

AN EXAMINATION OF TAX DISPUTE RESOLUTION MECHANISMS IN NIGERIA: A CASE FOR THE ADOPTION OF ALTERNATIVE DISPUTE RESOLUTION METHODS.

Newman U. Richards¹

Abstract

Litigation which is the traditional mode of resolving disputes in Nigeria; over the years has proven not to be the most effective means of resolving tax dispute. This is because it is characterised by undue delays and attendant high cost; which has made it unattractive. It is therefore, imperative to consider the adoption of other modes of dispute resolution in the resolution of tax disputes. The extant National Tax Policy² encourages the use of Alternative Dispute Resolution Mechanisms, especially arbitration in the resolution of tax disputes; however tax authorities don't seem too inclined to consider these options. This paper seeks to examine the constitutional means of tax dispute resolution and advocate for the adoption of alternative dispute resolution mechanisms and tax amnesty schemes in the resolution of tax disputes in Nigeria.

Keywords: Tax Law, Dispute, Tax Amnesty, Courts, Arbitration, ADR, Nigeria.

1. Introduction

Dispute is a natural phenomenon and an inevitable consequence of human interaction. Thus, in every tax system there are instances of conflict between the tax payer and the tax authorities; which could be as a result of assessment of tax or the complete refusal of a tax payer to pay tax. Sometimes, the dispute is between the Federal and State Governments, usually on issues related to the powers to impose or collect taxes. It is expected that tax authorities will enforce tax laws within the ambit of the law and that tax disputes are resolved within a reasonable time. The judicial powers of the federation are vested in courts established for the federation;³ and extends to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.⁴ The constitution specifically established the Supreme Court, Court of Appeal, Federal High court, High Court of the Federal Capital Territory, State High court, Sharia Court of Appeal of the Federal Capital Territory, Sharia Court of Appeal of States, Customary Court of Appeal of the Federal Capital Territory and Customary Court of Appeal

¹ PhD (Awka), LLM (Awka), LLB (Benin), BL, ACI Arb (UK), Legal Researcher and Consultant, Asaba. Contact: honnewman@gmail.com, +2348033865411.

² Adopted by the Federal Executive Council on 1 February, 2017.

³ Section 6(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) (hereinafter referred to as CFRN 1999).

⁴ *Ibid*, section 6(6) b.

of States for the resolution of disputes in Nigeria.⁵ However, this does not preclude the National Assembly or a State House of Assembly from establishing courts other than those listed above, provided that they shall have subordinate jurisdiction to a high court.⁶ Pursuant to this section the federal government established a special tax court, the Tax Appeal Tribunal while several states have established State Revenue Courts to adjudicate on issues arising from the imposing and collection of taxes.

Economic exigencies demand for an effective and efficient way to resolve tax dispute in every tax system. This paper seeks to discuss the various mechanisms provided by law, for the resolution of tax related disputes and explore the possibility of adopting tax amnesty schemes and alternative dispute resolution mechanisms particularly arbitration, in the resolution of tax disputes. For the purpose of this paper the jurisdiction of the Supreme Court, Court of Appeal, Federal High Court, State High Court's, Tax Appeal Tribunal and State Revenue Court on tax matters shall be examined.

2. State Revenue Courts

The House of Assembly of some States, in exercise of their powers to establish courts, other than those specified in the constitution, with subordinate jurisdiction to that of a High Court,⁷ have established State Revenue Courts. For instance, the Delta State House of Assembly enacted the Revenue Court Law of Delta State⁸ and therein established the Revenue Courts of Delta State⁹ which is intended to be a mobile court that can sit anywhere in the State.¹⁰

The jurisdiction of the court shall only relate to revenue matters arising from state laws and the court is a court of summary jurisdiction.¹¹ In other words, the court is to enforce State and Local Government tax laws.¹² The Revenue Court has criminal jurisdiction over tax offenders unlike TAT¹³ and appeals from the Revenue Court lies to the State High Court.¹⁴ The High Court is expected to dispose of the appeal within 30 days or such other period as the court may deem proper.¹⁵ The Revenue Court is similar to TAT, established at the Federal level. However, the controversy over the constitutionality of TAT may not arise in the case of State Revenue Courts; because the jurisdiction the State High Court is not exclusive under section 272 of the 1999 Constitution.

3 Tax Appeal Tribunals.

Tax Appeal Tribunal (TAT) is established by section 59 of the Federal Inland Revenue Service Establishment Act (FIRS(E) Act).¹⁶ Prior to the establishment of the Tax Appeal

⁵ Ibid, section 6(5).

⁶ Ibid, section 6(4) a.

⁷ Ibid, section 6(4)a.

⁸ Cap R7, Laws of Delta State, 2008.

⁹ Section 3(1).

¹⁰ Section 3(2).

¹¹ *Ibid*, Para. 6 of the First Schedule.

¹² Section 4.

¹³ Section 4(3).

¹⁴ Section 9(1) of the Delta State Revenue Court Law, *op cit*.

¹⁵ *Ibid*, section 9(2).

¹⁶ Cap F36, Laws of the Federation of Nigeria (LFN), 2004.

Tribunal, resolution of disputes arising from the administration of federal taxes was through an appeal to the Body of appeal Commissioners for matters relating to Income Tax,¹⁷ and the Value Added Tax Tribunal for matters relating to the administration of Value Added Tax.¹⁸ With the establishment of the Tax Appeal Tribunal, the Body of Appeal Commissioners and the Value Added Tax Tribunal have been scrapped.¹⁹

The tribunal has powers to adjudicate on disputes, and controversies arising from the administration of all federal tax laws including Companies Income Tax Act,²⁰ Personal Income Tax Act,²¹ Petroleum Profits Tax Act,²² Value Added Tax Act,²³ Capital Gains Act²⁴ and any other law contained in or specified in the First Schedule to this Act or other laws made or to be made from time to time by the National Assembly. In addition; enactment or laws imposing collection of taxes, fees and levies within the Federal Capital Territory. 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 licenses, collection of fees for oil exploration licence, oil mining licence, oil production licence, 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 listed.²⁵

By the provisions of the FIRS (E) Act,²⁶ the Tax Appeal Tribunal is expected to be the court of first instance in the resolution of all federal tax related disputes and has the jurisdiction to determine its jurisdiction over any tax matter.²⁷ It is important to state that, TAT does not have criminal jurisdiction. Where the tribunal in the course of adjudication discovers evidence of possible criminality, it shall pass such information to the appropriate prosecution authority for necessary action.²⁸ The tribunal is guided by the Tax Appeal Tribunal (Procedure) Rules, 2010²⁹ made by the Minister, pursuant to his powers to make rules for the Tribunal.³⁰ Any person dissatisfied with the decision of the tribunal may appeal to the Federal High court on point of law within 30 days³¹ and further appeals lie to the Court of Appeal and the Supreme Court.

¹⁷ Established under Section 71 of Company Income Tax Act,(CITA) Cap C21, LFN 2004, but now expunged by the 2007 amendment to CITA.

¹⁸ Established by section 20 of the VAT Act, Cap V1, LFN 2004.

¹⁹ See Section 59 FIRS (E) Act, *op cit*.

²⁰*Op cit*.

²¹(as amended) 2011, Cap P8, LFN, 2004

²² (as amended) Cap P13 LFN, 2004.

²³ *Op cit*.

²⁴ Cap C1, LFN, 2004.

²⁵ Section 59(2) and section 11 of the Fifth Schedule; 59 FIRS(E) Act, *op cit*.

²⁶ *Op cit*.

²⁷ *Federal Inland Revenue Service v General Telecom Plc*, (2012) 7 TLRN, 108 pp at 133.

²⁸ *Ibid*, para. 12 of the FIRS (E) Act.

²⁹ *Ibid*.

³⁰ Para.21, of the Fifth Schedule to the FIRS (E) Act.

³¹ *Ibid*, para. 17.

3.1 The Constitutionality of the Tax Appeal Tribunal.

The debate; on whether the Tax Appeal Tribunal is constitutional or not, has attracted the attention of lawyers, jurists and text writers over the years. The issue has been whether the jurisdiction of the Tax Appeal Tribunal is in conflict with the exclusive jurisdiction of the Federal High Court on Revenue Matters of the federation as enshrined in section 251 of the 1999 Constitution. The argument is an extension of the controversy on the constitutionality of the scrapped Value Added Tax Tribunal and the Body of Appeal Commissioners. In *Stabilini Visinoni v Federal Board of Inland Revenue*,³² the constitutionality of the VAT Tribunal was challenged. The Court of Appeal held that the establishment of the VAT Tribunal³³ was null and void for contravening section 251 of the 1999 Constitution of Nigeria. Based on the *Stabilini's* case, there has been argument, as to whether or not by necessary implication, TAT is unconstitutional.³⁴ Recently the court of Appeal specifically addressed this issue and seems to have resolved the controversy while allowing the appeal against the decision of the Federal High Court in *CNOOC Exploration & Production Ltd & Anor v Nigerian National Petroleum Company & Anor*.³⁵ and held that all tax disputes must commence at TAT and that the jurisdiction of TAT does not conflict with that of the Federal High Court.

Before this decision of the Court of Appeal there have been conflicting decisions of the Federal High Court on this issue that compounded the controversy. For instance, the Federal High Court sitting in Abuja in *TSKJ II Construces Internacional Sociedade LDA v Federal Inland Revenue Service*,³⁶ relying on the Court of Appeal decision in the *Stabilini's case*³⁷ held that the Jurisdiction of TAT is in conflict with the Jurisdiction of the Federal High Court and consequently restrained TAT from adjudicating on corporate taxation and federal revenue.³⁸ Within few months after this decision, the Federal High Court sitting in Lagos in *Nigerian National Petroleum Corporation v Tax Appeal Tribunal & Ors*³⁹ declined to follow the *Stabilini's case*⁴⁰ and held per Buba J that: 'Even if the Tax Appeal Tribunal is manned by legal minds, it does not enjoy the

Status of a Court. It is like a retired Justice of Supreme Court heading arbitration. It does not elevate him to any status more than an arbitral tribunal...'⁴¹ and held that the jurisdiction of TAT does not conflict with that of Federal High Court.

³² (2009) 1 TLRN, 1.

³³ Section 20(2) of the VAT Act vested the VAT Tribunal with coordinate jurisdiction with the Federal High Court, and appeal lies straight to the Court of Appeal.

³⁴ See B Atilola 'Reflections on the Constitutionality of the Newly Constituted Tax Appeal Tribunal' *NJBCL* Vol 1, No. (2010) , 10, 14-15; Ifueko Omoigui Okauru (ed), '*Federal Inland Revenue Service and Taxation Reforms in Democratic Nigeria*' (Ibadan:Safari Books Ltd. 2012, 147.

³⁵ Appeal No. CA/L/1144/2015 and CA/L/1145/2015 Delivered on 10 March 2017 by the Court of Appeal, Lagos Division.

³⁶ (2014) 13 TLRN, 1.

³⁷ *Supra*.

³⁸ *TSKJ II casesupra* at 18-20.

³⁹ (2014) 13 TLRN, 39.

⁴⁰ *Supra*.

⁴¹ Particularly at 93-94. See also, *Tax Appeal Tribunal sitting in Lagos, in Federal Inland Revenue Service v General Telecoms Plc.* 7 TLRN, 108, particular at 114.

Although the Court of Appeal has held that the Jurisdiction of TAT does not conflict with that of the Federal High Court in *CNOOC Exploration & Production Ltd & Anor v Nigerian National Petroleum Company & Anor*,⁴² it appears that the provisions of 251(1) of the 1999 Constitution clearly vested on the Federal High Court exclusive jurisdiction over all matters relating to the revenue of the Federal Government and Company taxation. Thus, the controversy may continue until the matter is finally addressed by the Supreme Court. However, the controversy generated on the constitutionality of the establishment of TAT does not in any way affect the desirability of having such a tribunal.⁴³ The advantage of TAT is that it will ensure speedy resolution of tax matters and help to decongest the Federal High Court. It will also allow tax matters to be resolved at first instance by a specialized court. Thus, there is need to amend section 251(1) of the CFRN 1999 to recognize TAT as the court of first instance in Federal tax matters, while the Federal High Court will exercise appellate jurisdiction over it.

4 The Federal High Court.

The Federal High Court⁴⁴ is established by section 249 of the 1999 Constitution.⁴⁵ The jurisdiction of the Federal High Court is contained in Section 251(1) of the 1999 Constitution.⁴⁶

A cursory look at the jurisdiction of the Federal High Court shows that, it has exclusive civil and criminal jurisdiction in all federal tax matters, including everything that has to do with the revenue of the Federal Government, Company taxation, custom and excise duties, import duties, fees for mining licenses and taxes from petroleum and minerals etc.

The Court of Appeal summarised the exclusive jurisdiction of the Federal High Court on Federal Tax Matters in *Lagos State Internal Revenue Board v Motorola Limited & Anor*⁴⁷ as follows:

Under section 251(1)(a) of the 1999 Constitution, the Federal High Court exercises jurisdiction to the exclusion of any other court in causes and matters relating to the revenue of the Government of the Federation in which the said government or any of its agencies is a party.⁴⁸

Thus, the Federal high court has jurisdiction over all federal tax matters and appellate jurisdiction over the Tax Appeal Tribunal. However, by the decision of the Court of Appeal

⁴² *Supra*.

⁴³ See the dictum of Ademola J in *TSKJ II Construces Case, Supra*, Particular at 21.

⁴⁴ Was originally called the Federal Revenue Court. The history of the Federal High Court dates back to the promulgation of the Federal Revenue Court Decree No. 13 of 1973. In 1979, the Federal High Court was created by Section 238 of the Constitution of the Federal Republic of Nigeria, 1979 and the Federal Revenue Court Decree was renamed Federal High Court Act.

⁴⁵ *Op cit*.

⁴⁶ *Op cit*.

⁴⁷ *Supra* at p.186.

⁴⁸ Particular at p. 198.

in *CNOOC Exploration & Production Ltd & Anor v Nigerian National Petroleum Company & Anor*,⁴⁹ all federal tax matters must commence at TAT.

5. State High Courts.

The Constitution of the Federal Republic of Nigeria 1999 establishes High Court for each State of the Federation⁵⁰ and the Federal Capital Territory.⁵¹ The jurisdiction of a State High Court is provided in section 272(1) of the CFRN 1999.⁵² The jurisdiction of a State High Court and the High Court of the Federal Capital Territory is subject to that of the Federal High Court. Thus, a State High Court does not have jurisdiction over any matter that has to do with the revenue of the Federal Government or taxation of companies,

State High Courts have both civil and criminal jurisdiction over all tax matters in respect of which the State Houses of Assembly have powers to legislate on, including the enforcement of State and Local Government tax laws. The area that may generate some controversy is which court between the Federal High Court and State High Courts; has the powers to adjudicate on matters arising from the administration of taxes imposed by an Act of the National Assembly but administered by States Governments like the Personal Income Tax.⁵³ This issue was resolved in *Lagos State Internal Revenue Board v Motorola Nigerian Limited & Anor*,⁵⁴ where the court of Appeal in allowing the appeal held that:

The subject matter of this suit has nothing to do with the operation of 1st Respondent's Company and even if the action is to challenge the lawfulness of the Act of enforcing an alleged tax liability, it is not questioning the power of the National Assembly to make the law and since it is expressly stated that it is the State that can enforce the payment of Personal Income Tax, the challenge should go to the State High Court.⁵⁵

This judgment is unassailable, and reflects the letter and the spirit of the Constitution, on the principles of federalism. The Federal High Court has no business with the enforcement of State revenue generation matters.

6. The Court of Appeal.

The Court of Appeal is established by section 237 of the CFRN 1999. The Court of Appeal has no original jurisdiction on tax matters; however, the Court has powers to hear appeals on tax matters arising from the decisions of the Federal High Courts, State High Courts, and the High Court of the Federal Capital Territory.⁵⁶

It appears that it is unnecessary for appeals on tax matters to get to the Court of Appeal except the issue bothers on the right to impose and collect taxes or the interpretation

⁴⁹ *Supra*.

⁵⁰ Section 270 of the CFRN 1999, *op cit*.

⁵¹ *Ibid*, section 255.

⁵² See section 257(1) of the CFRN 1999, for the jurisdiction of High Court of the Federal Capital Territory

⁵³ Section 88 of the PITA (as amended), *op cit*, delegates the collection of personal income tax to States.

⁵⁴ *Supra*.

⁵⁵ Particular at 198.

⁵⁶ *Ibid*, Section 246(1).

of the provisions of the Constitution. Other tax issues can sufficiently be resolved by the Federal or State High Courts. In practice very few tax cases go beyond the high court; it is therefore suggested that the Constitution should be amended to restrict further appeals on tax matters from the High Courts to the Court of Appeal to only issues that bothers on the right to impose and collect taxes or the interpretation of the provisions of the Constitution, and such appeals shall be with the leave of the Court of Appeal.

7. The Supreme Court

This is the Apex Court in Nigeria; it is established by section 230(1) of CFRN 1999. The Supreme Court has exclusive appellate jurisdiction to hear and determine appeals from the Court of Appeal.⁵⁷ Thus, the Supreme Court is the final arbiter on all tax disputes. It is opined that it is unnecessary for appeals on tax matters to get to the Supreme Court, except the issue bothers on the right to impose and collect taxes or the interpretation of the provisions of the Constitution. Issues of tax assessment and liability can sufficiently be resolved by the Federal or State High Courts. It is therefore, suggested that the Constitution should be amended to restrict further appeals on tax matters from the Court of Appeal to the Supreme Court to only issues that bothers on the right to impose and collect taxes or the interpretation of the provisions of the Constitution. This will help to reduce the cost of administration of taxes and compliance time when litigation is involved,

8 Alternative Dispute Resolution Methods. (ADR)

Litigation over the years has proven not to be the best and fastest way of resolving disputes. However, it is the constitutionally prescribed mode of dispute resolution. In Nigeria, litigation has been characterized by undue delays and attendant high cost, which has made it unattractive, to the extent that litigants often ask the question, ‘why do I want to get into it, when I don’t know when I will get out of it?’ For instance, in *Alh. Baba Saleh v Alh. Sheitama Monguno*,⁵⁸ it took about 24 years for a dispute on mortgages to be resolved from the High Court to the Supreme Court. Over the years, the use of Alternative Dispute Resolution (ADR) Mechanisms has become attractive, because it gives the parties to a dispute the opportunity to use other means of resolving their dispute other than litigation. The use of ADR⁵⁹ has proven to be an efficient and effective means of resolving disputes because of its advantages. Some of the advantages in contradistinction to litigation are that:

- (a) it encourages the use of experts; the parties are allowed to choose a person vast in their area of dispute to help them resolve the dispute e.g. a tax expert for tax matters; unlike the court where the judge, who is a lawyer, adjudicates on all type of cases.
- (b) It allows some flexibility in terms of procedure; parties are allowed to choose venue and even the people to resolve the dispute.
- (c) It is faster in most cases.

⁵⁷ Section 233(1) of the CFRN 1999, *op cit*.

⁵⁸ (2006) 7 SC (pt. 11) 97-99.

⁵⁹ Some authors prefer to describe it as Private Dispute Resolution Mechanism (PDR) see Chukwuemeka E Ibe, *Insight on the Law of Private Dispute Resolution in Nigeria*, (Enugu: El Demak Publishers, 2008), 3.

The extant Nigerian National Tax Policy encourages the use ADR in the resolution of tax disputes.⁶⁰ ADR methods involve negotiation, mediation, conciliation, arbitration etc. It is not intended to discuss, the forms, technicalities and the use of these methods in detail. The intention here is to examine the possibility of applying these methods in the resolution of tax disputes in Nigeria.

8.1 Negotiation.

Negotiation has been defined as a consensual bargaining process in which the parties attempt to reach an agreement on a disputed matter. Negotiation usually involves complete autonomy for the parties involved, without the intervention of third parties.⁶¹ According to Nwosu, 'Negotiation is communication with a view to reaching agreement.'⁶² Thus, negotiation is a process, where the parties to a dispute attempt to resolve the disputes themselves without the assistance of a third party. The pertinent question is whether it be an effective tool to resolve tax disputes? It seems that tax laws in Nigeria clearly allow the use of negotiation to resolve tax matters. As a matter of fact, negotiation is the first step in the tax dispute resolution mechanism in Nigeria. For instance, under the provisions of the Company Income Tax Act⁶³ and Personal Income Tax Act,⁶⁴ a person that is disputing an assessment is not expected to rush to TAT or the Courts. He can apply to the relevant tax authority by notice of objection in writing to review and revise the assessment.⁶⁵ On receipt of the objection, the tax authority may request for more particulars or books and may invite any person who may be able to give information for examination.⁶⁶ Where the tax payer and relevant tax authority agrees as to the correct amount of the tax chargeable, the assessment shall be amended accordingly.⁶⁷

This is clearly a form of negotiation, and the fastest way of resolving disputes relating to tax assessment. It is when they are unable to agree that the tax payer will be left with no other option than to seek other ways to resolve the dispute.

8.2 Mediation.

Mediation has been defined as 'a method of nonbinding dispute resolution involving a neutral third Party who tries to help the disputing parties reach a mutually agreeable solution.'⁶⁸ Mediation has been described as '...essentially negotiation that includes a third party who is knowledgeable in effective negotiation procedures, and can help people in conflict to coordinate their activities and to be more effective in their bargaining'.⁶⁹ Thus, mediation involves a third party assisting the parties to resolve the dispute, this will be

⁶⁰ Adopted by the Federal Executive Council of Nigeria on 1 February, 2017. See Para. 4.5.

⁶¹ Bryan A Garner (ed in Chief) *Black's Law Dictionary*, (9th edn. Minnesota: West Publishing Co, 2009) , 1136.

⁶² Kelvin N Nwosu, 'Critical Issues in Negotiation' (2004) *1 NDRJ*, 1; Chantal Epie 'Alternative Dispute resolution: Understanding the Problem Solving (win/win) Approach in Negotiations.' (2004) *1 NDRJ*, 74.

⁶³ *Op cit*.

⁶⁴ *Op cit*.

⁶⁵ Section 58(1) PITA, *op cit*; section 69(1) CITA *op cit*.

⁶⁶ Section 58(2) PITA, *op cit*; section 69(4) CITA.

⁶⁷ Section 58(3) PITA, *op cit*; section 69(5) CITA.

⁶⁸ Bryan A Garner, *op cit*, 1070-1071.

⁶⁹ C Moore, *How Mediation Works*' cited in Chantal Epie, *op cit*, 79.

necessary for instance, where negotiations have reached a deadlock, and it has become obvious that the parties cannot resolve the disputes themselves.

It might be difficult to use mediation like negotiation as a means of resolving tax disputes, because it is an informal way of resolving disputes, and has no statutory backing and as such the agreements may not be enforceable. Thus, parties may not be inclined to subject themselves to a mediation process. Tax authorities, being public agencies will naturally not be inclined to subject themselves to an informal third party especially when the outcome of the process may be difficult to enforce.

8.3 Conciliation.

Conciliation has been defined as ‘a process in which a neutral person meets with the parties to a dispute and explores how the dispute might be resolved, especially a relatively unstructured method of dispute resolution in which a third party facilitates communication between parties in an attempt to help them settle their difference.’⁷⁰ This definition seems to suggest that mediation and conciliation mean the same thing; as they both involve the process of a neutral third party helping the parties to arrive at an amicable settlement of the dispute. It seems that the difference between mediation and conciliation may be mere semantics. The difference seem to be that, while there is no legal backing for mediation under the laws of Nigeria, there is legal backing for conciliation. Sections 37-42 and the third schedule to the Arbitration and Conciliation Act⁷¹ provides for the use of conciliation in the resolution of disputes.⁷² Although, Conciliation is statutory unfortunately, the rules failed to provide for the mode of impeachment and enforcement of settlement agreement.⁷³

There is hardly any known instance where parties have resorted to conciliation in tax matters. The lacuna on its enforceability is a major reason, and it may not be suitable for the resolution of tax disputes. Taxes arise from commercial activities thus; no commercial minded person will want to be involved in a dispute resolution method, that may not be enforceable.

8.4 Arbitration.

Arbitration has been defined as ‘a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.’⁷⁴ Under the Arbitration and Conciliation Act,⁷⁵ Arbitration is defined ‘as a commercial arbitration whether or not administered by permanent arbitral institutions.’⁷⁶ This definition falls short of a proper definition. Arbitration is wider in scope than is being portrayed by this statutory definition. In Nigeria, Arbitration can be classified into International and Municipal. Municipal Arbitration includes Customary Law Arbitration,

⁷⁰ Bryan A Garner, (ed), *op cit*, 329.

⁷¹ Cap A18, LFN, 2004.

⁷² For a detailed discussion on Conciliation, see Chukwuemeka E Ibe, *op cit*, 63-77.

⁷³ *Ibid* at 75.

⁷⁴ Bryan A Garner (ed), *op cit*, p. 119.

⁷⁵ *op cit*

⁷⁶ Section 57(1).

Common Law Arbitration and Statutory Arbitration.⁷⁷ Statutory Arbitration in Nigeria is regulated by the Arbitration and Conciliation Act.⁷⁸ For parties to be subject to arbitration, it must be by written agreement. It is either their contract agreement has an arbitration clause, or they agree to refer their dispute to arbitration. Unlike mediation and conciliation, arbitrators have powers to make binding decisions and arbitral awards are enforceable in the High Courts as if they are judgments of the High Court.⁷⁹

Arbitration is an effective alternative to litigation but the issue is whether tax matters are arbitrable in Nigeria? The extant Nigerian National Tax Policy provides that ‘ In the event of any dispute, the tax authority and relevant stakeholders shall leverage on all amicable means of dispute resolution including arbitration and only resort to judicial determination as a last resort’⁸⁰ However, in practice tax authorities frustrate the use of arbitration in tax disputes. For instance, in *Federal Inland Revenue Service v Nigerian National Petroleum Corporation & 4 ors.*⁸¹ The plaintiff (tax authority) brought an action seeking the determination of whether the Arbitral Tribunal had jurisdiction to determine the subject matter of taxation of the defendants by the plaintiff; a jurisdiction which is ordinarily conferred on the Federal High Court by section 251(1) of the 1999 Constitution. The 2nd to 5th defendants had dragged the 1st defendant to an arbitral panel pursuant to the arbitration clause in their production sharing contracts. Before the awards were given, the FIRS approached the Federal High Court to stop the arbitral proceedings on the grounds that tax issues were raised in the arbitral proceedings, which are not resolvable by arbitration. The Federal High Court upheld the contention of the FIRS and voided the arbitral awards given while the court was still sitting.⁸² Similarly, the Court of Appeal, Abuja Division held in *Esso Petroleum and Production Nigeria Limited & SNEPCO v NNPC*⁸³ and *Shell (Nig) Exploration and Production Ltd. & 3 ors. v Federal Inland Revenue Service*⁸⁴ that arbitral tribunals has no jurisdiction to determine any dispute with tax implication as same is exclusively vested in the Federal High Court.⁸⁵ The implication of these decisions of the Court of Appeal is that arbitral clauses usually included in production sharing contracts are not enforceable.⁸⁶

These decisions clearly foreclose the use of arbitration in the resolution of tax matters, unless the Supreme Court holds otherwise. With the greatest respect the Court of Appeal appears to be inconsistent on the interpretation of the implications of the exclusive jurisdiction of the Federal High Courts under section 251 of the CFRN 1999. This is more as the Court of Appeal had recently in *CNOOC Exploration & Production Ltd & Anor v Nigerian National*

⁷⁷ Chukwuemeka E Ibe, *op cit*, p. 86.

⁷⁸ CAP A18 LFN 2004.

⁷⁹ Section 31 of the Arbitration and Conciliation Act, *op cit*.

⁸⁰ Paragraph 4.5.

⁸¹ (2012) 6 TLRN, 1.

⁸² Particular at 4.5.

⁸³ Unreported Appeal No. CA/A/208/2012 delivered on 22 July, 2012.

⁸⁴ Unreported Appeal No. CA/A/208/2012 delivered on 31 August, 2012.

⁸⁵ For a more detailed discussion see Funke Adekoya and Ibifubara Berenibara ‘Case Review: Esso Petroleum and Production Nigeria Limited & SNEPCO v NNPC www.aalex.com accessed 14 December, 2017; Olaniwun Ajayi,’ Tax Dispute in The Oil and Gas Sector: Are they Subject to Arbitration. <www.olaniwunajayi.com> accessed 14 December,2017.S

⁸⁶ Funke Adekoya and Ibifubara Berenibara ‘Case Review: Esso Petroleum and Production Nigeria Limited & SNEPCO v NNPC *op cit*, 3.

*Petroleum Company & Anor.*⁸⁷ held that the exclusive jurisdiction of the Federal High Court does not preclude the existence of Tax Appeal Tribunal and that all tax matters must commence at TAT. It follows by necessary inference that the exclusive jurisdiction of the Federal High Court should not be a bar on the use of arbitration in the resolution of tax disputes. It is hoped that at the earliest opportunity the Court of Appeal will revisit their position on the non arbitrability of tax dispute. This is more so as, it will be better to interpret the exclusive jurisdiction of the Federal High Court section 251 of CFRN 1999 in relation to other courts created by the constitution and not to extend it to arbitral tribunals that run on a separate track⁸⁸

Surprisingly, the *Federal Inland Revenue Service v Nigerian National Petroleum Corporation & 4 ors*⁸⁹ was initiated by the tax authority⁹⁰ and the FIRS in the Court of Appeal decisions under reference had argued against the arbitrability of tax disputes. While it is in the interest of the country that revenue is not lost as a result of an award against the FIRS; the FIRS ought not to have frustrated the possibility of resolving tax disputes through arbitration. This is because the National Tax Policy is a brainchild of the FIRS and the extant National Tax policy in force when those matters were instituted, encourages the use of Alternative Dispute Resolution mechanism especially arbitration in resolving tax dispute.⁹¹ The FIRS ought to be at the forefront of encouraging the use of ADR in resolving tax disputes considering the advantages of ADR rather than subjecting itself to the uncertainties of litigation.

The position on tax arbitration seems not to be different in other jurisdiction. In the Uganda case of *Heritage Oil & Gas Limited v Uganda Revenue Authority*⁹² the appellant entered into a production sharing agreement with the Government of the Republic of Uganda. The said agreement contained an arbitration clause to the effect that dispute will be referred to arbitration in accordance with the United Nations Commission for International Trade Law (UNCITRAL) arbitration rules. The High Court of Uganda per Helen Obura J. refused to give effect to the arbitral clause on the grounds that tax matters are statutory and not contractual, thus cannot be varied by contractual agreements.⁹³

Furthermore, a study of several South American countries like Colombia, Ecuador, Argentina, Peru, Bolivia reveals that, their laws does not support the use of Arbitration in the resolution of tax disputes.⁹⁴ For instance, in Colombia Article 70 of the Colombian Alternative Dispute Resolution Law 1988 excluded tax disputes from dispute that is resolvable by Alternative Dispute Resolution.⁹⁵ Similarly, in Ecuador, the Ecuadorian

⁸⁷ *Supra.*

⁸⁸ See Olaniwun Ajayi, 'Tax Dispute in The Oil and Gas Sector: Are they Subject to Arbitration, *op cit*, 3.

⁸⁹ *Supra.*

⁹⁰ Oluchi Monye, 'FIRS Secures Landmark Judgment Against the Arbitration of Tax Disputes' *Gauge* April – June, 2012, 20.

⁹¹ See para. 5.6 of the former National Tax policy adopted by the Federal Executive Council on 20 January, 2010.

⁹² (2013) 9 TLRN, 55.

⁹³ *Ibid* at 71-72.

⁹⁴ NQ Cruz, 'International Tax Arbitration and the Sovereignty Objection: The South American Perspective,' (2008) 51, *Tax Notes Int'l* No.6, 534.

⁹⁵ *Ibid*, at 535.

Arbitration and Mediation Law, 1997, does not allow the arbitration of tax disputes.⁹⁶ The rationale seems to be that tax is considered an issue of public order in those States thus; it must be enforced through publicly recognized channels, that is, the court.⁹⁷ However, in international matters, several countries have embraced the idea of International Tax Arbitration in resolving disputes arising from tax treaties.⁹⁸

It is therefore suggested that the tax dispute resolution mechanism in Nigerian can be strengthened by exploiting the use of Alternative Dispute Resolution Mechanism, especially Arbitration. Most disputes arising from taxation are based on assessment and computation of taxable income. Thus, if an expert sits on an ADR panel, he may be able to resolve the dispute on assessment and computation faster than a Judge. It is further suggested that the law and rules regulating the Tax Appeal Tribunal should be amended to allow parties elect to subject their dispute to any of the Alternative Dispute Resolution Mechanisms. In that case the parties shall be bound by the outcome of the Alternative Dispute Resolution process and can only appeal to the Federal High Court. Furthermore the Federal High Court should be vested with powers to enforce the awards on tax matters from Alternative Dispute Resolution processes.

9. Prosecution of Tax Offences.

The various tax laws provide for different offences and penalties. At the moment Nigerian tax laws contain about 48 offences and penalties.⁹⁹ The aim of providing tax offences in our laws is to discourage tax evasion. For an act or omission to constitute a tax crime, it must be prescribed by a written law.¹⁰⁰ It is not intended to go into a detailed discussion of tax offences and penalties, which are outside the scope of this work;¹⁰¹ rather the aim here is to look at the administration of tax criminal regime in Nigeria.

In Nigeria, there is hardly any reported case of a company or a person successfully prosecuted for tax evasion.¹⁰² But in Europe and the United States of Americas, there are several of such cases. For example, the following celebrities have been convicted for tax evasion; Stephen Baldwin, Lauryn Hill, Fat Joe, Willie Nelson, Pete Rose, Ja Rule, H. Ty Warner, Wesley Snipes, Willie Nelson, Nicolas Cage, Teresa and Joe Giudice, Darryl Strawberry, Heidi Fless, Leona Helmsley, Joe Francis, Domenico Dolce and Stefano Gabbana.¹⁰³ In Nigeria, the tax authorities seem not to be too inclined to take criminal actions against tax offenders,¹⁰⁴ they appear to prefer civil action to recover the tax due,

⁹⁶ *Ibid* at 536.

⁹⁷ *Ibid*.

⁹⁸ *Ibid* at 533.

⁹⁹ Ike Odume, Tax Offences and Penalties Compendium, (Abuja: FIRS, 2012) 31. This Compendium Contains a detailed list of all the tax offences and penalties under the various tax laws.

¹⁰⁰ See Section 36(12) of the CFRN 1999, *op cit*.

¹⁰¹ For a detailed discussion on Tax Offences, see OT Akinsola 'Tax Crime – Implication and Challenges for Tax Professionals,' *Nigerian Tax Notes*, (2011) Vol 16 No.5; Kwaghkehe Lerkwagh, 'An Appraisal of the Regime of Criminal Sanctions in Nigerian Tax Law' (2012) *NIALS Journal of Business Law*.

¹⁰² Section 36(12) of the 1999 Constitution, *op cit*.

¹⁰³ Laura Woods, '15 Celebrities Convicted for Tax Evasion' *The Inquirer Daily News*, 13 January, 2016. www.philly.com assessed 30 November, 2017.

¹⁰⁴ Kwaghkehe Lerkwagh, *op cit*. 57.

rather than pursue criminal causes that will lead to the conviction of tax offenders and payment of penalties.

There is a debate among scholars whether or not penal provisions in Tax Acts can serve, any useful purpose. Kanyip- has argued that imprisonment of tax offenders does not reflect economic realities, he observed that: ‘...there exist at present, empirical knowledge on taxation as to how, when and whether sanctions work. ...imprisonment of a tax payer means the productive capacity to produce for future tax is incarcerated...’¹⁰⁵ He suggested further that, instead of imprisoning a convicted taxpayer he should be made to pay an amount five times the tax evaded; as is the practice in United States of America and Switzerland.¹⁰⁶ Lerkwagh does not support the above view, according to him:

These submissions can be faulted on several fronts. The submission that the imprisonment of a defaulting taxpayer will limit the productive capacity to produce income for future tax is not supported by any empirical evidence and does not agree with simple logic. This is in view of the fact that if a tax payer refuses to pay tax on income already earned, there is no guarantee that he will be willing to pay tax on his future income.¹⁰⁷

It does not seem that criminal sanctions will be an effective tool, to guarantee tax compliance; rather imposition of penalties for default of payment may be more effective. There is need for tax authorities to evolve strategies to recover tax from tax evaders, without necessarily truncating their ability to earn; considering that the more income earned, the more tax to be collected. Rather than prosecuting tax defaulters, they should be denied some social benefits by making access to certain critical social services like hospitals, renewal of international passports, renewal of operating license of companies etc. subject to evidence of tax compliance. Furthermore, introduction of tax amnesty schemes could help tax evaders to regularise their tax status within a short time.

10. Tax Amnesty

An amnesty has been defined as ‘an act of erasing from legal memory some aspect of criminal conduct by an offender.’¹⁰⁸ Thus, it implies forgiveness from a wrongful act. Tax amnesty has been defined as ‘a waiver or reduction and sometimes removal of penalties in back taxes to encourage defaulting taxpayers to pay what they owe within a specified window.’¹⁰⁹ It has also, been defined as ‘a time-bound opportunity for defaulters to pay a defined amount relating to a previously unpaid tax liability (which may include interest and

¹⁰⁵ BB Kanyip cited in Kwagheke Lerkwagh *op cit*, 52.

¹⁰⁶ *Ibid.*

¹⁰⁷ Kwagheke Lerkwagh, *op cit*, 52-53.

¹⁰⁸ Jonathan Law and Elizabeth A Martin (eds) ‘Oxford Dictionary of Law’ (7th ed. Oxford: Oxford University Press, 2009) 32.

¹⁰⁹ Deloitte “Amnesty for Tax Defaulters” <<https://www2.deloitte.com/ng/en/pages/tax/articles/inside-tax - articles/amnesty-for-tax-defaulters.html>> assessed on 25October 2017.

penalties) without the fear of criminal prosecution.’¹¹⁰In other words it is a scheme that allows tax defaulters to voluntarily declare their assets and income and pay outstanding tax liabilities within a specified time, on the expectation that tax authorities will either waive penalties, interest, tax audit and investigation, prosecution of tax defaulters or in some cases reduce the principal tax liabilities. A tax amnesty scheme must be backed by some sort of legislation to make it effective and usually involves the relaxation of tax laws to encourage tax defaulters discuss their tax debt with the tax authority. At the expiration of the amnesty period the tax authorities will enforce the tax laws on tax defaulters who fail to take advantage of the scheme by commencing tax audits, investigations and prosecution.

Tax amnesty is a strategic fiscal policy measure to encourage voluntary compliance in the payment of tax and has some obvious advantages. Some of the advantages are that it could lead to an increase in tax revenue and widen the tax net within a short time. In addition it helps to improve the tax data bank of the revenue authorities and increases the level of information and awareness on tax matters of the populace. Furthermore, it reduces the cost of tax administration and helps to trigger the repatriation of capital abroad.¹¹¹ However, there are criticisms against the introduction of tax amnesty, some of which are that it is unfair to complain tax payers for the government to give reliefs or benefits to defaulters as it invariably rewards people who have cheated the governments and seems to give a pat on the back to criminals considering that tax evasion is a crime.¹¹² Notwithstanding these criticisms, the desirability of tax amnesty as a short term measure to encourage tax defaulters to regularise their tax status cannot be faulted.

Tax amnesty has been effectively used in several countries across the world. There is no specific structure or approach to tax amnesty, every country adopts the approach and structure that suits her specific needs and challenges in line with its fiscal policy objectives.¹¹³

10.1 Tax Amnesty in Nigeria

In Nigeria, the concept of tax amnesty is relatively new, for a long time it was not considered a strategy for tax administration; although some tax laws had provisions under which tax defaulters could be granted reliefs in the form of remission of taxes, penalties and interest as a means of encouraging voluntary compliance and increasing tax revenue. For instance, Sections 89 and 23 (2) of the Companies Income Tax Act¹¹⁴ gives the President powers to remit or exempt wholly or in part any tax payable by a company on any ground that appears

¹¹⁰ Folajimi Olamide Akinla, ‘VAIDS Imperatives and the Role Of Stake holders’ A paper presented at the Sensitisation Workshop on VAIDS organized by the Federal Ministry of Finance in Conjunction with PriceWaterCooperHouse (PWC). On 28 September 2017, 13.

¹¹¹ *Ibid*; Josephine AA Agbonika ‘ Tax Amnesty For Delinquent Taxpayers: A Cliché In Nigeria’ Global Journal of Politics and Law Research Vol.3, No.3, pp.105-120, June 2015 (Published by European Centre for Research Training and Development UK (www.eajournals.org)), 105-120.

¹¹² *Ibid*.

¹¹³ See Folajimi Olamide Akinla, ‘VAIDS Imperatives and the Role Of Stake holders,’ *op cit* ;Josephine AA Agbonika ‘ Tax Amnesty For Delinquent Taxpayers: A Cliché In Nigeria’ Global Journal of Politics and Law Research Vol.3, No.3, pp.105-120, June 2015 (Published by European Centre for Research Training and Development UK (www.eajournals.org)), 105-120.

¹¹⁴ (As Amended) 2011, Cap C21, Laws of the Federation of Nigeria, (LFN) 2004.

sufficient to him as just and equitable. In the same vein, the Governor of a State on the advice of the commissioner of finance and the relevant revenue authority can remit wholly or in part, personal income tax, if he is satisfied that it is just and equitable to do so.¹¹⁵ Also, the revenue board¹¹⁶ has power to remit either wholly or in part penalties and interest on unpaid taxes.¹¹⁷ Furthermore, the revenue board has powers to compound tax offences by accepting sums not more than the maximum fine prescribed for the offence.¹¹⁸

The earliest attempt to introduce tax amnesty in Nigeria was in October 2016 when the Federal Inland Revenue Service (FIRS) declared a 45 days tax amnesty on penalties and interest for outstanding tax liabilities for the years 2013-2015 by a public notice.¹¹⁹ The amnesty was a partial amnesty and was by way of waivers and pardon for accumulated interest and penalties. The waivers covered all federal taxes including personal income tax collectable by the FIRS, interest and penalties for late registration, late filling of returns and late payment for a period of 3 years, 2013-2015.¹²⁰ To take advantage of the amnesty scheme a written application addressed to the FIRS declaring the tax indebtedness of the organization within 45 days, is accompanied with evidence of part payment of not less than 25% or full payment of undisputed tax liabilities and a schedule of a payment plan for the balance. This was the closest attempt at tax amnesty in Nigeria before the introduction of the Voluntary Assets and Income Declaration Scheme (VAIDS) in 2017.

10.2 Voluntary Assets and Income Declaration Scheme (VAIDS).

The scheme which is an initiative of the Federal Ministry of Finance, the Joint Tax Board, FIRS and State Boards of internal revenue was launched by the then Acting President on the 1 July 2017 by an executive order.¹²¹ The scheme provides a Nine months period (commencing on 1 July 2017 and ending on 31 March 2018) for tax defaulters to declare their income and assets from sources within and outside Nigeria relating to the preceding six years of assessment and pay their outstanding tax obligation.¹²² The scheme affords all tax defaulters (corporate and individuals) including those who earn income and own assets but are yet to register with the relevant tax authorities, those who are registered but have been under declaring their income and assets or have not been filling returns and

¹¹⁵ See section 80 Personal Income Tax Act (as amended) 2011, (PITA) Cap P8, LFN, 2004. Note that in Nigeria, personal (individual) income tax is administered by states except for the federal capital territory.

¹¹⁶ The Federal Inland Revenue Service.

¹¹⁷ See section 85 (3) CITA, *op cit*; section 79 PITA, *op cit*; section 32 (3) Federal Inland Revenue Service (Establishment) Act, 2007. (FIRSE Act)

¹¹⁸ Section 48 (1) FIRS(E) Act, *op cit*.

¹¹⁹ See Taiwo Oyedele, 'FIRS Declares Tax Amnesty' (*PWC Nigeria*, 5 October 2016), <http://pwc-nigeria.typepad.com/tax_matters_nigeria/2016/10/firs-declares-tax-amnesty-.html> 16 October 2016. For a Downloadable copy of the notice. ; See also, Dyepkazah Shibayan 'Hurray! FIRS Grants Partial Amnesty to Tax Defaulters' (*The Cable*, 17 October 2017) <<https://www.thecable.ng/hurray-firs-grants-partial-amnesty-tax-defaulters>> Assessed 16 October 2016.

¹²⁰ Deloitte 'Clarifications of FIRS Waiver of Penalty and Interest' (*Deloitte Tax Alert*) <<https://www2.deloitte.com/ng/en/pages/tax/articles/clarification-of-firs-waiver-of-penalty-and-interest.html>> Assessed 16th October, 2017.

¹²¹ Executive Order No. 004, 2017. Downloadable copy available at 'Download VAIDS Executive Order: Tax Matters Nigeria' (*PWC Nigeria*) <<http://pwc-nigeria.typepad.com/files/vaids-executive-order.pdf>>. assessed 16 October, 2017.

¹²² Paras. 2 and 3.

those undergoing audits and/or engaged in disputes with the relevant tax authority who are ready to settle out of court¹²³ an opportunity to make voluntary, complete, full and verifiable declarations in the prescribed forms, while the relevant tax authority will assess the tax payable based on the declarations made.¹²⁴

The VAIDS scheme which is geared towards curbing tax evasion and stimulating voluntary tax compliance¹²⁵ has similar benefits with the previous amnesty scheme. Under this scheme immunity from prosecution for tax offences and tax audits, waivers from interest and penalty are granted to tax payers who make full and complete declarations and are willing to pay all outstanding taxes. Also, tax payers are allowed to pay outstanding tax liabilities over a period of 3 years in installment as may be agreed by the relevant tax authorities.¹²⁶ However, the waivers granted under the scheme; does not invalidate judgments of courts on already accrued penalties and interest.¹²⁷ The VAIDS Executive Order shall be read in conjunction with all extant tax laws, regulations and guidelines as well as those that may be issued pursuant to the Scheme¹²⁸ and the scheme covers all federal and state taxes.¹²⁹ Tax defaulters who fail to participate or make false declarations will be denied the benefits of the scheme and thus be liable to pay in full the principal sum due, penalties and interest and could face prosecution for tax evasion and comprehensive audits.¹³⁰

The VAIDS initiative is a welcome development, considering the low level of voluntary compliance and the unquantifiable accumulated tax arrears of individuals and companies over the years. The government hopes to through the VAIDS scheme raise additional tax revenue of 1 billion dollars and equally hopes to increase the tax to GDP ratio to 20% by 2020.¹³¹ These objectives are laudable but not easily realisation considering the general apathy towards the payment of taxes in Nigeria and the lack of adequate data. Amnesty programmes should not always be targeted at short term revenue generation; sometimes it is more effective when it de-emphasises short term revenue generation and focuses on bringing more people into the tax net, which in the long run will yield higher revenue.

11. Conclusion

An effective and efficient tax dispute resolution mechanism is part of the requirement of an investor friendly environment. Relying on Litigation alone in the resolution of tax dispute does not seem to be the best approach, because of its inherent challenges does not seem to be. Thus, there is the need to consider the use of Alternative Dispute Resolution Mechanism especially Arbitration in the resolution tax dispute in Nigeria. It is expected that the FIRS should play a facilitative role in the adoption of ADR mechanism in the resolution of tax dispute in Nigeria rather than frustrate such attempts.

¹²³ Para. 4.

¹²⁴ Para.5.

¹²⁵ Para. 3.

¹²⁶ Para. 6.

¹²⁷ *Ibid.*

¹²⁸ Para.12.

¹²⁹ Para. 7.

¹³⁰ Para. 8.

¹³¹ Jide Ajani 'The VAIDS Revolution Gathers Momentum' *Vanguard Newspapers*, (Lagos, 10October 2017) 24.

Also, tax amnesty schemes have proven to be effective in making hitherto tax defaulters compliant. It is a positive development that Nigeria is giving serious attention to tax amnesty. Tax amnesties as a fiscal policy measures has the capacity to increase tax revenues within a short time. Oftentimes, the target of most tax amnesty schemes is revenue generation; however a country should look at the state of its tax system and model its tax amnesty programme to suit its peculiar needs. In Nigeria, tax amnesty schemes have basically been targeted at increasing tax revenues within a short time rather than improving the tax system and increasing the level of tax compliance. For tax amnesties to be effective they should be preceded by necessary reforms that will sustain the gains of the amnesty scheme.