by a generalist superior court.[50] This may be true, but a smart expert judge can easily distinguish a wrongfully decided case from the one he is hearing and still arrive at the right decision without clearly and manifestly violating the doctrine of precedent. It is for this reason that the call for the establishment of specialized courts is being made. It does not help society to allow a generalist judge to decide very complex matters that demand expertise and specialized knowledge in an area where he knows practically nothing.

47 L Baum "Probing the effects of judicial specialization" (2009) 58 *Duke Law Journal* 1667 at 1677, also available at: <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1412&context=dlj> (last accessed 2 November 2020).

48 See generally, M Baye and J Wright "Is antitrust too complicated for generalist judges? The impact of economic complexity and judicial training on appeals" (2011) 54 *Journal of Law and Economics* 1.

49 Baum "Probing the effects", above at note 47.

50 Id at 1667–68.

The use of specialized courts also enhances the accountability and uniformity of decisions, unlike in generalist courts where cases are randomly allocated to judges who may not have sufficient technical knowledge in the cases assigned to them.[51] Technical knowledge of the area of law by judges is likely to lead to uniformity of decisions because expert judges are likely to evaluate legal issues in the same way. This may not always be the case; however, in very clear and unambiguous cases, similar or uniform decisions are likely to be the outcome. The uniformity of knowledge in a specific subject and continuous dealing in that area ensure that specialized courts are likely to handle cases more quickly.[52]

However, those who oppose the use of specialized courts argue that judges who deal with cases in a restricted area of the law are likely to be narrow-minded, biased and insular in the way they see things.[53] Due to their traditional "tunnel vision" approach, they tend to favour stakeholders of their constituency.[54] These stakeholders are involved in appointing judges to the courts who in turn preside over cases they (the stakeholders) represent.

Previous research suggests there is no scientific evidence to back up most of the claims made in favour of specialized courts and, perhaps, none to back up the claimed disadvantages held against such courts. This suggests that the claims are largely anecdotal.[55] Indeed, this research is doctrinal. However, the advantages of the division of labour or specialization cannot be denied and virtually all professions and different arms of government, save the judiciary, have accepted this. In our complex world, specialization in a particular field and even sub-specialization are welcome. In the field of medicine, no medical expert handles every illness or ailment confronting humanity; there are gynaecologists, ophthalmologists, cardiologists, etc. An equivalent professional specialization and sub-specialization is found among lawyers: some concentrate on tax, bankruptcy, intellectual property, health, etc.

Further, both the executive and legislative arms of government run their affairs by subdividing themselves into ministries or departments (for the executives) and committees concentrating on specific areas of the economy (for the legislature). The judiciary is only now accepting this trend. As stated above, even generalist courts in some jurisdictions make use of a compartmentalized bench divided into divisions; each division is designed to concentrate on a specific area of the law. Also, specialized courts are used in certain subjects. The inherent advantages accruable to this, reinforce the use of specialized courts and expert judges who preside over disputes brought before these courts.

51 Id at 1675.
52 Id at 1667.
53 Id at 1677–78.
54 Unah *The Courts of International Trade*, above at note 45 at 7.
55 Baum *Specializing the Courts*, above at note 3 at 34.

Criteria for determining the necessity of a specialized court

Having considered the reasons often given to justify the creation or otherwise of specialized courts, it is notable that Legomsky identifies 12 criteria or factors,[56] which he claims may help determine whether or not cases arising from a particular area or field are suitable for adjudication by a specialized court, tribunal or judge. However, he adds a caveat that none of the factors is considered a condition precedent for the establishment of a specialized court or tribunal.[57] In particular, he admits that some of the factors may conflict with others, giving rise to an option of balancing the contextual needs of each situation. Having noted this warning, only two of the 12 factors, which appear to support the creation of a tax court in Nigeria, are briefly considered below.

Technical complexity

Legomsky recognizes that, if an area of law is generally technical in nature, it calls for the establishment of a specialized court or tribunal to handle cases. However, he admits that it may be difficult to pinpoint clearly when an area is technical, but he argues that technical complexity could arise from how voluminous the subject is. For instance, if an area of law is governed by large volumes of statutes and administrative regulations, that could be evidence of technical complexity, especially when the statutes or regulations are broadly worded with references and cross-references made to thousands of sections and subsections of the primary act. There is then a need for an expert who will understand the policies behind a statute and / or regulation he is called upon to interpret.

Generally, one of the oft vaunted propositions or characteristics of a good tax regime is "simplicity", which should aid the seamless understanding or application of tax laws. Unfortunately, the truth (generally recognized among tax practitioners) is that tax is a complex and complicated subject, which becomes more complex as the years pass.[58] It is a subject governed by multiple legislation and regulations. Owing to the importance of taxation in directing the economic focus of most countries, there are constant changes in the tax laws and policy directives of most countries. The National Assembly recently enacted the Finance Act, 2019, which made substantial changes to several tax laws in Nigeria. The Finance Act accompanied the 2020 budget. It is expected that this kind of legislative rejig designed to aid the federal

56 Legomsky *Specialized Justice*, above at note 7 at 20–32. The 12 factors are: mix of law, fact and discretion; technical complexity; decree of isolation; cohesiveness; degree of repetition; degree of controversy; clannishness; peculiar importance of controversy; dynamism; logistics: volume, time per case and geographical distribution; special need for prompt resolution; and unique procedural needs.

57 Id at 20.

58 Tax Policy Center "Why are taxes so complicated?", available at: <https://www.taxpolicycenter.org/briefing-book/why-are-taxes-so-complicated> (last accessed 26 October 2020).

government's economic policies will continue to recur. Thus, the more that new tax laws and related subsidiary legislation are passed, the more complex the body of tax law becomes. As stated above, tax is an interdisciplinary subject covering virtually all aspects of human endeavour. This in itself makes the subject complex.

A look at paragraph 11 of the fifth schedule to the FIRS Act shows lists of federal tax statutes that the current TAT administers. The same federal statutes and, perhaps, more will be the tax statutes that Nigeria's proposed tax court will administer. These statutes, collectively, are voluminous and technical. The fact that not only lawyers but also accountants rely on them to perform their professional duties shows how complex tax laws could be and demonstrates the need for consistency among professionals involved in tax administration. Therefore, a call for the establishment of a specialized tax court is justified. This court would be dedicated to the adjudication of tax disputes.

Special need for prompt resolution

Cases that demand urgent resolution are better handled by specialized courts. Because of experts' familiarity with issues in their areas of concentration, it takes them less time to dispose of cases. Generalists will struggle to understand issues of a technical nature straddling different subject areas within their jurisdiction. This causes delay because these judges (at least in Nigeria) are flooded with cases covering different subject matter, which they battle to clear from their dockets.[59] Of course, other factors lead to delays in the administration of justice in Nigeria; however, it is expected that the introduction of specialist courts will help in the prompt dispensation of justice. In particular, matters demanding urgent settlement are better resolved by specialized courts. Taxation is one major source of revenue for most countries, including Nigeria. The prompt resolution of tax cases reduces administrative costs for tax authorities and ensures that more revenue is readily available for government. It is presumed that, with the establishment of a tax court, tax cases will be promptly resolved.

THE USE OF SPECIALIZED TAX COURTS IN CANADA AND THE USA

The choice of selecting these two countries is informed by the fact that they are western nations with deep histories of tax practice; they are constitutional democracies and, like Nigeria, both practise federalism.

59 A Abuh and A Afolabi "Reps judicial panel decries delays in justice delivery" (15 October 2019) *The Guardian*, available at: <https://guardian.ng/news/nigeria/national/reps-judicial-panel-decries-delays-in-justice-delivery/> (last accessed 26 October 2020).

The US tax court

The importance of the USA in the propagation of democracy and federalism is well-known, and the USA has remained an inspiration to Nigeria in her struggles to solve the myriad of problems confronting her. Thus, the examination of the US Tax Court may serve as an eye-opener to the issue of whether or not Nigeria is doing the right thing or should adjust her system to conform with US practice, while taking into cognizance the local differences between Nigeria and the USA.

Indeed, the USA is one country that has found the use of specialist courts useful in the settlement of many legal challenges that confront her.[60] One area in which the US has deployed the use of a specialized court is in the determination of tax disputes between taxpayers and the Inland Revenue Service (IRS), the federal agency charged with collecting federal taxes.

Historically, the US Tax Court replaced the Board of Tax Appeals (Tax Board), which was established in 1924 as an independent agency within the executive branch of the federal government.[61] At this time, the Tax Board's decisions were not appealable to the Court of Appeal; rather they could be attacked in the federal district court. It was in 1926 that Congress, through the Tax Code, approved that appeals from the Tax Board would go directly to the Court of Appeal, by-passing the district court. This remains the practice today.[62]

The name of the Tax Board was changed to the Tax Court in 1942, and further changed to the United States Tax Court (Tax Court) in 1969.[63] Although the Tax Court is based in Washington DC, it has a physical presence in all cities in the country.[64] In accordance with the provisions of the law creating the Tax Court, it is composed of 19 judges appointed by the US president on the advice and consent of the Senate.[65]

The Tax Court has a nationwide jurisdiction, throughout the USA, to adjudicate tax disputes between taxpayers and the IRS.[66] Trials at the Tax Court are conducted by a judge; the jury system is not used. Individuals are allowed to represent themselves personally or by a qualified legal representative(s) authorized to practise in the jurisdiction where the matter is being heard.

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60 Office of Justice Program "Problem-solving courts", above at note 3.

61 H Dubroff and BJ Hellwig *The United States Tax Court: An Historical Analysis* (2nd ed, 2004, Washington and Lee University School of Law) at 1–3, available at: <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1080&context=fac_books> (last accessed 2 November 2020).

62 26 US Code (2019), sec 7482(a).

63 See Tax Reform Act, 1969 Pub L No 90 - 172 83 Stat 730 (1969).

64 D Laro "The evolution of the Tax Court as an independent tribunal" (1995) 1 *University of Illinois* Law Review 17 at 23.

65 26 US Code (2019), sec 7443(b).

66 L Lederman "(Un)appealing deference to the tax court" (2014) 63 *Duke Law Journal* 1835 at 1836–37.

While the US Tax Court is a specialized court authorized to hear tax disputes nationally, it is not the only court with the jurisdiction to entertain federal tax suits. For instance, jurisdiction over tax disputes with the IRS is trifurcated: ie two other courts of first instance and the Tax Court can exercise original jurisdiction over tax disputes between taxpayers and the IRS. The other two are the Federal District Court and the Claims Court. It is at the Tax Court that a taxpayer is not required to pay upfront the assessed tax liability before commencing an action.[67] The other two courts require that a taxpayer pays their tax liabilities as assessed by the IRS and then commences a refund suit. This encourages forum shopping, which favours the rich. A poor person may not have the opportunity to take his or her case to either of the other two due to impecuniosity. The rich who are able to make use of this pay the assessed amount and only go to either the Federal District Court or the Claims Court to commence a refund suit.

The US Tax Court is an article I court.[68] There has been some debate as to actually what the Tax Court's status is within the US judicial system. Being an article I court means that the Tax Court is now a fully blown court and no longer part of the IRS. However, it is not fully integrated within the US federal courts' administrative framework. Although the responsibility to manage the federal courts resides with the individual courts, federal courts are overseen by centralized bodies, such as the US Judicial Conference and the Administrative Office of US Courts. These centralized bodies assist the article III federal courts[69] to formulate and implement policies and procedures. It should be noted that even the US Court of Federal Claims, which is an article I court, is considered part of the federal judicial system for the purpose of these centralized management bodies.[70] It is therefore confusing to see that Congress omitted the Tax Court from the administrative umbrellas that provide oversight functions for federal courts. The Tax Court is neither an agency of the executive arm nor a member of the judicial arm of the government. It is served by neither the US Judicial Conference or the Administrative Office of US Courts on the one hand, nor the Freedom of Information Act and the

67 L Lederman "Tax appeal: A proposal to make the United States Tax Court more judicial" (2008) 85 *Washington University Law Review* 1195 at 1197.

68 See 26 US Code (2019), sec 7441. Article I courts are federal courts created by Congress in exercise of the legislative power(s) conferred on it by article 1 of the US Constitution. These courts are generally referred to as "legislative courts" set up by Congress to review decisions of specified agencies of the federal government. In the case of the US Tax Court, it is set up to review decisions of the IRS, an agency of the US federal government. Article I courts enjoy certain levels of independence from the legislative and executive arms of the US government.

69 These are courts established under article III of the US Constitution. They form the judicial branch of the US federal government. They include the US Supreme Court and other lower courts created by Congress to adjudicate cases or controversies arising from certain federal laws.

70 Lederman "Tax appeal", above at note 67.

Administrative Procedure Act that serve administrative agencies on the other. This means that the Tax Court is left to its own devices. This is not good practice. The Tax Court should be fully integrated within the federal courts' administrative framework.

Appeals from decisions of the Tax Court go to the Federal Courts of Appeals, regardless that it operates outside the judicial branch. Considering the history of the Tax Court as an administrative agency that grew into the legislative court (article I court) that it is today, it is necessary to understand the standard of review applied by the Court of Appeal when it reviews decisions of the Tax Court. Are the Tax Court's decisions treated with deference? Or are such decisions treated in the same manner as the decisions of district courts in tax matters, where legal questions are reviewed de novo [afresh] while factual questions are reviewed under the "clearly erroneous" standard?

When the Tax Court was an administrative agency, the US Supreme Court led by Justice Robert Jackson in *Dobson v Commissioner*[71] held that appellate courts reviewing decisions of the Tax Court must show deference to them. Perhaps, the reason for this decision may be related to the status of the court at that time as an administrative agency, considered to possess high technical competence that an ordinary court may not have, and also to the desire to discourage unnecessary litigation. However, the *Dobson* rule remained, even after the transmutation to a tax court. Later, opposition against the *Dobson* rule started to grow and Congress quickly reacted by reversing the rule. Thus, Congress directed, through legislation, that decisions of the Tax Court should be treated "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury".[72] This is the position today. The threshold or standard of review applied to decisions of the Tax Court is the same as the appellate court's treatment of decisions of district courts in civil actions.

The standard of review is something of concern. One of the main reasons for establishing a specialized court is for society to benefit from the technical expertise of the members of the court. When decisions are subjected to appellate review by a generalist Court of Appeal, the expected benefit may be lost, especially when judicial review is not restricted to grounds of law alone or with leave of court when the ground of appeal is a mixture of fact and law. In the author's view, if an appellate court must apply the same standard of review employed when reviewing decisions of district courts in civil matters to decisions of the Tax Court, the review should be restricted to grounds of law alone or with leave of court when the ground(s) of appeal is or are a mixture of fact and law.

71 320 US 489 1943.

72 See 26 US Code (2019), sec 7482.

Tax Court of Canada

The history of the Tax Court of Canada (TCC) dates back to 1917 when the Canadian Income War Tax Act, 1917 (War Act)[73] was enacted. Sections 12 and 13 of the War Act provided that appeals against assessment of income tax should lie before a Board of Referees to be appointed by the governor-in-council. Section 17 of the War Act went further to direct that an aggrieved party (ie a taxpayer or minister of finance) could appeal against the board's decision to the Exchequer Court of Canada. The proposed Board of Referees was never created.

In 1983, the TCC was finally established by the Tax Court of Canada Act (TCC Act).[74] Even after its establishment in 1983, several amendments were made to improve the court's status and expand its jurisdiction. For instance, in 1983 the TCC Act transformed the court's immediate predecessor, the Tax Review Board (Review Board), to a tax court, making it independent of the Department of National Revenue to reassure taxpayers that the court is not an extension of the same tax authority with which they contended. However, at this time, the newly established TCC was not yet a superior court of record. It took a subsequent amendment to confer the status of a superior court of record on the court.[75]

The TCC is a statutory court, the jurisdiction of which is circumscribed by the law creating it to review tax appeals against decisions of the Canada Revenue Agency (CRA).[76] In particular, the TCC is invested with the exclusive and original jurisdiction to hear and determine appeals against the CRA's assessment of taxes, interest and penalties under various tax legislation listed in section 12 of the TCC Act.

It is interesting to note that the TCC, unlike its US counterpart, is not just a specialized tax court, but one that exercises original and exclusive jurisdiction to entertain tax disputes arising from the tax legislation listed in section 12 of the TCC Act. Unlike in the USA, there is not much opportunity for forum shopping in Canada, provided the dispute relates to the listed statutes and the remedies sought are not outside section 171(1) of the TCC Act; this is because of the exclusive jurisdiction the TCC has over tax issues.

Another impressive aspect about the TCC is the standard of review of its decisions when reviewed by the appellate courts, ie the Federal Court of Appeal and Supreme Court of Canada. The standard of review applied in reviewing the TCC's decisions is that of "correctness". In Canada, the "correctness standard" is used when the appellate court reviews the decision of a lower court. Generally, administrative agencies' decisions are often reviewed with

73 This was the first income tax legislation enacted in Canada. This act was enacted principally to raise funds for the prosecution of the First World War.

74 The Tax Court was established by SC 1980-81-82-83, c 158, as amended.

75 Courts Administration Service Act, SC 2002 c 8, sec 60.

76 B Alarie and A Green "Policy preferences expertise in Canadian tax adjudication" (2014) 62/4 *Canadian Tax Journal* 985 at 991.

deference. This is not the case with courts. However, in an address delivered in June 2011, Judge John Evans cited with approval the decision of the Supreme Court of Canada in *Housen v Nikolaisen*,[77] where appellate courts are cautioned not to interfere with the TCC's finding of facts or its application of the law to the facts, except where the appellate courts find that the trial court made a palpable and overriding error.[78]

Obviously, this standard of review demonstrates the deference that appellate courts in Canada have for the TCC as a specialized court. In particular, the standard of appellate review of the TCC's decisions could be likened to the US Supreme Court's direction in *Chevron USA, Inc v Natural Resources Defense Council, Inc*,[79] which enjoined courts to treat with deference an executive department's construction of a statutory scheme it is entrusted to interpret.

THE PROPOSED TAX COURT OF NIGERIA

Drawing inspiration from the Canadian experience, this article recommends the establishment of a Tax Court of Nigeria (TCN). Although this court would be modelled on the TCC, there would be some minor differences to suit the Nigerian context. Thus, this article now briefly examines the following important sub-topics: status and jurisdiction of the proposed court; composition of the court, qualification of judges and quorum; development of TCN (Civil Procedure) Rules and a practice direction; appeals against TCN decisions; Court of Appeal as the last court for appeals in tax cases; the abolition of TAT and the establishment of an Appeals Division within FIRS and other tax authorities administering federal tax statutes; and the TCN's remedial powers in tax matters.[80]

Status and jurisdiction of the proposed court

As with the TCC, the proposed TCN should be a superior court of record. To avoid potential disputes relating to the court's status, section 6(5) of the 1999 Constitution should be amended to list the TCN as a superior court of record. On jurisdiction, section 251(1) of the same 1999 Constitution should be amended to expunge from it the FHC's exclusive jurisdiction over issues relating to the revenue of the federal government or any of its agencies. A new section should be created to confer on the TCN the exclusive original jurisdiction to hear and determine cases arising from all the tax statutes enacted by the National Assembly. The TCN's jurisdiction should be both civil and

77 (2002) SCC 33.

78 JM Evans "Judicial confessions or how I learned to love the Income Tax Act" (10 June 2011) (speaking notes for an address to the annual meeting of the Ontario Bar Association, tax law section, Toronto, 10 June 2011), available at: <http://www.fca-caf.gc.ca/fca-caf/pdf/speech-Jun10-2011.pdf> (last accessed 26 October 2020).

79 467 US 837 1984.

80 These sub-issues are not exhaustive.

criminal, provided the matter brought before it centres on any of the proposed list of tax legislation.

Furthermore, the TCN should also exercise appellate jurisdiction over the final decisions of tax authorities administering any of the federal tax statutes. A taxpayer who is aggrieved with the decision of a tax authority (that is, after filing a notice of objection to the authority's assessment or re-assessment) should be free to appeal to the TCN within 90 days from the time the tax authority's final decision was served on him / her.

Composition of the court, qualification of judges and quorum

The TCN should consist of: a chief judge, appointed by the president of Nigeria on the recommendation of the National Judicial Commission, confirmed by the Senate of the National Assembly; such number of judges as may be prescribed by an act of the National Assembly; and associate judges of the TCN appointed by the president on the recommendation of the National Judicial Commission. A person would be qualified to be appointed a judge if s/he has been qualified to practise as a legal practitioner in Nigeria for at least ten years. In addition, they must have had a minimum of five years' experience in tax practice and administration. If a person who does not have this experience is appointed, they would undergo intensive tax law and administration training, conducted jointly by the Nigerian Bar Association and Chartered Institute of Taxation of Nigeria, before being allowed to assume his or her duties. A quorum would be formed once a single judge, who has no personal or pecuniary interest in a matter before him or her, is sitting.

Development of TCN (Civil Procedure) Rules and practice direction

Nigeria's Constitution should also be amended to allow the TCN chief judge to promulgate the TCN (Civil Procedure) Rules and a practice direction. In promulgating civil procedure rules for this court, the TCN chief judge should ensure the rules make provision for civil issues to be fast tracked. For instance, an appeal from tax authorities should be filed within 90 days from the time a taxpayer receives the final decision of a tax authority. Also, the rule could state that any civil matter brought before the TCN must be determined within six months from the time originating processes are served on a respondent. The respondent must file both his memorandum of appearance and defence to the suit within three weeks of being served the plaintiff's or appellant's originating processes. Further, a practice direction should prohibit interlocutory appeals against rulings of the TCN. An appellant must wait until the final determination of the suit on merit. This is necessary because, in cases where interlocutory appeals are allowed, this generally causes undue delays, and mischievous parties use this to frustrate cases they do not want to be heard on merit. The idea is that the TCN's rules of court should be such that civil suits are fast tracked.

Appeals against TCN decisions

As noted above, there should be no interlocutory appeals against the TCN's rulings. At the TCN, both interlocutory objections and the substantive matter on merit should be taken jointly. Thus, appeals against interlocutory ruling(s) and the final decision of the court could be lodged simultaneously. Therefore, section 241 of the 1999 Constitution should be amended to restrict appeals from the TCN to the Court of Appeal to final decisions of the TCN.

Court of Appeal as the last court for appeals in tax cases

Considering that it takes about five to six years, on average, before an ordinary appeal waitlisted in the Supreme Court's docket is heard for the first time, it is recommended that civil appeals should terminate at the Court of Appeal. Only civil appeals based on constitutional ground(s) with leave granted by the Supreme Court should proceed to the apex court. However, criminal appeals to the Supreme Court should be allowed as of right. Sections 233, 240 and 241 of the 1999 Constitution should be amended to accommodate these recommendations.

Abolition of TAT and the establishment of an appeals division within FIRS and other tax authorities administering federal tax statutes

Although the Court of Appeal has repeatedly described TAT as an administrative tribunal, the practice and procedure adopted in TAT resemble exactly what pertains in traditional courts of law. Again, retaining this tribunal in its current form after the TCN's establishment would only prolong the time for the final determination of tax disputes. It is therefore recommended that the National Assembly repeal section 59 of the FIRS Act. In place of TAT, an Appeal Division should be established within FIRS. Also, every state government should be encouraged to enact a tax administration law, creating an Appeal Division within each state's Board of Internal Revenue. The Appeals Division would comprise trained and dedicated staff of each tax authority. An Appeals Division would review administrative appeals against decisions of each tax authority. After the Appeals Division's decision, an aggrieved person could approach the TCN. This is the practice in Canada.[81] Although it may be difficult, an attempt should be made (through orientation, recruitment and internal checks and monitoring) to insulate the Appeals Division from undue influence from other staff.

The TCN's remedial powers in tax matters

Unlike the TCC, which exercises limited remedial powers, the TCN's proposed remedial powers would only be circumscribed to the extent that a remedy to

81 Canada Revenue Service "Resolving disputes", available at: <https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/corporations/after-you-file-your-corporation-income-tax-return/resolving-disputes.html> (last accessed 2 November 2020).

be granted must relate solely to the resolution of tax disputes. Unlike the Canadian provincial superior courts, which are constitutionally empowered to exercise inherent judicial powers relating to their jurisdictions, the TCC, as noted above, is a creation of statute, with its remedial powers restricted or limited by the same statute creating it. Thus, section 171(1) of the Tax Court of Canada Act circumscribes the TCC's remedial powers as follows: "[t]he Tax Court of Canada may dispose of an appeal by (a) dismissing it; or (b) allowing it and vacating the assessment, varying the assessment, or referring the assessment back to the Minister for reconsideration and reassessment."

The unfortunate part of this restriction is that many taxpayers are disappointed that the TCC cannot grant them reliefs or remedies that adequately address their grievances. For instance, the TCC does not have the traditional review powers exercisable by provincial superior courts, such as the power to grant the orders of *mandamus* and *certiorari* [prerogative writs]. Neither does it have the power to review the CRA's exercise of its discretional powers. Also, the TCC does not have the power to grant equitable reliefs based on fairness. In the case of *Brooks v The Queen*,[82] the TCC refused to grant tax relief tied to the Canadian Charter of Rights and Freedoms on the ground that it was outside its remedial powers under section 171(1) of the Tax Court of Canada Act.[83]

Owing to these obvious deficiencies, the Federal Court of Canada and the provincial superior courts have become the next most frequented fora in tax matters, especially when the civil remedies sought by taxpayers are outside the TCC's remedial powers. For instance, in *Leroux v Canada Revenue Agency*,[84] although the British Columbia Supreme Court dismissed the taxpayer's claim of malfeasance and negligence, it did recognize that the CRA could be held liable for such tortious claims if there was sufficient evidence to establish them. It is interesting to note that, before this decision, the British Columbia Court of Appeal upheld the taxpayer's claim.

Thus, the TCC's remedial power is one area that should not be replicated in Nigeria. Unlike the TCC, the TCN would be a constitutional creation, not just an enactment of the National Assembly. It should be conferred with the power to exercise inherent powers necessary to provide adequate relief to an aggrieved party.

CONCLUSION

Nigeria appreciates the importance of establishing a specialized tax court or tribunal in the area of taxation. In pursuit of this goal, several attempts have been made to establish a tax court or tribunal. However, unfortunately,

82 28 February 2019 - 2019 TCC 47.

83 The TCC gave this decision contrary to the Supreme Court of Canada's decision in *R v Conway* [2010] 1 SCR 765, which empowered administrative tribunals to consider and grant equitable relief under the charter.

84 30 April 2014 - 2014 BCSC 720.

none has been successful, at least to the extent that there is an independent tax court or tribunal. Each attempt has been impeded by legal constraints, mainly traced to Nigeria's Constitution. What appeared to be an independent tax court was set up by the military in 1973 via the Federal Revenue Court Decree of 1973 (now the Federal Revenue Court Act, 1973). This Federal Revenue Court was granted the exclusive jurisdiction to hear and determine disputes relating to the revenue of the federal government or any of its agencies. This court continued in operation until the promulgation of the 1979 Constitution by the then outgoing military junta. The 1979 Constitution created a dual model of high courts. The first is the FHC, which was modelled after the Federal Revenue Court. However, the major difference between the Federal Revenue Court and the FHC under the 1979 Constitution was that the FHC did not have exclusive jurisdiction over disputes relating to the revenue of the federal government or its agencies. In particular, the FHC under the 1979 Constitution would not have exercised exclusive jurisdiction over any matter, since the second model of court, a State High Court, created by the same constitution, was conferred with unlimited jurisdiction straddling any conceivable subject matter. Thus, the FHC remained without exclusive jurisdiction until 1993 when Decree 107 of 1993 amended section 230(1) of the 1979 Constitution. Earlier, but also in the same year, Decree No 102 of 1993 established the value added tax regime in Nigeria and, in particular, the Value Added Tax Tribunal. Therefore, the establishment of the FHC with exclusive jurisdiction over the revenue of the federal government or any of its agencies by section 230(1) of the 1979 Constitution (as amended by Decree No 107) pre-empted the Value Added Tax Tribunal established by Decree 102. Although the seeds of conflict were sown by the simultaneous promulgation of both Decrees 102 and 107, there was no recorded challenge against the FHC's status at this time. This remained the case even after the promulgation of the 1999 Constitution by the then outgoing military junta. Of note is that section 251(1) of the 1999 Constitution replicates section 230 (1) of the 1979 Constitution (as amended). The only difference between the two is that section 251(1) creates an additional exclusive jurisdiction, including virtually all the matters contained in the exclusive legislative list of part I to the second schedule of the 1999 Constitution. Therefore, instead of reinventing a specialized tax court, section 251(1) succeeded in creating a super-generalist court in the FHC. This, obviously, is not what the country wants. Therefore, in its continuous search for a specialized tax court or tribunal, the National Assembly enacted the FIRS Act, section 59 of which established TAT, which subsumed and, in fact, assumed the jurisdiction of the VAT Tribunal. Yet, despite the creation of TAT and confirmation of its status as an administrative tribunal by the Court of Appeal, TAT falls short of what an independent tax court should be.

Thus, in search of the theoretical basis for a specialized tax court, this article considered the seminal work of Professor Legomsky to justify the establishment of a tax court in Nigeria. To determine further the nature of the tax court that would befit the country, it examined the models of tax court

that the USA and Canada currently use. The research shows that the Canadian model appears more suitable (with some modifications) to Nigeria. Therefore, this article calls for the establishment of the Tax Court of Nigeria as one way of facilitating the quick and sound dispensation of justice in the country's tax sector.

CONFLICTS OF INTEREST

None