TAX OBJECTIONS PROCESSES, NIGERIA, WEST INDIES AND OTHER COMPARATIVE JURISDICTIONS

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Abstract

This paper examines the fundamentals of tax objection processes in Nigeria, the West Indian and other comparative jurisdictions. Comparative laws are essentially corroborative laws. Nigerian jurisdiction has something to learn and profit from foreign jurisdictions. There are abuse of powers amongst few Tax Administrators and Tax

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Practitioners in Nigeria, - all they want is to maximize collections of revenue - taxes both authorized ones and unenforceable ones in a bid to meet the target set by masters/politicians. In doing so oftentimes in most brute manners - they not only trample on the rights of the Taxpayers, they disadvantage them, seal-off premises when demands are not met. Citing cases from similar jurisdictions would enable all of us to educate ourselves - tax teachers, tax administrators, tax practitioners, tax policy makers and the Parliament of National Assembly known about what is happening in other jurisdictions and how to reform our own domestic laws in line with 'global best practices'.This paper attempts to scrutinize theapplicable principles in the commonwealth countries with identical common law such as the Caribbean States of Jamaica, Barbados, Guyana, Saint Lucia, Trinidad and Tobago in contradistinction with international best practices obtainable from Nigeria, USA, UK, Ireland, Canada, Ireland, Malaysia, Singapore, New Zealand, Australia, Nigeria, Kenya, Uganda, Tanzania, Zambia, Zimbabwe, Malawi and others in an effort to reform the subject-matter.

Addressing the similarities, differences, statutory developments and judicial responses thereof; this paper evaluates the preliminary processes of objection prior to appeal, the roles of Tax Appeal Tribunals (TATs) to hear, adjudicate tax disputes and the finality of tax litigations through the hierarchies of appellate courts. The discourse aims to provide international benchmark to guide, tax

administrators, tax practitioners prosecute and defend tax cases to avoid pitfalls. The reforms are proposed for the establishment of Independent Agency in Nigeria comparable to that of "**Revenue Appeals Division of Jamaica**[1] (RADJ)'' to handle and determine 'tax objections' fairly, quickly for Federal, States and Local Government taxes and levies, in accordance with international standards and the establishment of National **Tax Courts (NTCs)** as superior court of records comparable to US, Canada, Jamaica and South Africa. These would make tax disputes' adjudication more functional, if these reforms are introduced in Nigeria. There is also the need to alleviate the hardship caused to taxpayers' litigants' escalated expenses and journey risks in long distance travels to various zones of TATs. The reversal of burden of proof through legislative reform is advocated. Instead of burdening the taxpayer, it is better to impose the onus on the Relevant Tax Authorities (RTAs) to establish that their tax assessments were predicated on the right principles. The adaptation of US model Internal Revenue Service (IRS) styled 'National Taxpayers Advocate' is suggested as a form of legal aid to assist indigent taxpayers who cannot afford legal representation in tax resolution matters. These reforms are vital as litigation is a crucial component in tax administration as per its utility to provide precedents which would guide future actions of both the taxpayers and RTAs[2] in development of tax jurisprudence

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[1] Established under Revenue Appeal Division Act 2015 (RAD). It streamlined the appeal processes and guaranteed the independence of RAD as tax disputes adjudicating Agency or body. Presently, FIRS, SBIR and LGARC do not Agency to handle objections because they hand-pick few personnel to handle objections

[2] The equivalent to FIRS (Federal Inland Revenue Service), SBIR (States' Board of Internal Revenue Service), LGARC (Local Government Revenue Committee) are the Australia Tax Office (ATO), Canadian Revenue Agency (CRA), New Zealand Inland Revenue Department (NZIRD), TAJ (Tax

for cases that are similar or identical in material facts to the decided cases.

Keywords: Comparative tax objections and reforms in tax disputes adjudication.

The summary of the area covered are as follows;

1. Introduction to the subject-matter of Objection,

2. Preliminary issues and Assessment to tax,

3. Individuals and Corporate taxpayers must file Annual Tax Returns,

4. Tax as Constitutional Obligation to support the Government with Funds to Finance Projects – all the Residents must Report Income,

5. Administrative Assessment to tax, Defaults, Best of Judgement and Field Tax-Audits,

6. Notice of Assessment must be served on the taxpayer

7. Objection must be in written form,

8. Suspension of Obligation to pay tax until objection is validly determined,

9. Extension of time to file objection, extension by conduct, estoppel and waiver,

10. Lodging objection out of time and mode of application for extension and enlargement of time,

11. What constitutes good causes to warrant and merit extension of time, are inexhaustible?

12. The substance, ingredients and the validity of objection,

13. Tax Objection Precedents from the Tax Practitioner's office,

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Administration Jamaica) which replaced the Inland Revenue Department (IRD) 2011 pursuant to - Revenue Administration (Amendment) Act 2011 (RAAA Jamaica).

14. Assessments of taxes made on Repealed Tax Laws,

15. Assessments of taxes made on Income Tax Act Promulgated without Legislative Authority, is Void,

16. Lagos High Court Set Aside, Nullified Executive-Made Tax Law – Taxes and Levies (Approved Lists for Collection) Order 2015 - an encroachment on Legislative Powers of National Assembly to Promulgate Tax Laws,

17. Executive-Fiat-Made Tax Laws are beyond delegated legislation and constitute mere Proposals for Reforms,

18. Refund and Recovery of Taxes, though lawfully collected pursuant to Tax Laws that were later Nullified by the Courts and Precedents from Nigeria, Malaysia, Zimbabwe, South Africa and West Indies,

19. Contents of Letter of Objection,

20. Hearing and Disposition of Objections and its Consequences,

21. Conclusion of Objection and Appeal to the Courts,

22. Failure to Issue Notice of Refusal to Amend (NORA) – time-limits for NORA not stated – Precedents from Canada, Tanzania, Jamaica and Australia,

23. Lapsed Objections,

24. Continuous Objections to assessment, amendment of assessment – frivolous objections? And its effect,

25. Sealing of taxpayer's premises unless tax is paid without the order of the High Court,

26. Failure to File Objection and Consequences,

27. Assessments without Objection is final and conclusive,

28. Remedies of Judicial Review and Public Purpose Litigation,

29. Conclusions and Proposals for Reforms – National Tax Court of Nigeria as Superior Court of Records comparable to USA, Canada, Jamaica, South Africa, Proximity Factors in Location of Tax Appeal Tribunals etc

Before delving further, general introduction would suffice to set the general background.

1. INTRODUCTION TO SUBJECT MATTER OF TAX OBJECTIONS

Objection is the process of resolution of grievances of taxpayers from unsatisfactory actions/decisions of tax administrators who constitute the RTAs. It is in-house, internal handling - administrative mechanism without the resort to external litigation.[3] Through objections, complaints and grievances over tax assessments are reviewed, addressed and settled internally (if it is possible). Disagreements over tax calculations are settled internally through mechanism of objection[4], without going to court. Appeal is the external review of complaints over tax charges by judicial processes involved in court litigation.[5] Objections and appeals constitute the machineries of adjudication of tax controversies.[6]

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[3] Guilders, Taylor, Richardson & Walpole – Understanding Taxation in, Interactive Approach pp.992-994 (2004) 2nd Ed Lexis Nexis Melbourne Australia.

[4] S.54 (1) (2) (a) PITA 1993 as amended 2011 (Nigeria). S. 75 (4) Income Tax Acts (Jamaica), S. 94 (St Lucia), S. 57 (Barbados), S. 86(1) (Trinidad & Tobago).

[5] S.41 Personal Income Tax Act (PITA) 1993 as amended in 2011, S. 51 Company's Income Tax Act 1977 (CITA) as amended (Nigeria) S. 75 (1) Income Tax Acts (Jamaica), S. 97(1) (St Lucia), S. 59(1) (Barbados), S. 86 (7) (Trinidad & Tobago) See Roberts v. Commissioner of Taxes (below).

[6] Claude H Denbow (Dr) – Objections and Appeals chapter 12, Income Tax Law in Commonwealth Caribbean (1997) pp. 168 – 176 (Butterworths London) and Jack-Osimiri, U; & O'Sullivan, M. (Dr) - Dynamics of Tax Appeals in Nigeria (2014) Vol. 13 (No.1) Journal of Taxation and Economic Development pp.1-37

Both centers principally on over-payments – tax improperly paid - taxpayers' successfully asserting right to refund and verification of deficiency-in-payments by RTAs and ability of taxpayer to successfully resist it.[7]

2. PRELIMINARY ISSUESON SUBJECTS - ASSESSMENTS TO TAX

Assessments are raised on income, gains or profits of companies/individuals in respect of trade, profession, employment or vocation on income which accrued in, derived from, brought into or received in respect of business, property, office or employment, in the country of residence or where the transaction was operated.[8] The taxpayer has obligation to file income tax returns[9] through self-assessment[10] which shall contain duly completed form, audited financial statement, tax computation and evidence of payment of the whole tax or part of it. Tax disputes occur when there is a disagreement between taxpayer and RTA over the former's tax liabilities,[11] entitlements to expenses wholly, exclusively, reasonably incurred, reliefs and related issues.[12] It basically goes

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[7] Freeland, Lind & Stephens – Fundamentals of Federal Income Taxation in USA (1982) pp.959-1007 4th Ed. (Foundation Press Inc. Mineola New York).

[8] S. 5 (1) (a) (ii) Income Tax Acts (Jamaica), SS. 3(1), 5(1) (a) (b) (c) (d) (Barbados), SS. 5(1) (c) (d) (e) (Trinidad & Tobago).

[9] S. 53 (2) Income Tax Act (Barbados)

[10] Nigerian Tax Administration (Self-Assessment) Regulations 2011.

[11] Binh Tran-Nam & Michael Walpole – Independent Tax Disputes Resolution and Social Justice in Australia (2012) 35 University of New South Wales Law Journal 470 at 477

[12] Melinda Jones – Evaluating Australia's Tax Disputes System: A System Design Perspective (2015) vol. 13 (No.2) 552 at 563 e-Journal of Tax Research in Australia

beyond mere complaint,[13] expression of dissatisfaction by taxpayer or his/her agent about the quality of services, actions or inactions of the staff of RTA such as undue delays, unclear/misleading information, staff demands, misbehaviours, mistakes leading to misunderstanding, omission or oversights.[14]

3. INDIVIDUALS' AND CORPORATE TAXPAYERS MUST FILEANNUAL TAX RETURNS

It is obligatory for individuals' and corporate taxpayers, to file[15] and deliver annual returns[16]in a prescribed form. The annual tax returns must contain details/particulars of their taxable income,[17] proper books of account kept with records of transactions from trade, business, profession or vocation to RTA - Federal Inland Revenue Service (FIRS) for taxation of income of companies and States Board of Internal Revenue (SBIR) for taxation of income of individuals. Assessment is a tax charge on income – the chargeable gains or profits of every chargeable person for an accounting period – that particular year of income.[18] On receipt, RTA may accept the

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[13] Tania Sourdine - Alternative Dispute Resolution p.133 (Thomson Reuters 4th Ed.2012)

[14] Canadian Revenue Agency – What is Service Complaint and What is not? (26 June 2013 <http://www.cra-arc.gc.ca/gncy/cmlntsdpts/srvccmplnts/dfntn-eng.html>

[15] S.41 Personal Income Tax Act (PITA) 1993 as amended in 2011, S. 51 Company's Income Tax Act 1977 (CITA) as amended (Nigeria). See Roberts v. Commissioner of Taxes (below).

[16] *Infra Quest Limited v. Negeri* (below).

[17] S.161 Tax Assessment Act 1936 (Australia), S.33 Tax Administration Act 1994 (New Zealand)

[18] S. 72 (1) Income Tax Acts (Jamaica), S. 83 (1) (Trinidad & Tobago), S. 53 (1) (Barbados), S. 85 (1) (St Lucia)

returns and issue notice of assessment.[19] The compliance with this legal stipulation is strict. In *Robert v. Commissioner of Taxes*[20] it was held that annual return of income must be filed by the end of the financial year and the assessment must reflect the computation of income for the 12 months ending on 31 March in the year in question. Similarly, in *Infra Quest Limited v. Negeri,*[21] it was held that the law expects reasonable taxpayer to use due diligence to submit his returns, the court found that the taxpayer complied by filing its returns within time-frame in year 2003-2004 and that the impugned notices issued by RTA's officials were invalid, wrong in law and therefore of no effect whatsoever.

4. TAX AS CONSTITUTIONAL OBLIGATION OF RESIDENTS TO SUPPORT THE GOVERNMENT WITH FUNDS TO EMBARK ON PROJECTS

This process has been replaced by on-line electronic filing via e-tax website together with TIN – tax identification number. The obligation to file a return subsists whether a profit is made or loss was incurred.[22] Strictly speaking, the reporting of income is a constitutional matter imposed on individuals, corporate citizens and foreign residents. Section 24 (F) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides that: -

> ….it shall be the duty of every citizen/resident to declare his/her income honestly to the appropriate and lawful agencies and pay his/her tax promptly.

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[19] S.54 (1) (2) (a) PITA 1993 as amended 2011 (Nigeria).

[20] (1924) Rhodesian LR 33 (High Court Bulawayo Zimbabwe)

[21] (2017) 7 MLJ 35 at 36 per Bache J (Malaysia High Court).

[22] *Commissioner for Inland Revenue v. Grover* (1987) 2 NZLR 736 (New Zealand CA).

Violation of this obligation is a despicable act which strips the defaulter protection afforded by law.[23] Self-assessment is mandatory constitutional requirement imposed on all taxpayers to furnish returns.

5. ADMINISTRATIVE ASSESSMENTS, DEFAULTS, BEST OF JUDGEMENT, ADDITIONAL ASSESSMENT BASED AND FIELD TAX AUDITS

On receipt, RTA may accept the returns and issue notice of assessment.[24] There may be a pre-assessment query in form of rejection of a claimed deduction expenses or inclusion of amount of income such as undisclosed interest or dividend.[25] If the tax payer fails to deliver self-assessment returns, the RTA would normally issue "Administrative Assessment" in default[26], based on estimates

[23] Independent Television/Radio v. Edo State Board of Internal Revenue (2015) 12 NWLR (Pt.1474) 442 at 443 where Nigerian CA condemned the scuffle over non-remittance to Edo State BIR, of taxes deducted from employees' salaries and that this conduct is detrimental to the development of the nation.

[24] S.54 (1) (2) (a) PITA 1993 as amended 2011.

[25] Binh-Tran-Nam & Michael Walpole (above) at 478

[26] To ensure the validity of BOJ, RTA must first of all send written request demanding the taxpayer to file return – See *Mohammadu v. Oturkpo LGA* (1973) NNLR 112 where the court held that service of notice of assessment cannot be inferred and failure to serve it is not a mere defect in the procedure but nullifies all subsequent proceedings. It is only in default that valid BOJ could be issued. Strictly speaking, assessment must comply with this condition otherwise, it is null and void - See Ebosele v. State Tax Board (1976) 6 ECSLR 281 where the court held that income tax assessment made without a request for returns of income as provided by income tax law was made without jurisdiction. In *Makurdi LGA v. Billa* (1973) NNLR 101, it was held that the court would only act where there is a certificate signed by duly authorized RTA showing sufficient evidence of the amount of tax which the taxpayer is owing.

on the basis of information generated from the access to taxpayer's books and documents. This may also be in form of the "Best of Judgment" (BOJ) assessment which determines or estimates the total amount or chargeable income.[27] Where the taxpayer defaulted in supplying the relevant information, the RTA issuing the BOJ must not act capriciously but exercise his judgement honestly – fair estimate of proper figures attributable to the taxpayers' income

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[27] S.54 (1) (2) (a) PITA 1993 as amended. Where the taxpayer does not furnish the returns within the 30 days' time limit the FBIR/SBIR is entitled to raise best of judgment assessment taking into account his/her earnings for the period in question – See *Board ofInternal Revenue v. Sholanke* (1974) FHCLR 40 (Federal High Court of Nigeria Law Report) where taxpayer, a legal practitioner was assessed for arrears of tax and penalty for 3 years 1965 / 66, 1966 / 67, 1967 / 68 which he did not file statement of accounts of his professional income even though he was served with notice in writing. It was held that under S.24 PITA 1961 (Lagos State), if a notice was sent and taxpayer failed to furnish his professional income, the IRC was entitled to raise best of judgment assessment which must be fair, not punitive and not excessive. See also *Government of Malaysia v. Singh* (1986) 2 Malaya LJ 185 where the Supreme Court held that since there was no response to the various notices issued, the RTA was entitled to compute tax based on BOJ under S.91 (1) Income Tax Act and the onus to prove the allegation that the assessment was excessive, erroneous, malicious, vindictive lies on the taxpayer and in this case the burden had not been discharged. Similar views were expressed in Tanzanian cases – *Karia v. Shah* (1962) EALR 43 and *Income Tax Commissioner v. Ngaremtoni Estate Limited* (1970) EALR 511 (East African Law Reports) where CA held that the onus of proving the assessment was excessive, expenditures reasonably, necessarily, exclusively incurred cannot be discharged by providing false accounts. See also the West Indian – Guyana case of Argosy company Limited v. Commissioner Inland Revenue (1971) 2 WILR 502 at 503 where Privy Council held that RTA must also show the grounds on which they formed opinion that taxpayer was liable to pay tax on BOJ assessment and where there is no such prima facie evidence which no reasonable person could rely upon, such assessment is bad.

taking into consideration his previous returns. In *Bi-Flex (Caribbean) Limited v. Board of Inland Revenue,*[28] a garment manufacturing company's returns for the years 1971-74 could not be traced due to destruction by fire in 1975 but it furnished duplicate copies of its returns for those years. The figures showed trading losses for each of those years. On the basis of information obtained from other garment manufacturers, IRC discovered the percentage of the gross profits were understated. The privy council upheld the court of appeal judgment and held the BOJ was sustainable because in absence of records from the company, IRC was justified to use an acceptable accounting method utilizing the sparse materials available. The court was emphatic that a large element of guess-works must be involved and it was on this basis that a reference to the average gross profit of other garment manufacturers, formed the foundation of a rational BOJ assessment.

The RTA may nevertheless issue **additional assessment** where they dispute self-assessment returns on the basis of deficiency or under-declaration of income,[29] it discovered new facts or where it has formed different opinion as to the legal effect of the same facts on which the same assessment was made.[30] These fresh materials, evidence or information could be obtained from whatever source including the examination of books, records of accounts, the internal and **field tax-audits**, especially where additional source of income is discovered which ought to be charged to tax and they

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[28] (1990) 38 WILR 344 Privy Council appeal from CA Trinidad and Tobago.

[29] In *Negeri v. Chong* (below).

[30] S. 72 (4) Income Tax Acts (Jamaica), S. 54 (Barbados), S. 86 (St. Lucia), S. 89 (Trinidad and Tobago)

will increase the liability to higher amount of tax.[31] This would also be so where on the examination of the returns the taxpayer under-stated his/her tax liability due to discovered mathematical errors.

Sometimes unapproved claims or over-stated allowable expenses may have been deducted which led to under-payment of tax due.[32] Therefore, after totaling these sums of moneys, profits are discovered which show deficiency in the sum assessed to tax. In *Negeri v. Chong*[33] the taxpayer was found to have under-declared, his income for certain years. Notice of additional assessment was issued base on 22 percent of gross profit ratio (GPR) - the figure based on the first tax returns. GPR was upheld by the Special Commissioners for Income Tax. The High Court reduced it to 8 percent. The Court of Appeal Malaysia held that there was no basis for the reduction as it was not supported by evidence but mere opinion of the judge and therefore reinstated the 22 percent and was emphatic that it was just, appropriate and based on the evidence available.

The discovery of additional income and its sources must be backed by evidence that the income was actually received by the taxpayer. Where the alleged income is not received, the taxpayer is not

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[31] S.55 (1) PITA 1993 as amended 2011. Under S.48 CITA additional income latter discovered could induce FIRS to send additional assessment to the taxpayer. See the case of OLA v. FBIR(1974) FHCLR 70 at 71where the Court held that if the FBIR after making an assessment discovers some source of income not included in the earlier assessment, they are justified to raise additional assessment after the service of the relevant notices on the taxpayers.

[32] Robinson – An Inquiry into Tax Assessment Processes (1980) Vol. 35 Tax Law Review 285

[33] (2012) 4 Malaya L.J 184 at 185

obliged to pay. In *Cosmos v. Board of Internal Revenue*[34] where the appellant was originally assessed to pay N37. It was later revised because BIR substituted reassessment of N905 tax and N64 development levy because they obtained fresh information based on declaration the taxpayer erroneously made his application to Ministry of Lands, Enugu for allocation of a plot of land where he claimed his income was N6000. The taxpayer rejected the additional assessment on the ground that he confused capital income from his overseas assets with his real income in Nigeria. The Court held that the Additional income tax cannot stand unless there is proof and that the plea of mistake of inserting N6000.00 as his income when it was in fact capital expenditure must be accepted because there is no denial through counter-affidavit by the Internal Revenue.[35]

Similarly companies are required to file their returns[36] or further returns[37] through self-assessment process, compute the tax liability payable and show evidence of direct payment of the whole or part

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[34] (1973) ECSLR 661 at 662-663 (East Central State of Nigeria Law Report).

[35] See also *Mobil Oil Nigeria Limited v. FBIR* (2011) 5 TLRN 167 at 176-182 (Tax Law Report of Nigeria) where the Supreme Court of Nigeria held that additional assessment can be made on the discovery of new facts such as new source which disclosed additional income.

[36] S.57 Companies Income Tax Act (CITA) 2004 as amended. Individual tax payers must furnish FIRS or SBIR all information relating to the taxable income so that an assessment can be made regarding the amount payable as tax - See SS. 41,42,43,44,47, 51 CITA 1990 – see *Mgbemene v. Board of Internal Revenu*e (1980) IMSLR 460 (Imo State of Nigeria Law Reports).

[37] S. 58 CITA 2004 as amended. Petroleum Profits Tax is also payable in dollars into Central Bank of Nigeria (CBN) account with designated Banks – See Shell Petroleum Development Co. Limited v. FBIR (2004) 3 FWLR (Pt. 859) 46

of the tax due in the currency such as dollars, pounds sterling and Euro in which the transaction giving rise to the assessment was affected.[38]The RTA may proceed to issue assessment to the company's chargeable income where its audited accounts and return are acceptable.[39] Alternatively, the RTA may refuse to accept the return and proceed with its own best of judgment and determine the amount of the total profits of the company and make an assessment on it accordingly.[40] Like the private individual taxpayer, where the Company fails to deliver its return, the RTA may use its "Best of Judgment" to determine the amount of the total profits and make the assessment accordingly.[41] Similarly, if there is evidence (obtained from whatever source such as audit[42] of a return) of additional income and the company tax payer has not been assessed the full amount it ought to pay, the RTA may determine additional tax giving notice of the assessment of additional amount of tax which ought to have been changed.[43] In Jamaica, the RTA[44] is empowered to make additional assessments to tax where it appears the taxpayer has not been assessed or has been assessed to a less amount that he ought to haven charged within the year of assessment or within 6 years thereafter.[45]In

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[38] SS 52, 53, 54 and 55 CITA 2004.

[39] S. 65 (1) (2) (a) CITA 2004.

[40] S. 65 (1) (2) (b) CITA 2004.

[41] S. 65 (3) CITA 2004. 2004.

42. Suzette Chapple – Income Tax Dispute Resolution; Can We Learn from Other Jurisdictions? (1999) 2 Journal of Australian Taxation 312 at 318

[43] S. 66 (1) CITA 2004. There is a requirement that the notice of assessment shall specify the particulars or details of tax liability of the tax payer - See Ola v. FBIR (above) per Omoh-Eboh J (as she then was)

[44] Commissioner for Taxpayers' Audit and Assessment (CTAA)

[45] S. 72 (4) Income Tax Act (Jamaica)

chang v. Commissioner for Taxpayers Appeals[46] additional assessments of $12, 125, 393.75 and $8,136,090.94 being the value of investment gains derived from business activities conducted from a non-licensed Investment Club. The taxpayer challenged it and alleged the incomes were not his but investments of funds he made on behalf of his friend, a foreign national. Anderson J[47] disbelieved him and dismissed his appeal. The Jamaican Court of Appeal upheld the additional assessments were well-founded because the taxpayer's claims were not supported with documentary evidence[48]and therefore constitute additional income arising from trading gain from business activity he conducted and therefore properly charged as additional income tax.

Once this process is completed, there must be compelling reason for a tax duly assesses and paid to be reopened and reassessed again, the court would determine what circumstance the additional assessment shall become arbitrary and capricious.[49]

6. NOTICE OF ASSESSMENTS MUST BE SERVED ON TAXPAYER

In all cases, there is a requirement that notice of assessment stating total profits, amount of tax payable[50] shall be served on the tax payer[51] by RTA. It could be sent by registered post or through

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[46] (2016) JMCA Civil 16

[47] Jamaican Revenue Court is the equivalent of High Court.

[48] Unanimous decision of Dukharan, Sinclair-Haynes and Morrison JJA.

[49] *Ukpong v. Commissioner for Finance & Economic Development* (2006) 19 NWLR (Pt. 1013) 187 (2006) 11-12 SC 36 (2007) 2 CLRN 1 at 24

[50] S. 68 CITA 2004, *Mohammadu v. Oturkpo LGA* (below), *Barclays Bank Limited v. Zimbabwe Revenue Authority* (below).

[51] In *Mohammadu v. Oturkpo LGA* (1973-1975) NNLR 112 (Northern Nigeria Law Report) the CA held that the service of notice of assessment cannot be

courier service or electronic mail stating the amount of assessable, total or chargeable income, the amount of the tax charged and the designated banks where payment should be made.[52] The issuance of notice of assessment is a condition precedent to liability of the taxpayer to discharge obligation to pay tax. In*Barclays Bank Limited v. Zimbabwe Revenue Authority*[53] Makoni J held that ZRA could not garnish the taxpayer's funds, without assessments issued and served in compliance with the requirements of SS. 2 and 51 Income Tax Act stating taxable income, credits to which the tax payer is entitled and any assessed loss ranking for deductions and since the document failed to comply with these requirements, it is invalid.

Similarly in *Nizaba International Trading Limited v. Kenya Revenue Authority*[54] the Kenya High Court held that notice of assessment[55] must be served on the taxpayer, he must be informed of his right to lodge an objection and once an objection has been raised, it is incumbent on the Commissioner of Taxation to act on

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inferred but failure to serve it is not a mere defect in procedure but its effect is to nullify all the subsequent proceedings.

52 S. 57 PITA 1993 as amended 2011.

53 (2004) 2 Zimbabwe L.R 151 at 152

54 (2000) Kenya L.R. 587 at 588. In Ireland's cases of *Deighan v. Hearne* (1990) 1 IR 499 and *Criminal Assets Bureau v. M* (2001) 1 IR 121 O'Sullivan J held that prior demand note of the unpaid tax is required before the commencement of proceedings for the recovery of income tax which was due and payable.

55 In Malaysian jurisdiction, the notices of assessment validly posted to the taxpayer's last known address, may be accepted by the court as judicial and official acts regularly performed, in absence of the controverting evidence adduced by the taxpayer refuting the assertion – see *Kerajan Malaysia v. Central Strata Limited* (2013) 5 Malaya L.J 728 at 729 (High Court)

its statutory duties and it is not enough to remain inactive and state that there is no provision in the Income Tax Act to amend an assessment which has been made pursuant to an earlier assessment. Finally, the notice of assessment must also inform the taxpayer of his right to raise objection to the assessment within 30 days. The taxpayer may either agree or disagree with the assessment. If he/she agrees, the tax must be paid within the statutory period of 60 days from the date of the receipt of assessment notice.

7. OBJECTION MUST BE IN WRITTEN FORM

Objection is the method available to taxpayers to formally protest, dispute assessment, challenge errors in tax computation or inaccurate and improper decision by RTA. Taxpayer is only obliged to pay tax where a valid assessment had been served. An informal tax dispute would commence where assessment is under review - post-assessment review of affairs such as value of rental property, its associated claims, audited income and expenditures in the taxpayer's returns[56] or where the disputes cannot be resolved through amended assessment issued based on adjusted taxable income. If the taxpayer disagrees with the assessment, he/she may apply to RTA by **notice of objection in writing,** urging them to review and revise the assessment made.[57] Dissatisfied taxpayer may do this by himself or through tax adviser/chartered-tax-practitioner within **30 days**[58] from the date of the service of notice

[56] Binh-Tran-Nam & Michael Walpole (above) at 478

[57] S. 69 (1) CITA 2004.

[58] It is 90 days – See S.165 Income Tax Act (Canada), 60 days - SS. 84 & 85 Income Tax Act (Kenya), 30 days – S.91 (4) Income Tax Act (Tanzania) , 30 days – SS. 101 &102 Income Tax (Uganda), 60 days - S. 14ZW(1)(aa) Tax Administration Act 1992 (Australia)

of assessment.[59] The filed notice in writing must specify the relevance **grounds of objection** - amount assessable, total profits in year of assessment and amount of tax[60] payable as contained in notice[61] of assessment served personally or sent by registered post, courier or electronic mail, within 30 days.[62] At this stage, formal tax dispute had commenced. The grounds of objection must be backed with supporting documents and contain alternative tax computation.

The next consideration is who can file written objection? Taxpayers must file written objection personally or through their agent/chartered-tax-advisor.[63] In respect of the employer/employee relationship, it is the employee who is the taxpayer that can do so personally[64] or through employers on his/her behalf.[65]especially where RTA served demand notice/assessment on the employer and not the employee, it can validly file written objection on behalf of the employee.

8. SUSPENSION OF OBLIGATION TO PAY OF TAX UNTIL OBJECTION IS VALIDLY DETERMINED

RTA is under a duty to communicate its decision[66] (to reconsider the deficiency of tax complained of) whether with positive or

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59 30 days – See S. 76(1) Income Tax Acts (Jamaica), 59(1) (Barbados), S.97 (1) (St. Lucia) and S. 86(1) (Trinidad and Tobago).

60 S. 69 (2) (a) (b) (i) (ii) CITA 2004 (Nigeria).

61 S.57 PITA 1993 as amended 2011(Nigeria).

62 S. 58 (1) PITA 1993 as amended in 2011(Nigeria).

63 *ICAN v. CITN* (below).

64 *Westoil Petroleum Services Limited v. LSBIR* (2012) 6 TLRN 48 50-51 and *LSIRB v. SPDC* (below)

65 *Lagos State Board of Internal Revenue v. Shell Petroleum Development Company Limited* (2011) 5 TLRN 60 at 62 -63 per Adebiyi J

66 *Azikiwe v. FEDECO* (below)

negative result after it has considered the objection. As long as the objection is pending and unresolved, the amount of tax being disputed shall not be enforced[67] but must be held in abeyance.[68] In *Azikiwe v Federal Electoral Commission*[69] ARAKA CJ held that notwithstanding the provisions of the S.20 (3), a taxpayers' liability to pay tax only arises and becomes final under S. 29 (1) Finance law (Anambra State Nigeria) after RTA had first served him with a written notice demanding returns and secondly, with a written notice of assessment stating the amount of tax assessed, total income and amount of tax payable and where no extension[70] of time has been granted for making the payment,[71] and the tax payer has not objected[72] to the assessment.[73]

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[67] Adesola, S. M – Tax Law & Administration in Nigeria (1998) 2nd Ed. pp. 53-55 (OAU Press ILe-Ife).

[68] *Azikiwe v. FEDECO* (below)

[69] (1979) NCLR 276 (1979) 3 LRN 286 (1979) ANSLR 1 (1979) BNSLR 136. (1979) 3 PLR 236 per Araka CJ

[70] S. 72 (1) Electoral Act 1977 sets out the qualification for candidates for election and the word "year" in S. 72 (2) in relation to a failure to pay income tax refers to the 'fiscal year and not the calendar year'.

[71] *Azikiwe v. FEDECO*(above) Anambra State High Court.

[72] Objection suspends the obligation to pay the disputed tax in some countries such as Argentina Bolivia, Nigeria, Chile, Columbia, Peru, Dominic, Grenada, Trinidad and Tobago, Barbados, Guyana and Jamaica (50 percent of only VAT is payable) and interests are payable if objection is frivolous and failed.

[73] In some countries such as Costa Rica, Uruguay, Venezuela, St. Lucia, St Kitts & Nevis, St. Vincent and Grenadines, allow certain percentage of the tax to be paid.

9. EXTENSION OF TIME TO FILE OBJECTION, EXTENTION BY CONDUCT BY CONDUCT, ESTOPPEL AND WAIVER

If the taxpayer fails to lodge objection within the prescribed time-limit, an enlargement of time may be granted. The notice of objection filed out of time without unreasonable delay, shall be admitted and treated as a valid notice thereafter. If the application for the extension of time is not granted, the tax payer aggrieved by RTA refusal to admit notice of objection out of time[74] may apply to the Tax Appeal Tribunal or Revenue Court, for a review of the decision. In *Commissioner for Income Tax v. BO*[75]where the Commissioner assessed the defendant to tax for the years 1953 to 1957. The defendant did not object to the notice of assessment within 30 days under **S.** 109 (1) of the East African Income Tax (Management) Act 1958. Since no timeous objection was made, the assessment became final and conclusive under S. 114 of the Act. Thereafter an Assessor in the Income Tax Department agreed at the defendant's request to accept a notice of objection out of time and agreed to issue amended assessments based on new figures submitted by D. Although no amended assessments were issued, the defendant started making payment under the agreement. COT sued for the tax due on the original assessments, contending that although his employer had indicated that he would accept certain figures as the D's income and had issued amended assessments, he was not estopped or prevented from subsequently refusing to do so and relying on the original assessments. D contested the suit on the grounds that COT was estopped by the agreement to vary the

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[74] Bakibinga, D. J. (Prof) – Ugandan Revenue Law (2001) pp. 190-196 and Simiyu C.T.T – Taxation in Kenya (2000) pp. 112-117.

[75] (1960) 4 EATC (Pt.1) 10 and also Sheriff v. Commissioner for Income Tax (1960) 4 EATC Pt.1) 89 (East African Tax Cases).

original assessments and to issue amended assessments based on agreed figures. It was held that where the COT accepted a notice of objection made after the statutory period, he must be deemed to have been satisfied under S.109 (1) of the Act that the objector was prevented from giving notice within the period and it is not open to him to say later that he was not so satisfied. Additionally, the burden on the person assessed to satisfy COT under S. 109 (1) of the Act that there is just cause to admit a notice of objection after the statutory period, is discharged when COT later admitted late notice. Furthermore, the acceptance by COT late notice of objection after the expiration of the statutory period under Section 109 (1) of the Act was not *ultra vires* his statutory powers and the notice was, therefore, valid.

10. LODGING OBJECTIONS OUT OF TIME AND MODE OF APPLICATIONS FOR EXTENSION OF TIME

Extension of time may be granted to taxpayer to lodge objection if it was not filed within the time frame permissible by the law. Extension of time is not granted as of right and it is incumbent on the taxpayer to prove why it should be granted[76]RTA however, may on the application of the tax payer extend or enlarge time for objections filed late on expiration of statutory period on good cause shown[77] and within a reasonable time.

The Law is similar in many jurisdictions. Late objections may be accepted where taxpayer was unable to file objection due to sickness, absence from the Country or any other reasonable

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[76] Boral Resources (WA) *Limited v. Federal Deputy Commissioner of Taxation (FDCT)* (1998) 98 ATC 2158 at 2169 and *Minproc Engineers Limited v. FDCT* (1998) 98 ATC 2170 at 2181-2182 (Australian Tax Cases)

[77] SS. 59 (1) (a) (b) (2) CITA 2004.

cause.[78]The taxpayer need to convince the court to grant it. In Press Holding Limited v. Commissioner of Taxes[79]Mead J refused to grant extension of time where the failure to lodge the object was due to the fault or administrative error of the taxpayer. Here the court was influenced by the fact that there was no statutory provision in Tax Act of Malawi authorizing it. Criticisms - this decision appears faulty and subject to controversy as it amounts to deprivation of due process –as the taxpayer was denied its constitutional right to fair hearing because the judge should have relied on Rules of Supreme Court of England Order 3 Rule 5 to grant the relief sought.

Explanations such as inability to handle his/her tax affairs may be due to illness[80] or absence in the country and other reasonable excuse like incarceration or detention in police custody, hijack, kidnap, delay in communication resulting from the use of wrong address and other pardonable circumstances. In Ireland's case of CAB v. D (K)[81] the High Court held that the words "where the Revenue is satisfied that the taxpayer was prevented from giving the notice within the relevant time-limits by reason of absence, sickness or other reasonable cause[82] were interpreted *ejusden generis* with "absence and sickness" and incarceration in prison constitute a reason falling within the terms and the taxpayer must specify explicitly in order to invoke the provision. The above factors may weight in mind of the RTA to grant extension of time.

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[78] See S.91 (3) Income Tax Act (Tanzania).

[79] (1978) 9 Malawi L.R. 62 at 63

[80] See the Australian case of *Logonouve v. FCOT* (2000) FCA 1745.

[81] (2002) ITR 79

[82] S.933 (7) (A) Tax Consolidation Act 1997 (Ireland)

The permission to file objection out of time is strictly discretionary. It should disclose reasonable cause of the delay, merit or importance and that RTA would not suffer prejudice[83] by the tardiness of the tax payer's objection. RTA would suffer prejudice where it is shown that the taxpayer would use the extended time to abscond and it would likely be refused. In *Yu v. Government of Malaysia*[84] the Supreme Court held that evidence showed between June 1988 and April 1989 the taxpayer travelled extensively overseas and stayed longer in the foreign land than in Malaysia and in the circumstances the Director of Taxes refuse extension of time and was justified to rely on S.104 Income Tax Act 1967 to issue a certificate to prevent the taxpayer from leaving the country until the tax is settled.

The RTA's practice is to hear objection made out of time to facilitate the observance of due process, so as not to be caught by the allegation of violation of the taxpayers' right to fair hearing[85] guaranteed under Constitutions of all civilized nations. The attitude of the courts is not to shut-him out.In Ireland's case of *CG v. Appeal Commissioners*[86] Georgeghan J held that taxpayer is entitled to constitutional justice, fair trial and tax tribunals must act judicially in hearing and determining applications and failure to observe it would breach the taxpayer's right and render the entire proceeding a nullity. Her Ladyship's judgement implies equal treatment to all categorise of taxpayers as the duty of RTAs is not

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[83] RTA would suffer prejudice where it is shown that the taxpayer would use the extended time to abscond – See *Yu v. Government of Malaysia* (below).

[84] (1994) 1 Malaya LJ 667 at 678

[85] S. 36 Nigerian Constitution 1999.See also Irish cases of Re East Donegal (1970) IR 317

[86] (2005) 2 IR 472

to maximize revenue collection[87] but to apply tax laws correctly, identify and correct errors, reduce opportunities for corruption, abuse, strengthen public confidence[88] in tax system, enhance integrity of RTAs, improve the overall quality of tax administrative procedures and credibility of tax disputes-resolution processes.[89]

11. WHAT CONSTITUTES GOOD CAUSES TO WARRANT AND MERIT EXTENSION OF TIME, ARE INEXHAUSTIBLE?

The list of what constitutes good cause shown within a reasonable time is not exhaustive but it would be necessary for the taxpayer to provide explanations for the good causes. Although, the absence of such explanation would not necessarily mean that the extension would not be granted.[90] Some of the factors include whether the reason for the delay was outside taxpayer's control[91]such as the followings;

1. whether the delay was due to the negligence of the of the taxpayer's solicitor or accountant,[92]
2. the extent of the taxpayer's experience in tax and commercial matters,[93]

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87 World Bank's Handbook on Tax Simplification 2009 p. 131

88 USA (1927) Tax Appeal Office (Internal Revenue Service) Mission Statement – to resolve tax controversies without litigation, on a basis which is fair and impartial to both the Government and the taxpayer in a manner that would enhance voluntary compliance and public confidence in the integrity and efficiency of the service.

89 Tax Administration (2013) OECD (Organization for Economic Control and Development) p. 320

90 *Brown v. FCOT* (1999) 99 ATC 4516 at 4525

91 *Ciaglia v. FCOT* (2002) 202 ATC 2037-2076.

92 *Assimakopoulos v. FCOT* (1998) 98 ATC 2037 at 2041, Jesse v. Scott (1986) 70 ALR 185

3. whether a refusal would occasion injustice to the taxpayer and prejudice the RTA by the extension of time to an extent where payment of interest would not be an adequate remedy[94]
4. and generally, the merit of taxpayer's case[95]

One remarkable case on extension of time to file objection is *Texaco Overseas Co. (Nigeria) Limited v. FBIR*[96] where taxpayer dissatisfied with the decision of RTA dated 19 June 1992 disallowing N155, 164.38 being the bank charges/commissions which they paid to Central Bank of Nigeria for services CBN rendered to them in the process of remitting its tax liabilities in dollars through Federal Reserve Bank of New York to Federal Government of Nigeria. The Body of Tax Appeal Commissioners (BTAC) disallowed these expenses which the taxpayer strongly believed were deductible from its overall tax liability and filed appeal at the Federal High Court dated 14 September 1992. They brought a motion on notice praying the court for order granting leave to give notice of appeal out of time and deem the notice of appeal filed as having been properly given and filed. The motion was contested and the learned trial Judge held that taxpayer needed to give separate notice of appeal to FBIR within the time allowed under S. 39 Petroleum Profits Tax Act apart from simply filing the appeal. His Lordship further held that there had been unreasonable delay by the taxpayer in bringing the application beyond the period contemplated by the law and that time could not be extended when

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93 *Holm v. FCOT* (1998) 98 ATC 2064.

94 *Windshuttle v. DFCOT* (1993) 95 ATC 4992 at 5003-6004.

95 *Ratnam v. Cumarasamy* (1965) 1 WLR 8, *Zizza v. FCOT* (1999) 99 ATC 4166 at 4173-4175 and Greer v. DFCOT (99 ATC) 4717 at 4723-4724.

96 (1997) 4 NWLR (Pt. 595) 566 at 568-569 (Nigerian Weekly Law Reports).

the period stated under S. 39 PPTA have elapsed. The Court of Appeal unanimously reversed the decision of the trial Judge and held that the intention of S. 39 (1) PPTA, is that the notice of appeal against the decision of FBIR must be in writing and filed within 30 days and under S. 39(2) PPTA the time to give notice may be extended by further 7 days, if within 60 days after the failure to give notice within 30 days, if the Judge is satisfied that owing to absence from Nigeria, sickness or other reasonable cause by the taxpayer, there has not been unreasonable delay in giving such notice of appeal. UWAIFO JCA was emphatic that the taxpayer has a total of 97 days altogether tax appeal thus:

> Taxpayer can possibly appeal altogether within 97 days from the date of the decision of the FBIR. First, there is the period of 30 days, if no appeal is lodged within that period, the taxpayer may within 60 days request for extension of time to do so and if the Judge is satisfied, he may allow an appeal to be filed within 7 days. The provisions do not allow for further extension of time. They are self-evident and specific enough and therefore the powers given to the court under Order 9 Rules 1 and 2 Federal High Court (Tax Appeal) Rules 1992, must be made to operate within that total period and not to enlarge it further as the said rules relate to mere complementary procedure[97].

[97] Ibid at 573 italics supplied.

As regards the notice of appeal under consideration, His Lordship was emphatic thus:

> The taxpayer filed an appeal on 14th September 1992 from the decision of FBIR on 19th June 1992, a period of 85 days and had merely asked for enlargement of time to regularize that notice of appeal. Both the counsel and the learned trial Judge took the position…that the taxpayer was seeking for an enlargement of time within which to give a separate notice to the FBIR. The learned trial Judge thought it was too late. It has been shown that such other notice to the FBIR was unnecessary. The notice of appeal already filed served that purpose. That was left for the learned trial Judge was to extend the time to regularize the filing of that notice.

PATS-ACHOLONU JCA in support observed thus:

> … "There is no doubt that the intendment of S. 39 (1) PPTA is to provide an aggrieved taxpayer with greater latitude of time to appeal against the decision he complaints against. It is evident that the **taxpayer can lodge his appeal within 97 days** from the date of the decision of FBIR was given[98].

The Court of Appeal unanimously concluded that it is superfluous writing separate letter to FBIR thus:

> When the provisions of an enactment have subsections…all should be interpreted together…as

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[98] Ibid at 573.

> the surer way of ascertaining the intention of the law matter. Here-a notice of appeal is filed when it is lodged and paid for in the registry of the court from which the appeal lies. It is not by the aggrieved party writing to the person affected that appeal must be pursued. There is nothing in S. 39(1) (2) PPTA which suggest that the tax payer must take 2(two) steps (a) file an appeal in the court and (b) write to FBIR about such notice of appeal. Once the notice of appeal is filed with a copy made available for service on FBIR, it amounts to giving notice in writing to the FBIR[99].

This is similar in the **Ugandan jurisdiction** where after the expiration of 30 days stipulated by the Tax Appeals Tribunal Act, a simple motion may be brought by the taxpayer for the enlargement of time.[100]

Sometimes letter written by the by the RTA may by conduct have the effect of extending the time beyond the required time-limit. In *Capital Finance Corporation v Uganda Revenue Authority*[101] the Court of Appeal held that the exchange of letters by the parties dated 25 March 1999, 11 April and 10 May 1999 have the effect of setting time running afresh and according the appellant's application was accordingly within the statutorily prescribed period of 30 days. In spite of the above, the appellant must specifically request for extension of time through a motion filed in court

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[99] Ibid at 573.

[100] *Uganda Revenue Authority v. Toro & Mityana Tea Company Limited* (2007) Kampala L R 523 at 524.

[101] (2002) East African LR 25 at 28 (CA Kampala Uganda).

together with supporting affidavit and where he/she defaults, before the court would consider it and the court may strike out the request for extension of time[102] without genuine reasons adduced.

12. THE SUBSTANCE, INGREDIENTS AND VALIDITY OF OBJECITON

The format for notice of objection and the "specifics" and how precise the grounds of the objection should be, are not stated in any of the fiscal legislation. The necessary ingredients must be drafted in the letter of objection and contain the general complaint that the assessment is erroneous, excessive and not in accordance with the law, returns which the tax payer submitted would be valid,[103] though more and full details upon which an individual based as grounds, are necessary.[104] This is because the tax payer may face difficulty if he/she files a mere general complaint which fails to define specifically why he/she disagrees with the assessment such as the amount of chargeable income and the tax payable. This may be regarded as an invalid objection which the RTA would discountenance. In*Board of Internal Revenue v. Egole*[105]AGUTA CJ held that it is fatal where the ground of appeal omitted the amount of the chargeable income, the tax payable in which the court is asked to find and adjudicate upon. His Lordship held the purported grounds of appeal filed by the taxpayer without these particulars were invalid.

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[102] *Afrison Import Limited. v Commercial Credit Finance Ltd*. (2004) 1 Kenya L.R. 121 at 122 (Kenya High Court).

[103] Denbow, Claude H. (Dr.) - Income Tax Law in Caribbean (1996) pp. 168-177 at 189 (Butterworth).

[104] *HR Lancey Shipping Co. Ltd v. Federal Commissioner of Taxation* (1951) 58 ALR 507 (Australian Tax Case)

[105] (1978) IMSLR 692 at 593

Strictly speaking, objections to an assessment may contain the followings as the veritable grounds of appeal. Thus:

1. That the assessment is based on an amendment different from the returns,[106]
2. That the accounts and income tax computations were not submitted and the assessment is based on the officer's best of judgment,[107]
3. That the submitted accounts and income tax computation are rejected, after giving sound reasons for such rejection[108],
4. That the assessment is higher than what the tax payer was expecting,[109]this complaint would not stand if RTA rightly applied the correct principle of law to compute the tax payable to arrive at the proper taxable figure, impingement by the taxpayer cannot stand.[110]
5. That the assessment is speculative devoid of accurate criteria for computation especially where RTA applied wrong tax or wrong tax law,[111]
6. Allowances wholly, exclusively and necessarily incurred in the production of the income were wrongly disallowed,[112]
7. Rates of taxes applied were wrong which made the tax payable excessive,[113]

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[106] *Szajntop v. Federal Commissioner of Taxation* (1993) 93 ATC 4307 (Australian Tax Case)

[107] *Board of Internal Revenue v. Egole* (above).

[108] Discussed (below).

[109] *Onuigbo v. Commissioner of Taxation* (below)

[110] Re CACA (below)

[111] Discussed (below).

[112] SPDC Limited v. FBIR (1996) 8 NWLR (Pt. 256) 294 at 295 (1996) 10 SCNJ 50 (1996) NRLR 58 where SCN allowed appeal of taxpayer as RTA wrongly disallowed expenses incurred in the award of scholarship to indigenes of host communities and those made on national merits.

8. Capital allowances[114] which the taxpayer is entitled to deduct, were mistakenly excluded or wrongly disallowed. In *FBIR v. Azigbo Brothers Limited*[115] the court held whether or not capital allowance should have been deducted is a matter which would have considered by the RTA at the time of the hearing of objection in writing and failing, on appeal to the appropriate tribunal and further to appropriate court. It is not for the court in action for the recovery of income tax, to investigate this question which should have been raised during objection and appeal. The court was emphatic that capital allowance should have been deducted in estimating the assessment of income as one of the matters which RTA should have considered in the process of hearing of objections and appeal and not in an action for the recovery of tax in the court.

   Similarly in the Malaysian High Court case on appeal in *Infra Quest Limited v. Negeri*[116] applied functional test to determine that since the taxpayer's business income was derived from **the licensing of the** telecommunication services as a providers who had affixed their **antennas on telecommunication towers and without the towers the business of the taxpayer could not function or be conducted**, the telecommunication towers were plants

[113] Institute of Workforce Development – Essential of Tax Administration (2014) pp.-43-44

[114] *FBIR v. Azigbo Brothers Ltd*. (1963) 2 ALL NCR 198 (2012) 6 TLRN 79 at 80-81 and *Infra Quest Limited v. Negeri* (below)

[115] *FBIR v. Azigbo Brothers Limited* (1963) 2 ALL NLR 198 (2012) 6 TLRN 79 at 80-81 per Smith SPJ.

[116] (2017) 7 Malaya L.J 35 at 36 - per Bache J.

(equipment/machineries) entitling the taxpayer to claim capital allowances from 2003 to 2008.

9. The RTA failed to recognize or give credit to withholding tax already paid by the taxpayer,
10. That the objected or disputed tax especially the Capital Gains are on properties classified as the disposal or part disposal of the principal residence or a private dwelling place of the taxpayer or other assets exempted from tax,[117]
11. That the particular income is exempted from tax under Co-operative Society Laws.[118]
12. The RTA failed to recognize or give credit to withholding tax already paid by the taxpayer

The grounds of objections must specifically urge the RTA to review and revise the assessment. They are very fundamental because once stated they are difficult to change. In the event of appeal to the hierarchies of the judicial system, it forms the grounds of appeal, although amendment could be granted with the leave of the court to argue new grounds of appeal.

In spite of the objections, if RTA rightly applied the correct principle to arrive at the proper taxable figure, impingement by the taxpayer cannot stand. This is the position in RE CACA[119] Ugandan Court of Appeal held that since the taxing master applied the principle contained in SS.101 (1)(2) Tax Act to arrive at $8 million Ugandan Shillings, therefore he committed no error as he followed the correct modalities.

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[117] S. 37(1) (a) (b) Capital Gains Tax Act 1967

[118] See - *Negeri v. Malaysia Co-operative Society Limited* (2000) 1 Malaya L.J 561 (Court of Appeal Kuala Lumpur)

[119] (2006) Kampala LR 509.

13. TAX OBJECTION PRECEDENTS FROM PRACTITIONERS' OFFICE

There appears to be no known decided case dealing with the terms, ingredients and the language in which the letter of objection should be couched. The following is the precedence of notice of objection filed by PROF EZEKIEL EDEM WILLIAMS & CO (Chartered Tax Practitioners) on behalf of their clients, delivered to the Chairman Rivers State Board of Internal Revenue Port Harcourt dated 12th February 2014 in response, that the Property Tax Assessment Demand Notice No.0003597 of 29th January 2014 may be an example. It stated that the Property Tax Law passed by the Military Government of the Rivers State of Nigeria (RVSGN) on 1st January 1995 is unconstitutional and ultra-vires to Part II Taxes and Levies (Approved Lists for Collection) Act 1998. It is a valid notice of objection because it is a challenged that RVSGN can no longer collect Property Rates Taxation exclusively reserved for Port Harcourt Local Government Area Council. This notice of objection purports that the Property Tax Law 1995 had impliedly been repealed[120] because it is in conflict with
Part II Taxes and Levies (Approved Lists For Collection) Act 1998[121] which vest its collection on the local government authorities[122] and as a Federal statute promulgated by Federal

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[120] Implied repeal of Taxation Statutes was respectively recognized in *National Inland Waterways Authority v. Shell Petroleum Development Company Ltd*. (2005) 8 CLRN 132 at 132 per Faji J. (Federal High Court Port Harcourt) and *Zambia Revenue Authority v. Stallion Motors Limited. & African Cargo Services Limited*. (2011) Zambia L R 86 at 104 - 109 (High Court).

[121] Any Legislation of the component States that is in conflict with an Act of the Federal Parliament is null and void to the extent of inconsistency – See S.4(3) Nigerian Constitution 1999 as amended.

[122] Institute of Human Rights & Humanitarian Law v. Attorney General Rivers State (2014) 14 TLRN 9 at 14-18, *Eti-Osa Local Government v. Jegede*

Parliament of Nigeria, it overrides the States' Government Law promulgated by the subordinate/local Parliament - States' House of Assembly.

14. ASSESSMENTS OF TAXES MADE ON THE REPEALED TAX LAWS

The general principle is that assessments must be predicated on existing and valid law. If an assessment is based on a law which has been repealed, it is invalid. In *Zambian Revenue Authority v. Stallion Motors Limited & African Cargo Services Limited*[123] the High Court held that exemption granted by the Tax Appeal Tribunal pursuant to the repealed law was unlawful and that the Respondent was not entitled to the zero-rating of their invoices for the purpose of Value Added Tax Act. KAJIMANGA J set aside the judgment of the lower tribunal and awarded to the appellant the sum of K43, 689,599.00 being the VAT payments for transportation and ancillary services because the grant of zero-rating exemption was not legally correct for the services 1st Respondent rendered to 2nd Respondent on which exemption was claimed and granted by the tax appeal tribunal.

15. ASSESSMENT MADE ON INCOME TAX ACT PROMULGATED BY PARLIAMENT WITHOUT LEGISLATIVE AUTHORITY IS VOID

The general rule is that the Legislative Houses must have the legitimate capacity to promulgate the particular taxation statutes. If the Parliament passes Income Tax Acts in which it does not have

(2013) NRLR 99 ((CA) (Nigerian Revenue Law Reports) and *Thompson & Grace Investment Ltd. v. Government of Akwa-Ibom* (2010) 3 TLRN 94 at 95 -98 (High Court Eket).

[123] (2011) Zambia LR 86 at 88.

the power enact, the purported legislation is a nullity and the tax statute could be set aside and income taxes already levied and collected together with interests, are recoverable. Mistake in the promulgation of tax law contrary to Caribbean Community Law which resulted in unlawful tax levied on the taxpayer, was challenged and the law was set aside and the unlawfully collected revenues were recoverable.[124] In *SM Jaleel & Co Limited v. Guyana*[125] the taxpayer manufactured and sold beverages in non-returnable containers. Although, it was incorporated in Trinidad and Tobago but it has subsidiary in Guyana. In 1995, Guyana government promulgated environmental tax of G$10 dollars per container on all imported beverages. The legislation did not seek to exempt containers which qualified for exemption under the Caribbean Community Act. The Caribbean Court of Justice held that Guyana had been unjustly enriched by unlawful environmental tax in breach of fundamental obligations under the Caribbean treaty and ordered for a refund as Guyana has no legal basis to retain the *ultra-vires* tax it collected – an illegal profit from legislation known to be unlawful.[126]

Similarly in *Attorney General Cross Rivers State v Ojua*,[127] the objection raised by the taxpayer was on the ground that the Urban Development Tax Law legislated by the component State, usurped Local Government powers to collect or levy rates assessment on

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[124] *JM Jaleel & Co Limited v. Guyana* (below), *AG Cross Rivers State v. Ojua* (below), *IHRHL v. AG Rivers State* (below), *Thompson & Grace Limited v. Akwa-Ibom State* (below)

[125] (2017) 91 West Indian LR 276 at 277 -276 Caribbean Court to Justice

[126] Unanimous decision from 5 appellate Judges – Byron P, Saunders, Wit, Hayton and Anderson JJCCJ

[127] (2011) 5 TLRN 1 at 56 per Akaahs JCA.

privately owned houses or tenant and that it was not assigned to the State government, was upheld by the Court of Appeal on the ground that the Cross Rivers State House of Assembly lacked legislative competence to enact such law as it is ultra-vires the legislation of the Federal Parliament.

Also, in *Institute of Human Rights & Humanitarian Law v. Attorney General, Rivers State House of Assembly & Board of Internal Revenue*[128] the Claimant as a taxpayer challenged the Social Services Levy Law 2010 enacted by the Rivers State House of Assembly and alleged double taxation in violation of Personal Income Tax Act 1993. OKPARA J nullified the SSLL as double taxation overburdening resident taxpayers and therefore ultra-vires. Her Ladyship was emphatic that;

> After a careful consideration of Part II, I find that RVSG cannot collect the Social Services Contributory Levy through via the SSCL Law 2010. The power of 2nd Defendant (RVSHA) to make laws on taxes and levies are subject to Section 4 Nigerian Constitution 1999, item 8, Part II of the same Constitution and Part II of the Taxes and Levies (Approved List for Collection) Act. I therefore hold that the 2nd Defendant (RVSHA) has no legislative power to enact laws on taxes and levies outside Part II of the Taxes and Levies (Approved List for Collection) Act and item 8 Part II of the 2nd Schedule of the Constitution. The 3rd Defendant has no right to collect taxes pursuant to

[128] (2014) 14 TLR N 9 at 21, 46- 47 (Port Harcourt High Court Rivers State of Nigeria).

the law which contravened the provisions of Nigerian Constitution 1999 The SSLC Law enacted by the RVSHA is inconsistent with the Act and therefore void under Section 4(5) Nigerian Constitution 1999. Looking at the Part II of Act…the only levy allowed is 'Development Levy' for individuals only which is not more N100 per annum…the SSCL cannot by any stretch of imagination be translated to mean development levy.

16. LAGOS HIGH COURT SET ASIDE AND NULLIFIED EXECUTIVE MADE TAX LAW – TAXES AND LEVIES (APPROVED LISTS FOR COLLECTION) ORDER 2015

ENCROACHMENT ON THE POWERS OF NATIONAL ASSEMBLY TO PROMUGATE TAX LAWS - TAXES AND LEVIES (APPROVED LISTS) ORDER 2015?

The inevitable question is whether S. 1(2) Taxes and Levies (Approved List for Collection) Act 1998, gives the Minister of Finance authority to usurp the powers of the National Assembly to make tax laws for the FGN? This is a constitutional question that needs to be answered through litigation processes considering the fact that new items of taxes had been slotted into the approved lists by the ministerial/executive fiat rather than the act of the legislature whose duty is to make laws including that of taxation.

The '**executive-made tax laws** are thus: National Information Technology Development Levy has been added into the Part 1 of the schedule to make it 9th in number. Similarly13 (thirteen) new tax have been added into Part 2 such as Land Use Charge,

Hotel/Restaurants/Events Centre Consumption tax, Entertainment tax, Environmental/Ecology fee or levy, Mining/Milling and Quarrying fee, Animal trade tax, Produce Sales tax, Slaughter/Abattoir fees, Infrastructure Maintenance charge/levy, Fire Service Charge, Property tax, Economic Development levy and Signage/Mobile Advertisement tax (jointly by the State and Local Government). Only one new tax – Wharf Landing tax has been added into Part III.

Finally, an entirely new strange 21 (twenty one) taxes have been created such as: -a single inter-States' Roads Sticker for all States, a single Haulage payable at the point of loading in the State of departure and a single haulage fee payable at the point of discharge of goods which the States are required to set institutional structure to collect, Wharf landing fee to be collected by the State where there are facilities to administer such fees which may be jointly administered by the State and Local Government and proceeds from collection share in line with agreed proportion, a single parking permit sticker designed by the Joint Tax Board (JTB) and issued by the operators where vehicles are packed in course of their journey, Fire Service levy should be charged on business premises and corporate organizations only and the Federal Fire Service can only collect can only collect fire service levy in FCT and not in States and Road Worthiness Certificate fee should be collected by the State in which the vehicle operate and should be administered by Board of Internal Revenue in conjunction with appropriate agencies

The attempt by the Minister of Finance to slot new taxes without the input and concurrence of the legislature constitutes encroachment on the power of the National Assembly to make laws

including taxation. This lack of consensus and approval may create the problem of unenforceability because of the anticipated public opposition and outcry. No doubt, with the declining revenue attributable to oil glut, taxation would constitute major government source of funding for the government subventions but imposition of new taxes through executive is an outright transformation of power to make subsidiary legislation into full law-making functions in breach of the doctrine of separation of powers. The Nigerian electorate entrusted this function to an elected member of National Assembly. The processes of law making is a tedious one involving first, second, third readings, committees' stages and public hearings whereby bills are debated, panel-beated and transformed into laws. In this respect, the Taxes and Levies Order dated 26th May 2015 recommended by the JTB and approved by the Minister, would at best constitute a working which would undergo the normal legislative processes at the National Assembly or States' Houses of Assembly depending whether the subject matter is the exclusive, concurrent or residual list.

Tax law is statutory and it represents the policy power of the State which must be exercised only upon the clear powers of the statutory enactment and consequently, a taxpayer can only be taxed pursuant to a legislative authority.[129] Fiscal legislations which impose financial burden must receive the approval of the Parliament. In *Williams v Lagos State Development and Property Corporation*[130] where the assignee of unexpired residue of a term of lease contested his liability to pay 5^{1} percent of the consideration or valuation of the land leased by Defendant who purported

[129] *Williams v. Lagos State Development & Property Corporation* (below)

[130] (1978) 3 SC 11 at 1719

imposed a levy on the strength of a letter setting out the policy of the corporation acting pursuant to Town planning Regulation, which stipulated a covenant to pay "outgoings of whatever description as implied in every building lease". The Supreme Court held the defendant could not unilaterally and arbitrarily impose such a tax under the guise of outgoings unsupported by any statutory authority and since such a charge was not otherwise payable, it was a transparent attempt to impose an illegal levy.

ALEXANDER CJN has this to say:

> The rule of law is that no pecuniary burden can be imposed upon the subject by whether name whether tax, dues, rate or tolls except upon a clear and distinct legal authority established by those who seek to impose the burden.

17. EXECUTIVE-FIAT-MADE TAX LAWS' LISTS IS BEYOND DELEGATED LEGISLATION AND AT BEST WOULD CONSTITUTE MERE PROPOSALS FOR LEGISLATIVE REFORMS?

It is submitted the order made by the Minister would at best constitute legislative proposal with which the National Assembly would deliberate as a bill preparatory for its passage through all the stages of the law-making processes.

The true position is that the Minister as a member of the executive under the principle of separation of powers cannot transform power to make subsidiary legislation into full-blown power to enact new substantive tax laws without the consent or concurrence of the Parliament as this would amount to ultra-vires. A critical examination of some parts of the Order reveals many defects which

could have been cured or streamlined through legislative scrutiny processes.

The specific amounts of levies chargeable in respect of the National Information Development and Business premises in urban/rural registration/renewal fees, are not stated. In absence of liquidated sum, this would create confusion because every State Government would now impose arbitrary/oppressive sums as taxes, under the guise of accelerated revenue drive - the very evil or mischief which the courts nullified in the cases of *Thompson & Grace Investment limited v. Akwa-Ibom state government*[131] whereby the arbitrary charges of N5, 650, 0000. Those styled as Urban Development Taxes which failed in *Attorney General Cross Rivers State v. Ojua,*[132] had respectively resurfaced in the lists of taxes without the consent and approval of the legislators – the Nigerian Parliament of the House of Representatives and Senate. These ought not to be so because law-making is a very serious business and this should be left to those who were elected and properly equipped to do the required job of the enactment of Acts, particularly those concerning controversial subject matter such Revenue and other Fiscal matters.

The Social Services Contributory Levy and other tax laws which were hitherto held as violation of the principles of double taxation on the face of Personal Income Tax Act 1993 by the court in *IHRHL v. Attorney General Rivers State*[133], had reappeared through executive fiat, in the Taxes and Levies (Approved Lists for Collection) Order 2015 without the proper cleansing, debates,

[131] (above)

[132] (above)

[133] (above)

harmonization, public hearing and painstaking panel-beating involved in the legislative processes. The inevitable question is whether the legislation – Social Services Contribution Levy 2010, Urban Development Law and other arbitrary fiscal impositions which the High Courts of the Rivers State invalidated, lost or shaded-off its offending ingredients (double taxation) prior to its being reintroduction into our statute book, through the back-door?

The inevitable question is whether S. 1(2) Taxes and Levies (Approved List for Collection) Act 1998 gives the Minister of Finance authority to usurp the powers of the National Assembly to make tax laws for the FGN as per Taxes and Levies (Approved Lists for Collection) Order 2015? This is a constitutional question that has been answered through litigation processes considering the fact that new items of taxes had been slotted into the approved lists by the ministerial/executive fiat rather than the act of the legislature whose duty is to make laws including that of taxation. In accordance with our predictions, these taxes imposed through executive-made-fiat, have been declared ultra-vires, unconstitutional, null and void for infringement of the principle of separation of powers and its attempted transformation of the delegated legislative power into full-blown-law-making power in *Registered Trustees of Hotel Owners & Managers' Association Lagos State v Attorney General of Federation & Minister of Finance*[134] where the Claimants through originating summons challenged the Taxes and Levies Order 2015 made by Finance Minister – a member of the Executive Arm of the FGN as inconsistent with S. 315 Nigerian Constitution 1999 (as amended). The Claimant alleged that Taxes and Levies Order 2015 made by

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[134] (2020) 52 TLRN 1 at 5-10

Minister of Finance, went beyond delegated legislation permitted under S.1 (2) TALALC Act 1998 and merited the status of law-making which the Constitution vested on the National Assembly. In a well-considered judgement, **FAJI J** held thus:

1 The Claimants' *locus standi* is established as taxpayer because they have interest in the legislation which affects their business interests above that of ordinary Nigerians.

2. It is not a delegated legislation as it seeks to add, override the main legislation and has the same legal force as the Act itself. It is an amendment of the existing Act of the National Assembly, contrary to S.315 Nigerian Constitution 1999.

His Lordship nullified the Executive-Fiat-Made-Tax-Act and declared it:

3. Unconstitutional, null and void as it also violates S. 4 Nigerian Constitution 1999.

4. That S.1(3) TALALFC Act 1998 (the particular Section of the extant law which was interpreted as purporting to give the Finance Minister power), is inconsistent with S. 1(3) Nigerian Constitution 1999 and therefore null, void, unconstitutional and of no effect whatsoever. Commentaries – this case appears sound and faultless in principle. It is most unlikely that the Court of Appeal and Supreme Court would set it aside because the decision accords not only with common sense but with the jurisprudence of our tax laws and constitutional law, long ago established in our legal system.

18. REFUND AND RECOVERY OF TAXES, THOUGH LAWFULLY COLLECTED PURSUANT TO TAX LAWS THAT WERE NULLIFIED BY COURTS.

The court is not a father-Christmas and does not award remedies not claimed by the parties. Curiously, in these cases of *Mobil Producing (Nigeria) v. Tai LGA* (above), *Fast Forward Sports Marketing Limited v. Port Harcourt LG*A (above), *Cornerstone Insurance Plc v. Surulere & Mushin LGA* (above), *AG Cross Rivers State v. Ojua* (above) and *IHRL v. AG Rivers State* (above), the Claimants and their Lawyers over-sighted the possibility to ask the Honourable Courts for the refund and repayments with interests, of the taxes and levies, though lawfully collected from the taxpayers pursuant to the Urban Development taxes, Social Services Contributory Levy etc which were invalidated because their enactments were improper and made without legislative jurisdiction**?**

Curiously the Counsel for the claimant over-sighted the possibility to ask the Court for the refund[135] of Social Services Contributory Taxes which the 3rd Defendant unlawfully deducted from the salaries of the civil servants and other categories of employees in Rivers State pursuant to the invalidated law enacted without legislative jurisdiction? It is submitted that the **Rivers State Board of Internal Revenue should grant them tax credits in arrears to off-set subsequent future tax liabilities.** This is the most logical conclusion.

[135] *JM Jaleel & Co Limited v. Guyana* (below),

The taxes unlawfully collected are recoverable through time consuming and very difficult refund processes.[136] Strictly speaking, overpayment of taxes is recoverable[137] with interests and could be used as a set-off against future liabilities and **tax-credits** could be granted on this basis.[138]. Strictly speaking, interests are also claimable.

This is the position in *FBIR v Integrated Data Services Limited*[139] claimant sued for N15,2002,397.00 as unremitted Value Added Tax (VAT) plus penalty and interests thereon because D failed to deliver monthly VAT returns for period from January 1994 to October 1999 - 43 months instead of monthly as required by the S.12(1) VAT Act. The trial court gave judgement for the principal sum but refused the claim for interests and penalty but the Court of Appeal granted it by virtue of SS.15 and 31 VAT Act[140]. If interests are claimable by the Relevant tax Authority for late payment of taxes[141], there is no justification why the taxpayers could not be entitled to claim interests for taxes unlawfully collected pursuant to unlawful, illegitimate legislation. This equivalent to overpaid taxes.

In the Zimbabwean jurisdiction, this view is supported in *Ellis v. Commissioner of Taxes*[142]the COT assessed the taxpayer for Capital Gains Tax on expropriated shares. The tax demand was

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[136] S. 21 (2) (3) (3) Board of Internal Revenue Law No.12 (2012 Rivers State)
[137] *JM Jaleel & Co Limited v. Guyana* (below),
[138] S. 21 (2) (3) (3) Board of Internal Revenue Law No.12 (2012 Rivers State).
[139] (2009) 8 NWLR (Pt. 1144) 615.
[140] Ibid at 620 - 624
[141] *Lagos State BIR v. Mobotson Ventures (Nigeria) Limited* (2012) 6 TLRN 141 per Adebiyi J
[142] (1994) 1 Zimbabwe L.R. 422 at 435

paid but the provision of the legislation was subsequently held to be invalid by the Supreme Court as being contrary to the Constitution. COT thereafter reimbursed the bulk of the tax paid. The estate of the taxpayer brought an action to require the payment of interests on the tax paid from the date of payment to the date of repayment. The COT held it was immune from the claim of interests but the High Court held that interests were claimable only from the date when the Supreme Court nullified the legislation. On appeal the Supreme Court of Zimbabwe held that where a demand for tax is made pursuant to invalid legislation, the taxpayer has the right to recover the tax paid together with the interests from the date of the payment and there was no immunity which prevents the court from payment of interests.

GUBBAY CJZ observed thus:

> The view that there is in general a right to restitution of monies paid upon an ultra-vires and illegal demand, and so a right to the recovery of interests thereon, is both attractive and compelling. For such principal payment would have been made either in consequence of a perceive presumption on the part of the payer of the constitutional validity of the demand and the holding out of the such legality by the legislature, or on account of the prospect of the payer being subjected to penal interests were his opinion of the illegality of the demand being ruled to be incorrect. It matters not which it be, since payments made under unconstitutional legislation cannot be deemed voluntary. In short, an ultra vires demand alone by a government body provides a ground for restitution. It operates outside the field of

> and focuses on the preposition of the government body as payee rather than circumstances[143] of the payer.

This jurisprudential line of thinking also draws support from the Malaysian jurisdiction. In *Pelangi Limited v Ketua Negeri*[144] the Inland Revenue (IR) (respondent) had subjected gains arising from a compulsory land acquisition to income tax and consequently had retained the applicant's tax refunds. The applicant successfully applied for judicial review and obtained a declaration that the tax was unlawful and sought a refund of RM2, 360,723.62 together with interests. The IR contended that mandamus cannot be granted against it as a public body and that the taxpayer is not entitled to the refund. It was held that interest was the consequent to unlawful imposition of tax; the IR unlawful assessment did not follow the established principle[145]. YUSUF J was emphatic that since the tax was unlawful, the IR must refund it with interests and the S. 111 Income Tax 1967 relied upon by IR concerns overpayment but the case here was unlawful payment. The same line of reasoning was similarly stated in *Power Root (Malaysia) Limited v. Director General Customs*[146] where the applicants manufacture drinks (goods) and the Respondent classified it as Sales Tax of 10 percent

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[143] Ibid at 435. See also *COT v. F. Kristiansten Limited* 57 SATC 238, *BAT v. COT* 57 SATC 238 (Zimbabwean cases) and *KNA Insurance & Investment Brookers Limited* (In *Liquidation v. South Africa Revenue Service* 71 SATC 155, *Commissioner for Inland Revenue v. First National Industrial Bank Limited* 52 SATC 224, *Sage Life Limited v. Minister of Finance* 66 SATC 181 (South African cases) which support the proposition that interests should be paid to taxpayers for overpayment of taxes.

[144] (2012) 1 Malaya LJ 825 at 826

[145] *Ketua Negeriv. Penam Realty Limited* (2006) 3 MLJ 597 (2006) 2 CLJ 835.

[146] (2014) 2 MLJ 271 at 252

instead of 5 percent. The applicant paid and the appeals to High Court and Court of Appeal were in their favour. Applicant wrote to the Respondent demanding refund of the 5 percent was refused and they filed consequential relief. The court held it was an injustice and a breach of fundamental constitutional principles to permit the respondent to retain the illegally collected tax. **YUSUF J** was emphatic that the court was not functus officio when the applicant filed consequential relief and discountenanced the assertion by the Respondent that it was relieved of the obligation to make restitution because the illegally collected taxes had been 'passed on' to the end users as unfounded. His Lordship further stated thus:

> The Respondent had no right to retain illegally collected taxes and the applicants should have recourse to restitution as of right. The defense of 'passing on' was rejected because it was inconsistent with the basic principles of restitution law, it was economically misconceived and the task of determining the ultimate burden of tax was exceedingly difficult and constituted as an inappropriate basis for denying relief. The court had no jurisdiction to convert the originating motion, let alone interlocutory application such as filed by the applicant into writ of summons. It was clear when the matter was disposed of at the High Court and at Court of Appeal; there was no longer any cause of action or matter to be converted into a writ[147]

It is submitted that the Rivers State Board of Internal Revenue refund with interests, the amount illegally collected

[147] Ibid at 26, 29-30 italics supplied.

as tax on a legislation which has been nullified. Since it is usually too difficult to obtain refund from the government treasury, RVSBIR should at best grant them tax credits in arrears to off-set subsequent future tax liabilities. This is the most logical conclusion

19. CONTENTS OF LETTER OF OBJECTION

There is no rigid requirement that the contents of the letter of objection should be in a particular form provided it conveys to RTA the substance of what the tax payer desires to contest in the assessment such as statement of incomes/expenditures raised in the returns submitted – example the "taxpayer through this letter disagrees with the basis of calculation" of the amount of tax as set out in your notice of assessments and the reason of objection must be specified and supported by facts and/ or documentation[148]. This is the position in an Australian case of *Szajintop v. Federal Commissioner of Taxation*[149] where the taxpayer was assessed on the basis of an asset's betterment statement prepared by the Revenue officer. The taxpayer objected to the assessment merely stating that he had lodged income tax returns for the year in question and that the assessments which were raised upon a betterment statement were based on completely erroneous information. It was contended on the part of the RTA that the letter of objection was not a valid as it did not set out the taxpayer's grounds of objections. Instead, it was not more than a general complaint that the asset betterment statement was wrong. On the part of the taxpayer, it was submitted that the letter should not be

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[148] Melvin. A. Gerspercher – How do I Appeal My Income Tax Assessment in Canada download from http; / www.tcc.cci.gc.ca on 29/09/2014.

[149] (1993) 93 ATC 4307 (Australian Tax Cases).

considered in isolation but should incorporate by reference to the returns lodged. If this was done, the grounds of objection would be disclosed fully and in detail. The Australian Federal Court held that the letter of objection should not be taken in isolation but instead should be read as incorporating the tax returns already lodged. Consequently, it was a valid one.

In delivering the judgment of the Court (per Black CJ and Burchett J) it was stated as follows:

> We see no difficulty in this case in reference being made to the appellant's taxation returns to determine the scope of the purported objection. They were specifically identified and related to the very issue of the appellant's income for the years in question for they set out what the appellant declared the income from all sources to have been. In these circumstances we consider that what the tax agent's letter would have conveyed to the Commissioner was more than the mere generality that the assessments were excessive[150].

The main importance of this decision is that it recognizes that an objection, although may not contain any precise terms, can nonetheless be considered as valid once it makes specific reference to the taxpayer's returns and manifests an intention to incorporate those returns as the basis upon which the taxpayer disagrees with the assessment[151] received from the RTA. There is obvious judicial willingness in this area to give a benevolent interpretation to the

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[150] Ibid at 4310.

[151] Denbow, C.H, (Dr) (above) at 170.

taxpayer's letter of objection so as to ensure that he does not lose his right to dispute an assessment with which he does not agree.

20 HEARING AND DISPOSITION OF OBJECTIONS AND ITS CONSEQUENCES

The hearing of objections may be internally handled by an adhoc committee set up by RTA in many jurisdictions. In USA, it is the local appeals office which is separate and independent of IRS office that handled the initial tax assessments. In Jamaica, it is an independent agency in the National Headquarters– Revenue Appeal Division (RAD)[152] established to review objections, identify and correct mistakes at minimum fiscal and administrative costs without involvement of the judiciary, in order to promote fairness, credibility and strengthen the integrity in the tax review system.[153] It hears complaints on tax decisions in form of holding conference with the parties. This is similar to the Australian jurisdiction where internal review of the assessment will be conducted by the ATAO officers called objection officer who is separate and different from the ATO officer who made the initial taxation decision,[154] (the subject matter of the objection). The internal review must relate to matters raised in the notice of objection and not respect of the entire assessment.[155] On receipt of the notice of objection, the RTA may require the tax payer to furnish particulars,[156] produce books

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[152] Established pursuant to Revenue Appeal Division Act 2015 (Jamaica)

[153] The Administrative Review Process for Tax Disputes; Tax Objections and Appeals in Latin America and the Caribbean (2009) World Bank Groups pp. 18 - 23

[154] Joanne Dunne & Ellissa Romanin – The Australian Tax Objection Procedure: Time for Legislative Reforms (2010) 45 (1) Taxation in Australia 21 at 22

[155] Binh Tran-Nam & Michael Walpole (above) at 478

[156] *Board of Internal Revenue v. Egole* (1978) IMSLR 592 at 594

of accounts[157] or documents relating to income, profits[158] as deemed necessary and RTA may summon person(s) who may be able to give evidence or information in respect of the assessment which is material and necessary to the determination, review of the objection[159] to attend to give evidence on oath or examination by whatever method such as written deposition through affidavits.[160] The taxpayers can present the objection by themselves or through a chartered tax advisor. The RAD Jamaica[161] has been using its jurisdiction to review cases in PAYE, Income tax, Consumption tax, Stamp duty, Transfer tax, Custom duty Acts. Other principal legislation together with amendments, under this method.

Objections in different jurisdictions, differ but may initially involve the same officer who issued the disputed assessment at the first instance to have a second look, appraise defect and later by another colleague in the same department[162] or by the immediate superior officer,[163] or the manager or supervisor in the same unit or specialized department.[164]

[157] *Onuigbo v. Commissioner of Internal Revenue* (below).

[158] S.69 (4) CITA 2004

[159] S. 56(2) PITA 1993 as amended 2011.

[160] S. 38(4) Petroleum Profits Tax Act 1958 as amended 2004.

[161] Within 2 years 2015 – 2017, RAD eliminated all the backlog of Revenue Appeal Cases

[162] Tax Administration in Latin America and Caribbean 2006 – 2010, IDB (2013) P.238.

[163] Administrative Review Process for Tax Disputes; Tax Objections and Appeals in LAC (2009) World Bank Groups pp. 25 – 28.

[164] See also Tax Administration and Procedure Act 2003 (St. Kitts and Nevis`)

In most cases, decisions of RTAs verdicts in terms of taxpayers' liabilities, are upheld, vacated or referred-back to them, for second review and issuance of new decisions.

If the tax payer agrees with the amount of tax liability, the assessment is varied or adjusted in form of amended assessment". It shall be served accordingly and the amount of tax payable shall be stated.[165] In *Ilorin Tax Authority v. Ajao*[166] Reed J. held when a taxpayer objects to his income tax assessment, the RTA is under obligation by virtue of S.94 Personal Income Tax Act to either confirm the assessment by refusal to amend or revise it and failure to do so means the objection has not been determined so as to render the assessment final and conclusive.

If the **disagreement** persists or lingers over the amount of tax payable, the RTA shall reconsider all the factors and issue **written decision[167] -notice of refusal to amend[168]** (NORA). Sometimes, RTA may further revise the assessment where appropriate to include **additional assessment** and thereafter issue **notice of revised assessment**[169] and total amount of tax payable shall be stated. As soon as RTA confirms the assessment or disallows the

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[165] S. 69(5) CITA 2004. Amended assessment is a situation where the submitted administrative assessment is faulted and the original assessment earlier made is revised or amended in line with the new information revealed in the computation of tax liability.

[166] (1967) NNLR 25 at 28 (1967) NCLR 99 (Nigerian Commercial Law Reports).

[167] The Jamaican RAD Commissioner must issue written decision within 60 days.

[168] NORA is issued in Nigeria, Kenya, Uganda, Tanzania and Zambian jurisdictions.

[169] S. 58(3) PITA 1993 as amended 2011.

objection through the issuance of NORA, the tax payer's right of appeal had crystallized.

The RTA may after serious appraisal of all the circumstances, disallow the tax payer's objection and maintain or confirm its original cum additional assessment(s). In *Onuigbo v Commissioner of Internal Revenue*[170] the tax payer was assessed to pay tax of £96, 6 shillings and 3 pence. He filed a statement of account with schedule of assets depreciation and balance sheet of the business as at 31 March 1962. The RTA contended that his income was £664, 10 shillings 6 pence. The taxpayer appealed contending that the assessment made by RTA was arbitrary and the tax payable by him was therefore 27 pounds, 10 shillings and not 96 pounds, 6 shillings, 3 pence. In reply to the grounds of objection, the RTA denied that the assessment was arbitrary and contended that the trading account submitted by the tax payer contained discrepancies and unexplained figures and thereby rejected the account. RTA further contended that the tax payer refused to produce for examination documents relating to his income which RTA considered necessary. The trading account prepared by public accountant and auditors were unsatisfactory and consequently, the RTA determined the amount of tax payable using its best of judgment. The High Court refused to reduce the assessment, dismissed the appeal and held that the burden of proof that the tax is excessive lies on the tax payer while it is incumbent on the RTA to establish the correctness of the assessment. IDIGBE J(as he then

[170] (1963) 10 ENLR??? (1992) 1 Nigerian Tax Cases 101 at 104 (2011) 4 TLRN 149 at 150 -152. See also *FBIR v. Nigerian General Insurance Company Limited* (2012) 8 TLRN 106 at 109 where the Supreme Court held that the court has no power to reopen assessment which has become final and conclusive.

was) was emphatic that the review of the assessment was proper because:

> Tax payer failed to take opportunity available to produce sufficient evidence; he cannot have the tax reduced and the RTA inability to place reliance on certain documents, they cannot be said to have acted arbitrarily if they proceed to make an assessment taking into consideration some figures in the account of the preceding year which they can ascertain as income and proceed to charge it as tax liability.[171]

There must be compelling reason for a tax duly assesses and paid to be reopened and reassessed, the court would determine what circumstance the additional assessment shall become arbitrary and capricious.[172]

21 CONCLUSION OF OBJECTION AND APPEAL TO THE COURT

It is only at the point of refusal to amend the assessment after hearing the objection that the tax payer's right of appeal to Tax Appeal Commissioners/Tax Appeal Tribunal (TAC/TAT) and to other hierarchies of the courts would crystallize. This is because; he/she would be aggrieved by that decision. It is only when these procedures are dealt with exhaustively that a tax "dispute" would arise which would need resolution through the process of appeal.[173]

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[171] *Onuigbo v. CIR* (above) at 152.

[172] *Ukpong v. Commissioner for Finance & Economic Development* (2006) 19 NWLR (Pt. 1013) 187 (2006) 11-12 SC 36 (2007) 2 CLRN 1 at 24

[173] *Mobile Producing (Nigeria) Unlimited v FIRS* (2012) 6, TLRN 119 at 112 (Tax Appeal Tribunal Lagos).

In *Federal Inland Revenue Service v. Mega Tach Software Limited*[174] TAT held that it is only where there is a notice of assessment predicated on the returns submitted that a tax dispute would result and RTA could not recover value added tax where they failed to issue notice of assessment containing the amount of tax due under SS. 15 (1) and 18 Value Added Tax Act.

22 FAILURE TO ISSUE NOTICE OF REFUSAL TO AMMEND (NORA)

Although, there is a requirement that objection should be filed within 30 days by the tax payer, subject to extension of time at the appropriate circumstances but there is no corresponding time-frame in which the RTA could hear and determine the notice of objection filed. In view of this lacuna in many common law and British Commonwealth fiscal legislations, reform is suggestion by the adaptation of the Jamaican model. The Commissioner Revenue Appeal Division (CRAD), after receiving all the relevant information pertaining to the particular tax case, has 60 days to issue written decision, he/she is bound to follow the relevant legislation and decisions made by courts – case law judicial precedents.[175]

Borrowing further leaf from Canada, S.165 (3) (a) Income Tax Act (Canada) provides:

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[174] (2012) 7 TLRN 65 at 67-68 (TAT Lagos Zone). See also *Cnooc Exploration & Production Limited v. FIRS* (2012) 7 TLRN 1 at 6-7 where TAT Lagos Zone held that the tax payer is foreclosed from initiating the process of tax appeal but in unusual circumstance where there is a material stake which would impact on the outcome of the determination of the case, the tribunal is duty bound to give all the necessary parties the opportunity to be heard.

[175] Revenue Appeal Division Act 2015 (Jamaica)

> On the receipt of notice of objection, the Minister of National Revenue of Taxation (MNRT) must "with all **due dispatch**" reconsider the assessment and vacate, confirm or vary the assessment or reassess.[176]

The phrase with due dispatch though has no precise meaning but it is synonymously with all due diligence[177] and within a reasonable time. In a Canadian case of *Minister of National Revenue of Taxation v. Appleby*[178]a lapse of time of 22 months between the service of notice of objection and confirmation was allowed in view of the work that had to be done before the reassessment could definitely be confirmed. However, if the delay persists beyond 180 days, the taxpayer who had served notice of objection without receiving definite response can proceed with his/her appeal to tax court[179] and the minister shall be deemed to have confirmed the assessment to which the notice relates and the taxpayer shall be deemed to have instituted[180] an appeal[181]. This is also the same position in Australia to the effect that where objection has validly

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[176] If taxpayer further disagrees with the Notice of Revised or Amended assessment, COT shall issue notice of Non-Agreed Amended Assessment (NAAA) and inform the taxpayer of his/her right of appeal - S. 92 (1) Income Tax Act (Tanzania). This is equivalent to the Nigerian NORA (notice of refusal to amend).

[177] Canadian case of *Jolicoeur v. Minister of National Revenue of Taxation* 60 DTC 1254 (Exc. Ct.)

[178] 64 DTC 5199 (Ex.Ct)

[179] S.169 Income Tax Act (Canada)

[180] Arthur Scace & Douglas Ewens - Income Tax of Canada pp.580-584 (1983) (Carswell Publishers)

[181] Appeal becomes operative after 180 days have elapsed - See SS.169, 170 Income Tax Act (Canada)

lodged within 60 days of the notice of assessment and if the Commissioner of Taxation has not made any decision within 60 days from the date which objection was filed, the taxpayer may by written notice require the COT to make decision on the objection[182] if COT fails to make the decision within a further 60 days, COT is deemed to have disallowed the objection[183]and the taxpayer may after the expiration of these cumulative **180 days**, commence the appeal proceedings[184].

Even though the lacuna in tax legislation is noticeable, the Jamaican, Canadian and Australian better practices demonstrated above have been followed in Nigeria. The acceptable practice is that RTA must act within a reasonable time to issue a notice of refusal to amend in order not to keep the tax payer unduly waiting. If there is unreasonable delay, the tax payer as an aggrieved person in a taxation dispute, can apply to the tribunal to commence the process of appeal to enforce his/her rights. This is position in *Oando v. Federal Inland Revenue Service*[185] where the RTA served the notice of additional assessment for 2006, 2007 and 2008 years of assessment. By a letter dated 26th May 2010, the taxpayer filed written objection and 6 months later RTA claimed it was still reviewing the notice of objection. The tax payer filed the appeal at the tribunal. The RTA filed a preliminary objection to strike out the action on the ground that "notice of refusal to amend" (NORA) has not been issued by RTA pursuant to S. 69 Company Income Tax Act and Paragraph 13(2) of the Fifth Schedule Federal Inland

[182] SS. 14ZYA (1) (2) Taxation Administration Act (1953) as amended.

[183] SS. 14ZYA (3) Taxation Administration Act (1953) as amended.

[184] Julie Cassidy – Concise Income Tax Law pp.65-73 (2004) 3rd Ed. (Federation Press New South Wales Australia)

[185] (2011) 4 TLRN 113 at 115-119

Revenue Service Establishment Act (FIRSEA) 2007. The Tax Appeal Tribunal held that since there is no time table stipulated for taking a step required by the law, it does not lie prostrate because reasonable time is always imposed. What is reasonable depends on the circumstances of the case. Inspiration is drawn from the 30 days' time limit allowed the tax payer to file his notice of objection. We shall not insist on that the tax collector should respond to issue NORA within the same time frame but instead a generous and reasonable time table of 90 days is ideal bearing in mind the extremely busy schedule of RTA. Failure to serve NORA within 90 days from the receipt of the objection should enable the tax payer who has opted to exhaust the RTA in-house complaints handling system to approach the tribunal for redress. 6 months' time frame is unduly oppressive against tax payer who is entitled to get correct information on his precise tax liability quickly. The law is lopsided in favour of the tax collector and the tribunal is entitled to treat failure to issue NORA within a reasonable time or at all and is interpreted as a deemed refusal to amend and NORA as part of FIRS internal tax complaints handling procedures are now optional[186].

23 LAPSED OBJECTION

The inevitable question is what are the consequences where the taxpayer filed his/her objection to the assessment carried out by the Tax Assessment Authority (TAA) but refused or neglected to turn-up at the date fixed for interviews/hearing of the grounds of the objection? The common-sense dictates that where the taxpayer refused to appear for the hearing after several invitations, the

[186] Ibid at 115.

purported objection would definitely lapse and the assessment would become final and conclusive.

This is the position in *Board of Internal Revenue v. Egole*[187] where the evidence disclosed that BIR served the taxpayer with form A for the return of his income, claims for allowances and reliefs. The taxpayer neglected to attend interviews scheduled on three occasions on 24th September 1975, 29th October 1975. On 28th February 1976, TAA pursuant to S. 9 (2) Finance Law 1963 assessed and determined his total income as N170 to the best of its judgment and by a letter of 3rd March 1976 and assessment notice No. 334095 required the taxpayer to pay on 20th March 1976. On 10th March 1976, the taxpayer addressed a letter of objection to TAA. The TAA wrote to the taxpayer several letters to attend interviews and defend his objection such as the on dated 17th March 1976 together with other correspondences on the matter. On 19th June 1976 TAA also wrote to the taxpayer warning that if the tax is not paid on 25th June 1976, prosecution action would be taken to recover the amount. The taxpayer replied on 19th June 1976 and referred to his objection on 10th March 1976, called for a decision on it so that he could appraise his chances of appeal. He requested for another interview on 11th August 1976 and again failed to turn up. Since he neither completed returns form nor attended the interviews, on 8th February 1977, wrote a letter to the taxpayer informing him that the assessment had become final and conclusive under S. 28 (1) Finance Law and Called on him to settle the tax within 14 days. It was after this point that the taxpayer filed his purported appeal to the High Court. AGUTA J striking out the appeal of the taxpayer, held that the letter of objection dated 10th

[187] (1978) IMSLR 592

March 1976 was proper under S. 23 (b) Finance Law because it was within the time frame under S. 23 (2) Finance Law since the notice of assessment was served on 9th March 1976. The time stipulated under S. 26(3) Finance Law would not operate against him until the objection is heard and the result communicated to him. If for any reason, it is impossible to hear the objection as in the instant case, until such reasons and the final decision on the assessment are communicated to the taxpayer.

His Lordship was emphatic and held thus:

> Here the TAA wrote him several letters to attend interview and defend his objection, but the taxpayer failed even though he denied receiving the letters. He promised to attend the interview for 11th August 1976 but he never kept the appointment[188]. He did not complete and return the assessment form. His refusal to attend interviews and complete and return the assessment form made it difficult for TAA to determine his objection. By a letter dated 8th February 1977, TAA informed him that since he failed to attend the interview scheduled on 11th August 1976 as agreed, the assessment was final and conclusive in accordance with S. 28 (1) Finance Law…this being so, the **21 days' time** stipulated under S. **26(3) Finance Law** would …start to run against the taxpayer from 9th February 1977 and so when he filed his purported appeal on 8th March

[188] Ibid at 593, 595-597. Italics supplied

1997, the appeal was out of time. Taxpayer did not file any motion for extension of time[189].

The implication of the above case is that where it is impossible to hear and determine the objection within a reasonable time-frame, especially where the fault is attributable to the fault of the taxpayer or RTA, the objection would automatically lapse. If the taxpayer is in default, RTA would be entitled to enforce the obligation via action in court to recover the payment of the tax debt, interests and penalty thereon.

24 CONTINUOUS OBJECTIONS TO ASSESSMENT/ AMENDMENT OF ASSESSMENT, COULD BE FRIVOLOUS - ITSEFFECT?

The inevitable question is whether the RTA is bound to respond to continuous objections or series of letters of objections? The answer appears in the negative because the law requires the RTA to respond once through the issuance of amended assessment or the issuance of NORA (notice of refusal to amend). Once it has discharged either of these requirements, it has fulfilled its obligation.

This is the position in *Nigerian Bottling Company Plc v. Lagos State Board of Internal Revenue*[190] where the taxpayer was assessed N2,456,289.46 as per the demand notice covering the deductions from pay as you earn (PAYE) not remitted, State development levy inclusive of the 21 percent interests and 10 percent penalty. The demand notice stipulated 14 days to pay. The

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[189] Ibid at 595-597. Italics supplied.

[190] (2000) 1 LHCR 147 at 148-149

taxpayer sent its letter of objection dated 3rd September 1997. After series of meetings between the parties, the RTA reviewed the assessment to N1, 142,180 and by a letter dated 24th October 1997; it gave the taxpayer 3 days (27th October 1997) to settle this liability. The taxpayer filed this suit contending that NORA has not been issued to amend the assessment in line with taxpayer's objections required by SS. 33(3) and 57(3) PERSONAL INCOME TAX ACT 1993 prior to LSBIR sealing the premises on 6th November 1997 which was suspended on 11th November 1997.

ADEFOPE-OKORIE J. held thus:

> (1). that the duty placed on LSBIR is to respond to the objection and give notice of their response. Having done this, it is not mandatory to respond or enter into continuous correspondence because it discharged its obligation to the taxpayer pursuant to S.33 (1) PITA.
>
> (2). that the intention of the legislature that the taxpayer should not be taken unawares by any government action[191] has been fulfilled by the revised assessment even though it did not specifically state it as a notice of refusal to amend. Since it stated however that they looked into the objection of the taxpayer following its representation and explanation, they revised their computation and they complied with the provisions of S.33 (1) PITA as contemplated by the legislature,

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[191] *Ogualaji v. Attorney General Rivers State* (1997) 6 NWLR (Pt. 508) 209 (SC Nigeria)

therefore the revised assessment is final and conclusive.

(3). that the LSBIR having received the particulars of objection, issued its own re-assessment, it is entitled to distain the goods, chattels, land or premises of the taxpayer without the order of the court by virtue[192] of S.50 (a)(1) PITA.

Criticisms – With the greatest respect to the learned trial Judge, though this case is technically right in respect to the principles of objection, hearing and its disposal but its applicability to the archaic remedy of distraint - sealing of the taxpayer's premises without the order of the court, is faulty as it promotes lawlessness and barbarism. The proper and legally justifiable position is that LSBIR to apply to court (now TAT) for the enforcement of the obligation to pay tax by the taxpayer. Invading the taxpayer's premises in a brute and obsolete manner could lead to bloodshed. This case was decided in the pre-2007 era. With the new reforms introduced in the post-2007 era, it is submitted that with the establishment of TAT since 2009/2010, the only legitimate process available would be for LSBIR to procure the order of the TAT for the payment of the tax assessed, in addition to the penalty and interests. When the judgment is obtained, it could be registered at Federal High Court and execution carried out through the instrumentality of the Deputy Sheriff, bailiffs, police and other law enforcement agencies through the writ of *fierifacias* and not to take the laws by its hands.

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[192] (above) at 148-149. Italics supplied.

The point on the invasion of premises without the order of the court in the above case appears to have been overruled.

25 RTA SEALING OF TAXPAYER'S PREMISES UNTIL TAXES ARE PAID

This is the recurrent tax practice problem we encounter in many tax jurisdictions. In respect of the power of RTA to distrain over breach of obligation to pay tax and seal-up the premises, we should be guided by the principles enunciated in *Independent Television/Radio v Edo State BIRS*[193] where RTA applied and obtained *exparte* order to distrin land, premises, chattel, bond place of business, movable goods, securities and any kind of property belonging to the taxpayer, until the personal income tax liability of N12, 882, 596. 43 which were deducted from salaries of their employees which they failed to remit to RTA, is paid. ACHA J ordered it to be paid into the coffers of Edo State Government (EDSG) Treasury and that the premises should be unsealed upon the presentation of the receipt of such payment. Taxpayer filed motions on notice in which it prayed the court to discharge the order made against it and to unseal the premises and RTA filed counter-affidavit and further counter-affidavit, in reaction and opposition. **ACHA J** further ordered that the money so paid should be refunded to the taxpayer within 48 hours, should the application it filed through motion on notice to challenge and discharge the exparte order, succeeds. His Lordship adjourned the motion on notice, for hearing. Aggrieved, the taxpayer, appealed.

The CA unanimously affirming the Ruling of EDO HC and dismissed the appeal and held thus:

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[193] (2015) 12 NWLR (2015) 12 NWLR (Pt. 1474) 442 at 446 – 450 (CA)

> Under PITA, the options and several opportunities are available to taxpayer who dispute tax, to be heard. They are:
> The service of the notice of assessment on taxpayer by RTA which allows him/her 30 days to scrutinize it and raise objections in writing addressed to RTA.
> Upon failure to object within time, the taxpayer has option to proceed to Court (TAT, RC, SHC) to air his grievances under S. 60 PITA,
> Upon information of an exparte motion pending before High Court, the taxpayer can apply to be put on notice thereby converting the motion exparte to motion on notice, upon ability to convince the Court of its need,
> After the warrant of distrain has been issued, the taxpayer has 14 days to pay the tax and if he/she intends to contest the warrant, to appeal to CA.
> If the CA upturns the appeal, the taxpayer still has the right to appeal to SC.

OGUNWUMIJU JCA denounced the taxpayer's attitude thus:

> Where taxpayer failed to utilize any of the above listed opportunities which the law affords him to be heard, such a person cannot run to the same law to cry foul. When a party is given the opportunity to be heard and such party fails to utilize it, he/she cannot hide under the umbrella of fair hearing rule. He will fail. In the instant, it was overwhelmingly beyond doubt that RTA, has exercised unreasonably patience with taxpayer/appellant who kept frustrating RTA;s invitation for tax review/audit,

and thereafter claimed to have been deprived of fair hearing. RTA/Respondent followed the provisions of PITA and the distraining order given against them, was well deserved.[194]

(ii) S.104 PITA 1993 as amended by PITAA 2011, where an assessment has become final and conclusive and a demand notice in accordance with the provisions of PITA, has been served on a taxable/chargeable person, then if payment of tax is not made within time limited by the demand note, RTA may **resort to any** of the following, to recover the tax due:

- distrain the taxpayer's goods, chattels, bonds or other securities
- distrain the taxpayer's land, premises or other property owned by him, and subject to the provisions of S. 104(3) PITA, to recover the amount of tax due by the sale of anything so destrained.[195]

(iii) S.104 (3) PITAA 2011, the PRESCRIBED WAY OF ENFORCEMENT OF PAYMENT OF INCOME TAX, is a mere application to a High Court Judge sitting in Chambers (exparte). Such application is better supported with an affidavit which must be in writing and any application under S. 104 PITA, is a special procedure.[196]

(iv) By virtue of S. 44(2)(a) Nigerian Constitution 1999, nothing in S. 44(1) shall be interpreted as affecting any general law for the imposition or enforcement of any tax, rate or duty.[197]

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[194] (above) 446 at 491 – 482, applying *Newswatch Communications Limited v. Atta* (2006) 12 NWLR (Pt. 993) 144.

[195] (above) 447 at 466 – 467

[196] (above) 447 at 466 – 467

[197] (above) 447 at 489.

COMMENTARY - AIT TAX CASE with its widest publicity attracted and public outcry. Renowned lawyers joined the case as amicus curiae. This case, no doubt, would command highest quality or ratio and greatest respect because so many of our experts such as FA Orbih (SAN), Ade Ipaye (AG Lagos State), Olu Daramola (SAN), Dr Oladapo Olanipekun, B O Odigwe (Solicitor General Delta State) and Paul Usoro (SAN) (Now President Nigerian Bar Association) respectively filed briefs of arguments, appeared and adopted their briefs as the Amicus Curriae (friends of the Court).
In *Ikokas Limited & City Fair Consortium Limited v Nigerian Bottling co. Limited*[198] the Claimants commenced action claiming N3.8m as debts owed by D for advertisements placed by D on Federal Highway bridges from 1999 – 2003. D alleged that it is only Federal High Court and not Rivers State High Court, that has jurisdiction over this case. DIEPIRI J. held that the monies demanded does not constitute revenue of FGN which would qualify it to be within the jurisdiction of Federal High Court and the mere creation of a body by FGN does not make such body agent of FGN. His Lordship was emphatic that by the combined effect SS.1(1), 2(1) and Part III of the Taxes and Levies (Approved Lists for Collection) Act 1998, the sign board and advertisement permit fees, are the exclusive reserve of the LGA and the action was dismissed.

The adoption of the Tanzanian better method of recovery of tax by distraint to cushion the hazard of injury and violence involved using this procedure[199]. The Commissioner of Taxation may file a suit in a court of competent jurisdiction to recover the tax as a debt

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[198] (2009) 10 RSLR 135 at 136 138 at 156.

[199] Luoga FDAM (Prof) – Sourcebook of Income Tax in Tanzania (1990) pp.194-195 (Dar es Salaam University Press)

due to government where the defaulting assesses[200] owns substantial property. Under this procedure, the taxpayer is notified of the outstanding tax liability, interests thereon and be required to pay within 10 days[201]. Thereafter, bailiffs and distraint officers are appointed to value and take inventory of all the properties and assets of the defaulters. The RTA shall thereafter apply to the court through a motion on notice for the issuance of warrant of distraint against the defaulting taxpayer. The RTA need not adduce any evidence provided a certificate issued by COT of default of the payment, containing the name, address, amount of tax debt due and payable. This would be regarded as sufficient evidence[202] and in absence of rebutting evidence; the assets of the taxpayer shall be seized and sold. This is the most suitable method that ought to have been adopted[203]

26 FAILURE TO FILE OBJECTION

The filling of objection is fundamental requirement to the resolution of tax disputes proceeding. Failure to comply with the requests to produce books of accounts, records and particulars of transactions is also fatal. In the case of *I-D Sam (Nig) Ltd v. Lagos State Internal Revenue Service*[204] the Claimant claimed it had no qualified auditors but made available to LSBIR, the records of income and expenditures. LSIRS therefore assessed its tax liability with total sum of ₦13, 143,625 on its best of judgment. The

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[200] SS.18 and 109 Income Tax Act (Tanzania).

[201] Income Tax (Distraint) Regulations 1975

[202] Luoga (n199) 94.

[203] The cases of Nigerian Bottling Co. Ltd. v Lagos BIR (above) and Independent Television/Radio v. Edo BIR do not represent good law.

[204] (2011) 5 TLRN 41 at 44-46 (Lagos State High Court).

Claimant alleged the assessment is excessive, arbitrary out of touch with reality and is a weapon of extortion. Oyefeso J. held:

> That a tax payer has a right to disagree with any assessment as being arbitrary, excessive, out of touch with reality etc but he must communicate that disagreement to file a notice of objection within 30 days of prescribed by S. 58 PITA and since no valid objection was filed against the assessment and demand notice, the assessment becomes final and conclusive[205].

This is also the position in *Lagos State Internal revenue board v. odusani*[206] where the court held that the additional assessment which was made in which the tax payer neither raised objection in writing nor appealed; cloths the court with no jurisdiction to alter or review the amount claimed unless the Board acted unreasonably.

27 ASSESSMENT WITHOUT OBJECTION IS FINAL AND CONCLUSIVE

The general rule is that assessments made by RTA whether formal objection or based on the best of its judgment is final and conclusive where the tax payer filed no valid written objections within the stipulated period of time and had not procured extension of time to that effect[207]. The demand notice alone cannot be taken

[205] S. 66 PITA provides where no valid appeal or objection is lodged in a prescribed form, the assessment becomes final and conclusive and payment must be made under S. 104 PITA.

[206] (1979) N Com LR 421 at 422 (Nigerian Commercial Law Reports (1979) 3 LRN 118 (Law Reports of Nigeria) per Omotosho J.

[207] *Board of Internal Revenue v. Egole* (1978) IMSLR 592 at 593 per Aguta CJ.

as final and conclusive because the tax payer still have the options of objecting within the prescribed time or filling an appeal against an assessment or filing an appeal against the decision of Tax Appeal Tribunal or a judge. It is upon the failure of the party to object or appeal that will lead to the finality of demand notice[208]. Where the tax payer did not appeal, against the decision of the RTA or RTA did not to amend the assessment, or where the RTA had confirmed the assessment without appeal, the assessment will be final and conclusive[209]. Similarly, the assessment, varied or amended or confirmed by the Tax Appeal Tribunal (former Tax Appeal Commissioners) without further appeal, becomes final[210].

28 REMEDIES SUCH AS JUDICIAL REVIEW AND PUBLIC PURPOSE LITIGATION

The duties of the Panel-Members-For-Review-Of-Objections are basically quasi-judicial in nature and must be exercised impartially. They are classified as inferior tribunal subject to the supervisory jurisdiction[211] of the States' High Court[212] and Federal High Court,

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[208] *LSIRB v. SPDC* (below) at 63 per Adebiyi J.

[209] See Tanzanian cases – Commissioner of Income Tax v. Singh 3 EATC 24, *Mandava v. CIT* 2 EATC 426, Kenyan cases – Commissioner *of Income Tax v. Singh* 3 EATC 24 and *Mandava v. CIT* 2 EATC 426. See also Ireland's case of Deighan v. Hearne (1990) 1 IR 499 for the assessment of what was due and payable which must be final and conclusive before proceedings would be commenced.

[210] *FBIR v. Nigerian General Insurance Company Limited* (2012) 8 TLRN 106 at 109, where the Supreme Court held that the court has no power to reopen assessment which has become final and conclusive assessment - See also LSIRB v. SPDC (2011) 5 TLRN 60 at 62 -63.

[211] *Thompson & Grace Limited v. Government of Akwa-Ibom State* (2010) 3 TLRN 96 (High Court Eket) and *Attorney General of Cross Rivers State v. Oju*a (2011) 5 TLRN 1 at 56 (Court of Appeal).

for the order of certiorari prohibition and declaration that their assessments and conclusions, are ultra-vires[213] for infringements of Law[214]. The superior courts may entertain application for judicial review on the grounds that an actions by the Panel-Members-For-Review-Of-Objections are ultra-vires, irrational, procedurally deficient and unfair.[215] The second class of this type of remedy is

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[212] *Nizaba International Trading Company Limited v. Kenya Revenue Authority* (2000) Kenya L.R. 587 at 588.

[213] In the Malaysian High Court case of *Metacorp Development v. Negeri* (2011) 5 MLJ 447 at 448 it was held that judicial review of assessment is available to the taxpayer where RTA acted in excess of authority, error of law or abuse of power that goes to the legality of the conduct of the decision-making authority. Here the taxpayer had demonstrated illegality and unlawful treatment and it would be wrong to insist that it should exhaust its statutory right of appeal because it is settled law that the availability of an alternative remedy in form of appeal process would not bar application for judicial review.

[214] In *Keroche Industries Limited v. Kenya Revenue Authority* (2007) 2 Kenya L.R. 240 at 241-242 where Nairobi High Court granted certiorari that quashed assessment based on illegal consideration, error of law, irrational, unreasonable tainted with procedural improprieties, mala-fide, arbitrary, oppressive, biased, discriminatory and abuse of power and also granted further assessments. In Australia and New Zealand, it is called conscious maladministration which produced an assessments' which were abuse of process, unlawful and liable to judicial review – See *Commissioner of Taxation v. Futuris Corporation Limited* (2008) 247 ALR 605 Westpac Banking Corporation v. Commissioner of Inland Revenue (2009) NXCA 43.

[215] Ian Saunders – Taxation Judicial Review and other Remedies (1996) pp 122-332. See also Ireland's case of *CG v. Tax Appeal Commissioners* (2005) 2 IR where Georghegan J. granted certiorari to quash administrative decisions because TAC failed to act judicially. In Government of Malaysian v. Singh (1987) 2 MLJ 185 the Supreme Court held that the courts have discretion to grant judicial review where a clear case of lack of jurisdiction, blatant failure to perform statutory duty or breach of the principles of natural justice are proved.

the public purpose litigation. Public interests' litigation should be encouraged amongst lawyers, accountants, economists and business men/women who are versed in the interpretation of tax laws and other fiscal legislation particularly members of CITN in their personal or individual capacities.

In *Nizaba International Trading Company Limited v Kenya Revenue Authority*[216] the taxpayer filed motion on notice under the provisions of Order 53 Rule 3 Civil Procedure Law and SS.52-, 76, 85(3) and 92-Income Tax Act seeking judicial review of the actions and inactions of the Commissioner of Income Tax. The grounds were that the additional assessment levied was arbitrary, lacking factual basis, wrong in principles, bad for disclosing fatal errors on the face and CIT had abused his discretion in making it. The High Court allowed the application and held that CIT as a creature of the statute can only do what an Act allows and if he gets outside the powers granted by the Act or fails to perform his duties, he is amenable to be supervised by the court

Similarly, the court could also use the concept of judicial review to quash legislation promulgated irregularly by State legislature without jurisdiction and made in breach of the principles of prohibition against double taxation. In *Institute of Human Rights & Humanitarian Law v. Attorney General Rivers State House of Assembly & Board of Internal Revenue*[217] a Non-Governmental Organization resorted to this type of public interests litigation when it successfully challenged the Rivers State Government Social Services Contributory Levy Law 2011 at the Port Harcourt High

[216] Nizaba International Trading Company Limited v. Kenya Revenue Authority (2000) Kenya L.R. 587 at 588.

[217] (2014) 14 TLRN 9 at 14-18

Court. OPARA J declared the purported law as double taxation and therefore ultra-vires, null, void and of no effect whatsoever because it contravened the provisions of Personal Income Tax Act 1993 as amended. Her Ladyship affirmed that the 2nd Defendant has no legislative competence to enact the SSCLL 2010 and the 3rd Defendant has no right to collect taxes pursuant to the law which contravened the provisions of Nigerian[218] Constitution 1999. Curiously the Counsel for the claimant over sighted the possibility to ask the Honourable Court for the refund of Social Services Contributory Levy Taxes which the 3rd Defendant unlawfully deducted from the salaries of the civil servants and other categories of employees in Rivers State pursuant to the invalidated law enacted without legislative jurisdiction? Curiously the Counsel for the claimant over-sighted the possibility to ask the Honourable Court for the refund of Social Services Contributory Levy Taxes which the 3rd Defendant unlawfully deducted from the salaries of the civil servants and other categories of employees in Rivers State pursuant to the invalidated law enacted without legislative jurisdiction? The 3rd Defendant has no right to collect taxes pursuant to the law which contravened the provisions of Nigerian Constitution 1999. It is submitted that the Rivers State Board of Internal Revenue should grant them tax credits in arrears to off-set subsequent future tax liabilities. This is the most logical conclusion. The taxes unlawfully collected are recoverable through

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[218] Curiously the Counsel for the claimant over sighted to ask the Honourable Court for the refund of Social Services Contributory Levy Taxes which the 3rd Defendant unlawfully deducted from the salaries of the civil servants and other categories of employees in Rivers State pursuant to the invalidated law enacted without legislative jurisdiction. It is submitted that the Rivers State Board of Internal Revenue should grant them tax credits in arrears to off-set subsequent future tax liabilities. This is the most logical conclusion.

time consuming and very difficult refund processes[219]. Strictly speaking, overpayment of taxes are recoverable and could be used as a set-off against future liabilities and tax credit could be granted on this basis[220]. Strictly, interests are claimable.
This is the position in *FBIR v. Integrated Data Services Limited*[221] claimant sued for N15, 2002,397.00 as unremitted Value Added Tax (VAT) plus penalty and interests thereon because D failed to deliver monthly VAT returns for period from January 1994 to October 1999 - 43 months instead of monthly as required by the S.12(1) VAT Act. The trial court gave judgement for the principal sum but refused the claim for interests and penalty but the Court of Appeal granted it by virtue of SS.15 and 31 VAT Act[222]. If interests are claimable by the Relevant tax Authority for late payment of taxes[223], there is no justification why the taxpayers could not be entitled to claim interests for taxes unlawfully collected pursuant to unlawful, illegitimate legislation. This equivalent to overpaid taxes.

In the Zimbabwean jurisdiction, this view is supported by the case of Ellis v. Commissioner of Taxes[224] the COT assessed the taxpayer for Capital Gains Tax on expropriated shares. The tax demand was paid but the provision of the legislation was subsequently held to be invalid by the Supreme Court as being contrary to the Constitution. COT thereafter reimbursed the bulk of the tax paid. The estate of the taxpayer brought an action to require

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219 S. 21 (2) (3) (3) Board of Internal Revenue Law No.12 (2012 Rivers State)
220 S. 21 (2) (3) (3) Board of Internal Revenue Law No.12 (2012 Rivers State).
221 (2009) 8 NWLR (Pt. 1144) 615.
222 Ibid at 620 - 624
223 *Lagos State BIR v. Mobotson Ventures (Nigeria) Limited* (2012) 6 TLRN 141 per Adebiyi J
224 (1994) 1 Zimbabwe L.R. 422 at 435

the payment of interests on the tax paid from the date of payment to the date of repayment. The COT held it was immune from the claim of interests but the High Court held that interests were claimable only from the date when the Supreme Court nullified the legislation. On appeal the Supreme Court of Zimbabwe held that where a demand for tax is made pursuant to invalid legislation, the taxpayer has the right to recover the tax paid together with the interests from the date of the payment and there was no immunity which prevents the court from payment of interests. GUBBAY CJZ observed thus:

> The view that there is in general a right to restitution of monies paid upon an ultra-vires and illegal demand, and so a right to the recovery of interests thereon, is both attractive and compelling. For such principal payment would have been made either in consequence of a perceive presumption on the part of the payer of the constitutional validity of the demand and the holding out of the such legality by the legislature, or on account of the prospect of the payer being subjected to penal interests were his opinion of the illegality of the demand being ruled to be incorrect. It matters not which it be, since payments made under unconstitutional legislation cannot be deemed voluntary. In short, an ultra vires demand alone by a government body provides a ground for restitution. It operates outside the field of and focuses on the preposition of the government

body as payee rather than circumstances[225] of the payer.

This jurisprudential line of thinking also draws support from the Malaysian jurisdiction. In the case of *Pelangi Limited v. Ketua Negeri*[226] the Inland Revenue (IR) (respondent) had subjected gains arising from a compulsory land acquisition to income tax and consequently had retained the applicant's tax refunds. The applicant successfully applied for judicial review and obtained a declaration that the tax was unlawful and sought a refund of RM2, 360,723.62 together with interests. The IR contended that mandamus cannot be granted against it as a public body and that the taxpayer is not entitled to the refund. It was held that interest was the consequent to unlawful imposition of tax; the IR unlawful assessment did not follow the established principle[227]. **YUSUF J** was emphatic that since the tax was unlawful, the IR must refund it with interests and the S. 111 Income Tax 1967 relied upon by IR concerns overpayment but the case here was unlawful payment. The same line of reasoning similarly stated in the case of *Power Root (Malaysia) Limited v Director General Customs*[228]where the applicants manufacture drinks (goods) and the Respondent classified it as Sales Tax of 10 percent instead of 5 percent. The

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[225] Ibid at 435. See also *COT v. F. Kristiansten Limited* 57 SATC 238, BAT v. COT 57 SATC 238 (Zimbabwean cases) and *KNA Insurance & Investment Brookers Limited (In Liquidation) v. South Africa Revenue Service* 71 SATC 155, *Commissioner for Inland Revenue v. First National Industrial Bank Limited* 52 SATC 224, Sage Life Limited v. Minister of Finance 66 SATC 181 (South African cases) which support the proposition that interests should be paid to taxpayers for overpayment of taxes.

[226] (2012) 1 MLJ 825 at 826

[227] *Ketua Negeri v. Penam Realty Limited* (2006) 3 MLJ 597 (2006) 2 CLJ 835.

[228] (2014) 2 MLJ 271 at 252

applicant paid and the appeals to High Court and Court of Appeal were in their favour. Applicant wrote to the Respondent demanding refund of the 5 percent was refused and they filed consequential relief. The court held it was an injustice and a breach of fundamental constitutional principles to permit the respondent to retain the illegally collected tax. **YUSUF J** was emphatic that the court was not functus officio when the applicant filed consequential relief and discountenanced the assertion by the Respondent that it was relieved of the obligation to make restitution because the illegally collected taxes had been 'passed on' to the end users as unfounded. His Lordship further stated thus;

> The Respondent had no right to retain illegally collected taxes and the applicants should have recourse to restitution as of right. The defense of 'passing on' was rejected because it was inconsistent with the basic principles of restitution law, it was economically misconceived and the task of determining the ultimate burden of tax was exceedingly difficult and constituted as an inappropriate basis for denying relief. The court had no jurisdiction to convert the originating motion, let alone interlocutory application such as filed by the applicant into writ of summons. It was clear when the matter was disposed of at the High Court and at Court of Appeal; there was no longer any cause of action or matter to be converted into a writ[229]

It is submitted that the Rivers State Board of Internal Revenue refund with interests, the amount illegally collected as tax on a

[229] Ibid at 26, 29-30 italics supplied.

legislation which has been nullified. Since it is usually too difficult to obtain refund from the government treasury, RVSBIR should at best grant them tax credits in arrears to off-set subsequent future tax liabilities. This is the most logical conclusion. Where the government funds are being misused or channeled into wrong expenditures, a tax payer can initiate litigation against the particular government department, ministries etc. The tax payers' right to challenge irregular expenditure of public funds was recognized in the case of *Gani Fawehinmi v President of Nigeria*[230] *where the taxpayer challe*nged the President payment of salaries allowances in dollars $247,000 and $1117,000 respectively to certain categories of choice Ministers above the one approved by Revenue mobilization, Allocation and fiscal commission (RMAFC)) i.e. ₦794, 085 as violation of SS. 15, 84, 124 & 153 Nigerian Constitutions 1999 and Political, Public and Judicial Office Holders (Salaries and Allowances) Act cap. 6 (2002). The Court of Appeal held that the taxpayer has *locus standi* to sue because it will definitely be a source of concern to any taxpayer who watchers the funds he contributed or is contributing towards the running of the affairs of the State being wasted when such funds could have been channeled into providing jobs, creating wealth and providing security to the citizens. ABOKI JCA was emphatic that such a taxpayer has sufficient interest of coming to court to enforce the law and ensure his tax money is utilized prudently[231].

29. CONCLUSIONS & PROPOSALS FOR REFORM

The efficacy and desirability of the TAT is not in doubt.[232] What is required is the necessary constitutional amendment to bring it in

[230] (2007) 14 NWLR (Pt.1054) 275 at 299.
[231] Ibid at 299.
[232] *TSKJ 11 v. FIRS* (2014) 13 TLRN 1 at 6.

conformity with what is obtainable in USA, India, Australia and China. The better time to give the TAT the constitutional legitimacy is the present time what the National Assembly is in the process of amending the Nigerian Constitution of 1999. When this is done, the TAT would enjoy the constitutional status comparable to the superior court of record Comparable to the National Industrial court[233].

30. NATIONAL TAX COURT OF NIGERIA?

In spite the nomenclature of the TAT, its chairmen and members are still known and enjoy the status of Tax Appeal Commissioners individually even though they collectively constitute the TAT. It is suggested that the reform should take structure of transforming the TAT into "**NATIONAL TAX COURT OF NIGERIA**" (NTCN). This argument is plausible because the National Industrial Court of Nigeria (NICN) initially started as an employment dispute tribunal before it metamorphosed into NICN now enjoying the status of superior court of records equivalent to the High Courts. There is no impropriety if the legislative amendment of the constitution is sought so as to give the TAT the status of National Tax Court comparable to NIC. This is the only way litigants can continue to enjoy the innovations and reforms introduced into the conduct of tax litigations proceeding by the TAT. This is comparable to Tax Court of Canada (TCC) which the Canadian Government converted and replaced her former Tax Review Board (TRB)[234]. TCC is a

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[233] See the Constitutional Amendment (third Alteration) Cap. 3 (2010)

[234] SS. 158 Tax Court of Canada Act 1983. TCC has the jurisdiction to hear appeals on tax or revenue matters

superior Court of record[235] in Canada. Tax appeals in Canada are heard by the TCC with subsequent appeals to Federal Court of Appeal and Supreme Court of Canada (SCC)[236] where the question involved is considered to be of public importance. Cases in TCC may be conducted with either flexible informal procedure way if the total tax (excluding interests) is $25,000 but less than $50,000 or through the General way involving exchange of pleadings and documents, discoveries, contentious examination and cross-examination of the evidence of the witnesses and other complex proof on balance of probabilities before a judge who may order reassessment wholly or partially. On conclusion, modest tariff costs and disbursements reasonably incurred (including cost of hiring expert witnesses) are recoverable by successful party to the litigation[237]. In the United State of America (USA), there exists similar specialized "US Tax Court"[238] staffed with experts in taxation where litigants can dispute tax deficiencies, review of certain collection actions determined by RTA and other incidental matters[239] Victor Thuronyi summed up the position thus:

> The judges understood the tax well. They are not faced by complex facts patterns and they are not impressed by taxpayer arguments seeking to justify tax avoidance efforts. The tax courts judges tend to

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[235] David Jacyk the Dividing line Between Jurisdiction of Tax Court of Canada and Other Superior courts (2008) vol.52 (No. 3) 661-707 Canadian Tax Journal.

[236] Brian Arnold – Canada in Ault et al. (1997) pp.30-31

[237] Tax Court of Canada http;/www.tcc-cci.gc..ca/ downloaded 29 November 2014.

[238] S.8 Revenue Act 1942 and Tax Reform Act 1969 (USA).

[239] Richard Levine, Theodora Peyser and David Weintraub – Tax Litigation, Tax Management Portifolio (2012) Vol. 630 Bloomberg BNA 4th Edition

> try to uphold the integrity of the tax system; therefore, they are sympathetic to the government's economic substance attack on tax shelters. At the same time, they will reject the government's arguments that they see as inconsistence with the law and they do so with confidence in their understanding of the law[240]

There are also other superior tax courts of records equivalent to the one being advocating such as the Tax Court of South Africa (TCSA)[241] and Revenue Court in Jamaica[242].

31. PROXIMITY FACTOR IN LOCATION OF THE PROPOSED NATIONAL TAX COURT OF NIGERIA

The courts should be accessible to the litigants and its location is an essential factor. Nigeria is a nation built on tripod stand comprising the defunct Eastern, Northern, and Western regions. Even though, the six geo-political zones have emerged but its former geographical characters are still retained. Although, Benin is a beautiful city originally was in Western Region. It later metamorphosed into Mid-West, later Bendel and presently it is in Edo State. Compelling taxpayer litigants based in the Eastern Nigerian cities of Ugep Ogoja, Calabar, Uyo, Ikot-Ekperne, Eket, Port Harcourt, Degema, Bonny, Yenagoa to attend the TAT at Benin City Edo State is not costs-effective. Port Harcourt takes a minimum of 4-5 hours' drive to travel to Enugu and it is closer than

[240] Victor Thuronyi - Comparative Tax Law (2004) pp. 215-220 (Kluwer Law International)

[241] Luke Connell -Trial by Ambush in the Tax Court (2003) vol. 120 pp.558-579 South African Law Journal JUTA publications.

[242] S. 16 Income Tax Act 1985 (Jamaica).

Benin City which is a distance of 6 to 7 hours' drive. The litigants at Sokoto, Kebbi Zamfara States suffer the same fate of two to three days journeys to and fro Kaduna. So also those residents at the remotest part of Borno, Yobe, Adamawa, Plateau traveling to Bauchi zone of the TAT, encounter two to three days to and fro journeys. These coupled with hotel bills and the attendant journeys risks are matters associated with the zones of the TAT handling tax cases. The soaring costs would discourage tax litigation. If the costs benefits analysis are evaluated, the taxpayers may be intimidated, frightened to embark on litigation or possibly subdued into out of court settlement whose terms are dictated by the mercy, whims or oftentimes caprice of the RTAs' in spite of the facts that most of the objections/appeal cases may have greater chances of success.

Furthermore, TAT have minimum sitting of once, twice or thrice per quarter. Sometimes the tenures of the TAT chairman and tax appeal commissioners may expire without renewal. These cause delays, disruption and occasion hardship to litigants in urgent case[243]. Instead of part time or adjunct members, we advocate the appointments of career processionals and tenured judges as judicial officers such as the proposed National Tax Courts of Nigeria (NTCN).

It is advocated that the proposed National Industrial Court be cited in all the 36 States of the Federation of Nigeria including Abuja Federal Capital territory like the National Industrial Courts to save

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[243] U. Jack-Osimiri and M. O'Sullivan - Dynamics of Tax Appeal in Nigeria (2014) Vol. 13 (No.1) Journal of Taxation and Economic Development pp.1-37

costs and journey risks. Tax Court of Court currently sits in 68 cities of Canada[244].

It is further suggested that the payment of the judgment debt or two thirds of it, as a condition of appeal should be abrogated. The most sensible approach is for the taxpayer to pay the undisputed portion of the tax assessed like the system in Tanzania. Compelling the appellant taxpayer to pay all or part of the judgment debt is stifling and could frustrate appeals whose clarifications by the appellate courts would help shape and molding our jurisprudence of taxation as guidance for the future disputes. The appeal court should be given the discretion whether to grant a stay of execution pending appeal or not following the well-defined principles of law enunciated in our legal system.

In *Federal Inland Revenue Service v TSKJ 11 Construces Internationals Sociadade Unipessoallda*[245] the Federal High Court held that in application for stay of execution pending appeal, the court must exercise its discretion judicially, judiciously taking into account the competing rights of the parties and the requirement of justice and the court would do so if it is satisfied that there are special and substantial reasons to deprive the successful party of the fruit of his judgment. Here Ademola J. refused the stay of execution for the judgment debt because there were neither exceptional circumstance nor arguable grounds and recondite points of law raised by the applicant/Counsel. His Lordship nevertheless granted the order for the stay of execution of costs of

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[244] Tax Court of Canada 20 Anniversary Symposium (2005) 53 Canadian Tax Journal 135 – 175.

[245] (2014)14 TLRN 159 at 161

N400, 000 provide the appellant provides security undertaking to pay the sums to the Respondent should the appeal fails.

The above case is technically correct because in *Harris v. Inspector of Taxes*[246] the Supreme Court of Ireland held that tax overpaid taxes pending appeal should be refunded because the taxpayer is entitled to a refund of excessive tax and it is obligatory that it should be repaid pending final determination of appeal.[247]

The problems of the congestion of cases and snail-pace of cases at the TAT have been stresses.[248] The engagements of tenured career judges would alleviate this problem. The amendments of taxation laws may take lengthy period and in the interim, it is suggested that TAT should be pro-active and move their sittings intermittently from one State capital to the other in all the zones. This is comparable to National Tax Appeals Board of Tanzania (NTAB) whose itinerant responsibility mandated it to move from one region to another in order to discharge its onerous adjudicatory responsibilities[249].

It is suggested that there should be a reversal of the burden of proof on the taxpayer and through legislative changes. The onus should be on RTA to prove its assessment is correct[250] rather than stifling

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[246] (2006) 1 IR 165 at 166-167

[247] Under equitable principle of unjust enrichment and See also SS. 933(4), (6) 934 (6) and 941(9) Tax Consolidation Act 1997 (Ireland).

[248] Adedokun, Olujimi – Slow Pace of Tax Appeal Tribunal (2013) 8 August This Day p.74

[249] Income Tax (Appeal Board) Rules 1975 (Tanzania).

[250] Binh-Tran-Nam & Michael Walpole (above) at 478 and Melinda Jones – Evaluating Australia's Tax Disputes System: A Dispute System (above) at 563

the taxpayer to bear the burden to establish that the assessment is excessive. The internal review of objection department of the RTA should be strengthened. It is suggested some external members should be appointed from the professional bodies like CITN into RTA internal review committee. This would help improve its effectiveness in the quicker dispensation of its duty to review assessment expeditiously to reduce delay and attendant costs. We suggest the adoption of the best practice identified from the Australian system whereby the internal review would be carried out by an officer different from the officers who carried the assessment. We also advocate the adoption and adaptation in Nigeria, the United States model in the Internal Revenue Service (IRS) styled the National Taxpayers Advocate (NTA).[251] Under this system, the Head of NTA is directly appointed by the US federal government and he is a member of the senior management team in the IRS with high level of information flow. The NTA independently of IRS in that it is not directly accountable to it but rather reports to the Congress. NTA operates Low Income Taxpayers' Clinic which provides professional representation to individuals who need to resolve tax related problems with IRS thereby making tax disputes resolution processes accessible to Americans with low income.

[251] Internal Revenue Service, United States Department of the Treasury, The Taxpayers Advocate I Your Voice at IRS (12 June 20112) <http://www.irs.gov/advocate/article/o.id=212313,00.html>