

## DISTILLING THE CONTOUR OF ADR APPLICABILITY TO TAX DISPUTES IN NIGERIA

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### **Abstract**

*Alternative Dispute Resolution (ADR) Mechanism is a nascent adjudicative mechanism to adversary legal jurisprudence though an integral part of African adjudicatory system. Its preference to litigation is premised on lots of advantages which the cardinal ones include saving time, cost effectiveness and saving mutual relationship of disputants. Notwithstanding the seeming advantages and preference of ADR to litigation, there is a growing concern as to whether ADR can be used in the resolution of tax dispute, it has been argued that matters of public concern cannot be referred to arbitration and that the Court retains exclusive jurisdiction in disputes of public policies. The issue is whether ADR can legitimately resolve tax dispute in Nigeria. The controversy forms the crux of this dissertation. The aim and objective of the study was to establish that there is limit to which ADR, including arbitration, could be applied in Nigeria for the efficient and effective settlement or resolution of tax disputes. Both theoretical and empirical research methodology were employed in the course of the research. Accordingly, reliance was placed on the study of both primary and secondary sources of law like the Constitution, Federal and State enactments, text books, journals, newspapers and internet base materials respectively. It was found that application of ADR processes to tax disputes is efficient and to tax administration. If this is sustained, it would enhance and promote voluntary tax compliance thereby maximising revenue generation. The work however is not a general study of ADR or tax law. The main focus is to distil the contour of ADR applicability to tax dispute. It is Nigerian based; however, comparative recourse is made to foreign jurisdiction for the purpose of sustaining a persuasive argument.*

### **Introduction**

Taxation is the primary and the ancient source of government revenue. It plays an important and established role in any economy. There is hardly any government that does not rely on taxation to provide the much needed revenue for socio-economic development and also to reduce the inequality of wealth in the society.<sup>1</sup> Tax system is one of the most powerful levers available to government to stimulate and strengthen its economic and social development. The consequence therefore, is that every government is desirous of maximizing tax revenue by institutionalising a healthy sector of tax compliance. Unfortunately, the Nigerian citizens are averse to tax payment. Statistics has it that in Nigeria, less than 6% of the population pay tax and the rest do not pay tax.<sup>2</sup>

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<sup>1</sup>A. I Ayua, Nigerian Tax Law (Ibadan: spectrum Law Series)1996, p.9.

<sup>2</sup>See Kemi Adeosun, speech at the 9th Colloquium to mark the 65th birthday of Asiwaju Bola Tinubu, available at [www.Pmnewsnigeria.com](http://www.Pmnewsnigeria.com) (accessed on 18 April, 2018).

The reason has been attributed to lots of factors ranging from low per capital income, lack of tax awareness, none accountability of tax fund to obvious intention to evade tax. The government on the other hand is not giving up on tax collection. This has brought unending dispute between tax payers and tax authorities in the course of tax administration. There is also dispute between tax authorities as to the jurisdictional power of each tier of government to impose tax.

The tax dispute, like every other dispute has been resolved through litigation which has been a conventional method of dispute resolution. There is nevertheless a paradigm shift from the conventional litigation to Alternative Dispute Resolution (ADR) process. Application of ADR in the resolution of disputes has become a global trend. Tax dispute is one of the areas that have witnessed this global shift to ADR. It has been submitted that it is high time Nigeria joined her counterpart in the application of ADR to the resolution of tax disputes as there is no law mandating tax authorities to explore ADR in the resolution of tax disputes.<sup>3</sup> The recent adoption of ADR in tax dispute is premised on lots of advantages which ranges from saving cost, saving time and building tax payers and tax authorities friendliness which enhances voluntary tax compliance.<sup>4</sup>

There is however a controversy as to the propriety of ADR applicability to every tax dispute. Tax dispute is very dynamic; it could be a jurisdictional dispute- a dispute between two tiers of government on one hand; or administrative dispute- a dispute between the tax authorities and taxpayers on the other hand. These types of disputes require different categories of dispute resolution processes.

ADR could be very effective and efficient in the resolution of Administrative Tax Dispute and may not be efficient in the resolution of Jurisdictional Tax Dispute as no ADR process can usurp the power of the court in the interpretation of the Constitution and other tax enactments with regards to the power of the government to impose tax. ADR can be efficient in the resolution of tax dispute between tax authorities and tax payers. The process in this context can be adopted as an in-house administrative mechanism of tax authorities to resolve tax dispute with taxpayers without allowing such to result in litigation.

## **The Nature of Alternative Dispute Resolution Mechanism (ADR) And the Developmental Process**

### **Nature and Types of ADR**

#### **Negotiation**

According to *Chambers English Dictionary*, Negotiation means “to bargain, to confer for the purpose of mutual agreement or to arrange for by agreement”.<sup>5</sup> Negotiation is one of the most common ADR processes in the world. It is a process whereby parties to a

<sup>3</sup>See Odinkonigbo & Ezeuko, “Does Nigeria Follow the Contemporary Global Trend in Tax Dispute Resolution Strategy?” *Nigerian Juridical Review*, Volume 12 (2014) p.164.

<sup>4</sup>See S.O.Tonia, “Evaluating Alternative Dispute Resolution (ADR) in Dispute About Taxation.” Available at [www.law.monash.edu.au/countries/acji/projects](http://www.law.monash.edu.au/countries/acji/projects), (accessed on 20, April,2018).

<sup>5</sup>Chambers English Dictionary, 7th ed., (Edinbur, W&R Chambers,1990, p. 961.

dispute attempt to settle that dispute on their own and without the assistance or intervention of a third party. Parties may either be represented by professional negotiators or conduct the negotiation themselves.

Negotiation can be informal when two or more persons initiate and work through their own negotiation privately and in an unstructured manner. The parties exchange useful information, give and take concessions and finally agree at some terms of settlement acceptable and satisfactory to both of them.

### **Mediation**

Mediation is a process whereby parties are assisted in their negotiations by a neutral third party (mediator) to identify the issues in dispute, generate options around these issues, and consider alternatives and to attempt to reach agreement that will meet the underlying needs and interests of both or all parties to the dispute.

A neutral person called a "mediator" helps the parties try to reach a mutually acceptable resolution of the dispute. The mediator does not decide the case, but helps the parties communicate so they can try to settle the dispute themselves. Mediation may be particularly useful when family members, neighbours, or business partners have a dispute. Mediation may be inappropriate if a party has a significant advantage in power or control over the other.

Mediators do not make decisions about who is right or wrong or what the best outcome should be. A key advantage to mediation is that the parties have significant control over the end result. Decision-making power stays in the parties' hands, and is not passed on to a judge or arbitrator. Instead, a mediator helps bring the parties together by establishing a framework for the negotiation within which all parties agree to participate.

### **Conciliation**

Conciliators are usually recognized experts in the field of the dispute and are empowered to suggest or give advice on likely settlement terms. It is not uncommon for the third party conciliator to be very persuasive and to recommend strongly certain outcomes that they believe are suitable. Conciliation is less formal than arbitration. This process does not require an existence of any prior agreement. Any party can request the other party to appoint a conciliator. One conciliator is preferred but two or three are also allowed.

Conciliation as a type of ADR in Nigeria is governed by law. It derives its force from Sections 37 – 42 and section 55 of the Arbitration and Conciliation Act.<sup>6</sup>

### **Arbitration**

Arbitration is the process of referring a dispute to an impartial intermediary chosen by the parties who agree in advance to abide by the arbitrator's award that is issued after a hearing at which all parties have the opportunity to be heard. Arbitration resembles traditional civil litigation in that a neutral intermediary hears the disputants' arguments

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<sup>6</sup>Cap A 18, LFN, 2004.

and imposes a final and binding decision that is enforceable by the courts. One difference is that in arbitration the disputants elect to settle any future disputes by arbitration before a dispute actually arises, whereas with civil litigation the judicial system is generally chosen by disgruntled party after a dispute has materialized.

In arbitration, a neutral person called an "arbitrator" hears arguments and evidence from each side and then decides the outcome of the dispute. Arbitration is less formal than a trial, and the rules of evidence are often relaxed. Arbitration may be either "binding" or "nonbinding." *Binding arbitration* means that the parties waive their right to a trial and agree to accept the arbitrator's decision as final. Generally, there is no right to appeal an arbitrator's decision. *Nonbinding* arbitration means that the parties are free to request a trial if they do not accept the arbitrator's decision.

### **Cases for which Arbitration May be Appropriate**

Arbitration is best for cases where the parties want another person to decide the outcome of their dispute for them but would like to avoid the formality, time, and expense of a trial. It may also be appropriate for complex matters where the parties want a decision-maker who has training or experience in the subject matter of the dispute.

**Dispute that can be referred to arbitration must be justiciable issues which can be tried as civil matters.<sup>7</sup> It must be dispute that can be compromised by way of accord and satisfaction.<sup>8</sup> The dispute includes all matters about any real or personal property.<sup>9</sup> Terms of a deed of separation between a husband and wife has been settled by arbitration.<sup>10</sup>**

**Matters of public concern are not arbitral. It has been held that reference of an indictment for conspiracy and perjury to arbitration is illegal.<sup>11</sup> Obi Okoye<sup>12</sup> has identified matters that cannot be settled by arbitration to include dispute involving crime and dispute involving interpretation of the Constitution and other statues.** Supreme Court of Nigeria had in the case of *Kano State Urban Development Board VS. Fanz Construction Company Limited*,<sup>13</sup> given a guideline on the categories of matters which cannot be the subject of an arbitration agreement and therefore cannot be referred to arbitration to wit: an indictment for an offence of a public nature; disputes arising out of an illegal contract; disputes arising under agreements void as being by way of gaming or wagering; disputes leading to a change of status, such as divorce petitions; any agreement to give the arbitrator the right to give judgment *in rem*.

### **Development and Practice of ADR**

Alternative Dispute Resolution is an ancient set of dispute resolution mechanism. The traditional societies across the globe have featured varieties of ADR process like Negotiation, Mediation and Arbitration. ADR therefore is not an imported concept to

<sup>7</sup>Gaus Ezejiolor, *The Law of Arbitration in Nigeria* (Nigeria: Longman, 2005)p.3.

<sup>8</sup>See Blake's case (1606) 610 p.436.

<sup>9</sup>Baker v Town Shend (1817) 7 Townt 422.

<sup>10</sup>De Riki v De Riki (1891) Q. 378.

<sup>11</sup>Queen v Hard (1850) 14 Q. B 82.

<sup>12</sup>Obi Okoye, *Law in Practice*, op cit at p. 325.

<sup>13</sup>(1990) 4 NWLR Part 172 P.1.

African Jurisprudence. It has existed in our indigenous societies and rudimentary to our customary jurisprudence.

*Traditional African Dispute Resolution and Alternative Dispute Resolution are like six and half a dozen.* Before the advent of colonialism, when existing African judicial systems were replaced with Western systems, there existed a well-developed mechanism for settling disputes in Africa. This mechanism was very conciliatory in nature and was able to maintain a communal spirit and good neighbourliness. But with the advent of colonialism, the mechanism was replaced with the western favourite – litigation, which is non-conciliatory. Some scholars are of the opinion that the name Alternative Dispute Resolution should be replaced with African Dispute Resolution so that the system can assume its proper position as the Continent's contribution to world peace and progress.<sup>14</sup>

### **The Legal Framework for the Practice of ADR in Nigeria**

The practice of Alternative Dispute Resolution in Nigeria has been enshrined in the Nigerian constitution. Section 19(d) of the 1999 Constitution states:

*...Respect for international law and treaty obligation as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication”.*

Section 254C (3)<sup>15</sup> also states that:

*“The National Industrial court may establish an Alternative Dispute Resolution Centre within the court premises on matters which jurisdiction is conferred on the court by this Constitution or any Act or Law”*

ADR also has the blessings of The Arbitration and Conciliation Act.<sup>16</sup>

The Act provides that:

*Every arbitration agreement shall be in writing contained (a) in a document signed by the parties; or (b) in an exchange of letters, telex, telegrams or other means of communication which provide a record of the arbitration agreement; or (c) in an exchange of points of claim and of defence in which the existence of an arbitration agreement is alleged by one party and denied by another.<sup>17</sup>*

<sup>14</sup>See generally J.K Gazama, “ Development and Practice of ADR and Arbitration in Nigeria” available at <http://www.nigerialawguru.com>. (accessed on 12 March, 2017) See also B.E Onimim , “Using ADR Process in Resolution of Marine Dispute: A Nigerian Perspective,”Rivers State University Law Journal Vol. 1 No. 3 (2005). See also Chukwunonso Okafor, “African Jurisprudence and Restorative Justice: The need to Re-Think the Philosophical Foundation of Nigerian Criminal Law and Criminal Justice Administration,” in G.C Nnona (ed) Law, Security and Development: Commemorative Essays of the University Law Faculty (Enugu: Snap Press, 2013) pp. 247-286, particularly at 260-264. See also C. Okafor, S.U Ortuanya & C.A Ogbuabor , “Fighting on the Side of Law and Justice: Legal Essays in Honour of Professor G.O.S Amadi (Enugu: Snap Press Ltd, 2016) pp.75-112.

<sup>15</sup>The 1999 Constitution (Amended).

<sup>16</sup>Cap A. 18 LFN, 2004. The preamble of the Act provides thus: An Act to provide a unified legal frame work for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting State arising out of international commercial arbitration.

<sup>17</sup>See section 1(1) supra.

The Act also provides for Conciliation. It states that:

*Notwithstanding the other provisions of this Act, the parties to any agreement may seek amicable settlement of any dispute in relation to the agreement by conciliation under the provisions of this part of this Act.*

Order 19 of Federal High Court (civil procedure) Rules of Nigeria is also supportive of interventions in arbitral proceedings.<sup>18</sup> The Government of Nigeria has also entered into an international agreement and treaty in respect of ADR. These includes:

- New York Convention (Recognition and Enforcement of Foreign Arbitral Award) 1958
- International Centre for Settlement of Investment Dispute (ICSID) (Washington Convention) 1966

There have also been court decisions as regard arbitration awards. In the case of *Kano State Urban Development Board V. Fanz Construction Co.*<sup>19</sup> the Court held that the respondent is bound to pay the award made by an arbitration panel. Similar decision was made in *LSDPC V. Adold/Stan Ltd.*<sup>20</sup> Furthermore, Supreme Court, in the case of *Ohiaeri vs. Akabueze*,<sup>21</sup> held as follows: *Parties that voluntary submit themselves to the decision of the arbitrators who are either the chiefs or elders of their community are bound by such decision.*<sup>22</sup>

## **Incidences of Tax Dispute and the Resolution Mechanism**

### **Meaning and Nature of Tax Dispute**

Tax Dispute is any dispute that arises in any circumstance relating to tax legislation and administration. It could be dispute between taxpayer and tax collector as well as dispute between different tax authorities with regards to power of imposition. The Supreme Court Justices in the case of *Attorney General of Ogun State V Attorney General of the Federation*<sup>23</sup> defined tax dispute as:

Any argument, disagreement or controversy between two or more people regarding the payment and/ or discharge of tax liability owed government, or collection of same from taxpayers by tax authorities.<sup>24</sup>

<sup>18</sup>The Lagos State judiciary has taken a giant stride towards curbing the menace of long delays associated with litigation. This has been achieved by the issuance of Lagos State (Civil Procedure) Rule, 2012. This provides that before a matter is accepted for filing, Counsel must indicate, through a prescribed form, that attempts have been made to settle the dispute through ADR process. See Order 3 Rule 2 & 8. The Rule further provide that process shall upon acceptance for filing by the registry be screened for suitability of ADR and referred to the Lagos Multi Door Court House or other appropriate ADR institutions or Practitioners. See Order 3 Rule 3.

<sup>19</sup>(1990) 4 NWLR (Pt N7) P.1.

<sup>20</sup>(1994) 7 NWLR (Pt 358) P. 545.

<sup>21</sup>(1992) 2NWLR (Pt221) P.1 at 7 Paras 12.

<sup>22</sup>See also *Eke vs. Okwaranyia* (2001) 12 NWLR (PT 726) P.181 at 184. For where arbitration was used to settle disputes relating to land, see *Larbi v Kwasi* (1952) 13 WACA 76, see also *Okpuruwu v Okpokam* (1988) 4 NWLR (pt 90) where the Court has held that arbitration is not alien to customary jurisprudence.

<sup>23</sup>(1960-2010) 2 N.T.L.R 902.

<sup>24</sup>This definition is faulted on the ground that it relate only to parties involve in the dispute without considering the subject matter of the dispute. There can be tax dispute between two tax entities other than taxpayer and tax entity. See generally *Odinkonigbo & Ezeuko*, "Does Nigeria Follow the Contemporary Global Trend In Tax Dispute Resolution Strategy?" *Nigerian Juridical Review*, Volume 12 (2014), pg 154 .

In *Attorney General of Ogun State & 4 Ors V Eko Hotel* and another,<sup>25</sup> it is also stated that tax dispute may be any argument, disagreement or controversy between two or among more people regarding the payment and/or discharge of tax liabilities owed government, or the collection of same from taxpayers by tax authorities. The dispute, most of the time, is generally between taxpayer(s) and tax authorities who are authorized under the law to collect taxes in a particular jurisdiction. Sometimes, it could be between tax authorities on which of them is authorized under the law to collect a particular kind of tax.

While elucidating on the meaning of tax dispute, Odinkonigbo & Ezeuko submitted that tax dispute could arise from disagreement or dispute over the right amount of tax payable to tax authorities, and/or when such tax becomes due and payable by taxpayers; or dispute between or amongst tax authorities over who collects what tax from taxpayers. That is, the dispute (regardless of the parties involved) may revolve round a misunderstanding or misinterpretation of facts, law and/or both facts and law relating to tax issues.<sup>26</sup>

From the foregoing, it is seen that tax dispute is not limited only to dispute between taxpayer and tax collecting agent; it also includes the dispute between different tiers of government regarding the power of very tier to impose a particular kind of tax. It is therefore submitted that the nature of tax dispute can be classified into two categories.

One is the dispute between tax payer and tax collecting agents, while the other is the dispute between two or more tiers of government regarding the power to impose a particular tax. The first usually occur at the administrative level. Considerably, any dispute between FIRS, State Boards of Inland Revenue and tax payers in the course of tax administration and collection, be it issues of tax assessment, notice of objection and other ancillary issues of tax administration is referred to as administrative tax dispute.

On the other hand, any tax dispute with regards to power to collect, impose or legislate on tax matter between Federal Government and State Government; Sate Government and Local Government is regarded as jurisdictional tax dispute.<sup>27</sup>

### **Administrative Tax Dispute**

Administrative tax dispute arises as a result of applicability of tax administrative apparatus to the income of taxpayer . This is usually apparent when a taxpayer fails to agree with the findings of tax authority, refuses to comply with request for information from tax authorities.<sup>28</sup> It can begin during audit process. A taxpayer may be audited if his return is suspected to have been compromised or it could be as a result of routine exercise. If the audit is not followed by an agreement between the tax payer and tax authority concerning the amount, the tax payer could file a protest letter.<sup>29</sup>

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<sup>25</sup>(1960)2 N.T.L.R 809.

<sup>26</sup>Odinkonigbo & Ezeuko op cit .

<sup>27</sup>This distinction becomes very imperative as it would help in determining which category of tax dispute is suitable for ADR. It perhaps determines the contour of ADR applicability to tax dispute.

<sup>28</sup>P.M Gregory, " Using Negotiation, Mediation, and Arbitration to Resolve IRS-Taxpayer Disputes", available at [https://kb.osu.edu/dspace/bitstream/handle/1811/77168/OSJDR\\_V19N2\\_0709.pdf](https://kb.osu.edu/dspace/bitstream/handle/1811/77168/OSJDR_V19N2_0709.pdf) (accessed on April 25, 2018).

<sup>29</sup>See Keith Gercken et al, "A comparative Discussion of Negotiation with Revenue Authorities", 16 Tax Note, 136, 1998.

In the jurisdiction where self-assessment is required,<sup>30</sup> a taxpayer will first examine himself/herself and then files a return to Federal Inland Revenue Service (FIRS) after which FIRS assesses the return filed by the taxpayer and issues demand notice. Where a taxpayer is aggrieved with FIRS assessment or demand notice, he or she can, within 30 days from the issuance of the assessment file a Notice of objection demanding that the assessment be reviewed.

### **Jurisdictional Tax Dispute**

With dwindling oil revenue, every tier of government has accorded attention to taxation in order to boost internally generated revenue. The result is multiplicity of taxes from tiers of government, all in quest to maximise revenue generation. This became apparent as one tier of government enacts various types of laws that is not within the ambit of their jurisdictional powers; while others in exercise of their legitimate tax power act excessively that leads to tax proliferation, leaving tax payer with burden of paying too many taxes.

Jurisdictional Tax Dispute is the type of tax dispute that roots to the taxing powers of various tiers of government. It is usually a constitutional issue between one arm of government and another: the taxing power of every government in Nigeria is rooted in the Constitution.

It could also arise from the interpretation of any law or enactment which the bearing is on the imposition and collection of tax from the government. There are different cases that borders on jurisdictional tax dispute such as the Sales Tax Law of Lagos State.<sup>31</sup> In the recent case of *Lagos State Board of Internal Revenue V Nigerian Bottling Company*,<sup>32</sup> the court while inquiring into the validity of the law, held that, Lagos State Board of Internal Revenue does not have the power to impose Sales Tax in view of the extant provisions of Value Added Tax.

### **Tax Dispute Adjudicative Mechanism**

#### **Tax Appeal Tribunal (TAT)**

Tax Appeal Tribunal is a very important and critical administrative body in the enforcement of tax in Nigeria. The Tribunal was established by section 59 of the Federal Inland Revenue Service (FIRS) Act, 2007 which provides that Tax Appeal Tribunal shall have power to settle disputes arising from the operation of this Act and under first schedule. The Tax Appeal Tribunal therefore has jurisdiction over disputes arising from the Companies Income Tax, Petroleum Profit Taxes, Personal Income Tax, Capital Gains Tax, Value Added Tax, Stamp Duties, Taxes and Levies.<sup>33</sup>

<sup>30</sup>Tax assessment is required in Nigeria, see section 41 and 44 of Personal Income Tax Act, 1993 (as amended) and section 53 and 55 of the Companies Income Tax Act, 2007 (as amended).

<sup>31</sup>Cap. S3, Laws of Lagos State, 2003,

<sup>32</sup>Unreported suit No/D/454/2002, [www.aelx.com/files/LSBIR%20v%20NBC%20judgement.pdf](http://www.aelx.com/files/LSBIR%20v%20NBC%20judgement.pdf). See also *Lagos State Government & 4 Or's V Registered Trustees of ALTON & 6 Or's Appeal No CA /L/769/2007* Unreported, Attorney General of Lagos State V Eko Hotel, [2008] All FWLR (Pt. 398) 235.

<sup>33</sup>First Schedule to the FIRS Act 2007.



It was established in 2010 in eight different locations namely Bauchi, Kaduna, Jos, Ibadan, Enugu, Benin, Lagos and Abuja,<sup>34</sup> and vested with powers to settle dispute arising from the operations of the FIRS Act and other tax laws as spelt out in the First schedule to the Act. Its scope also covers any other law for the assessment, collection and enforcement of revenue accruable to the Government of the Federation as made by the National assembly from time to time or regulations incidental to those laws, conferring any power, duty and obligation on the Service. Other laws include laws imposing taxes and levies within the Federal Capital Territory; laws imposing collection of taxes, fees and levies collected by government agencies and companies, including signature bonuses, pipeline fees, penalty for gas flared, depot levies and licence fees for Oil Exploration Licence (OEL), Oil Mining Lease (OML), Production Licence, royalties, rents (productive and non-productive), fees for licence to operate drilling rigs, fees for oil pipeline licenses, haulage fees and all other fees prevalent in the oil and gas industry.

### **The Federal High Court**

The Constitution provides for the jurisdiction of the Federal High Court (FHC) to the exclusion of any court, on matters relating to revenue of the nation.

Section 251 (1) (a) & (b) provides that the Federal High Court shall have exclusive jurisdiction on matters:

- (a) Relating to the revenue of the Government of the Federation in which the said Government or any organ thereof suing or being sued on behalf of the said Government is a party.
- (b) Connected with or pertaining to the taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal taxation.

In relation to this provision of the Constitution, all issues pertaining to the revenue of the Federal Government and taxation of companies are vested exclusively on the Federal High Court.<sup>35</sup>

### **ADR and Tax Dispute Resolution**

#### ***Comparative Review of ADR Procedures in Selected Tax Jurisdictions***

##### ***United States***

In United States, the establishment of the Appeals Office in 1927, the Inland Revenue Service (IRS) first embraced the value of resolving taxpayer disputes without litigation.<sup>36</sup>

<sup>34</sup>Tax Appeal Tribunal Establishment order 2009, Supplement to Gazette No. 77.

<sup>35</sup>There have been controversies on the jurisdiction of TAT vis a viz the exclusive jurisdiction of Federal High Court until the Court of Appeal has upheld the jurisdiction of the Tax Appeal Tribunal (TAT) to determine tax disputes. The Court delivered the judgment in the case of CNOOC Exploration & Production Nigeria Ltd. & Another v. Nigerian National Petroleum Corporation & Another, appeal numbers CA/L/1144/2015 and CA/L/1145/2015 available at [http://tat.gov.ng/content/appealcourt-upholds-tax-tribunal%E2%80%99s-jurisdiction,bringing-to-rest-the-conflicting-decisions-of-the-federal-high-courts-in-TSKJ-II-Construces-Internationals-Sociadade-LDA-v-FIRS,Suit-No.-FHC/ABJ/TA/11/12-and-Nigerian-National-Petroleum-Corporation-\(NNPC\)-V-Tax-Appeal-Tribunal-&-3-Ors\(2014\)-4-CLR.N](http://tat.gov.ng/content/appealcourt-upholds-tax-tribunal%E2%80%99s-jurisdiction,bringing-to-rest-the-conflicting-decisions-of-the-federal-high-courts-in-TSKJ-II-Construces-Internationals-Sociadade-LDA-v-FIRS,Suit-No.-FHC/ABJ/TA/11/12-and-Nigerian-National-Petroleum-Corporation-(NNPC)-V-Tax-Appeal-Tribunal-&-3-Ors(2014)-4-CLR.N). The controversy however does not seem to have ended as we await the decision of the Supreme Court. For more on the controversy, see also Umenweke & Ezeibe, "Nigerian National Petroleum Corporation (Nnpce) V Tax Appeal Tribunal & 3 Others – The Constitutionality of The Jurisdiction of The Tax Appeal Tribunal Revisited" International Journal of Business & Law Research 3(2):73-81, April-June 2015 and Odinkonigbo & Ezeuko, "Does Nigeria Follow the Contemporary Global Trend In Tax Dispute Resolution Strategy?" Nigerian Juridical Review.

<sup>36</sup>See William Taggart, Corporation Argues Payment for Consulting Services Is Deductible, Tax Notes Today (June 18, 2002), Lexis 2002 TNT 117-37;26 U.S.C. § 7430 (b)(1) (2000).

The Appeals Office operates independently from the local IRS office with which the taxpayer has interacted; however, a case that goes to Appeals remains under the jurisdiction of the IRS.<sup>37</sup>

A taxpayer can initiate the Appeals process by filing a protest letter. An Appeals conference is then scheduled so that the Appeals officer and the taxpayer can attempt to negotiate a mutually acceptable settlement. The Appeals process is designed to be neutral and has the purpose of effecting decisions regarding the settlement of taxpayer disputes. After reviewing the facts and evidence, and upon considering the hazards of litigation, the Appeals officer determines a fair position for the IRS.<sup>38</sup>

In fact, between eighty-five and ninety percent of the cases that reaches Appeals result in settlement.<sup>39</sup> Consequently, in 1996, Congress mandated that all government agencies to begin implementation of ADR into their administrative dispute resolution processes.<sup>40</sup> Additionally, the IRS Restructuring and Reform Act of 1998 have led the IRS to develop more formal ADR policies and procedures.<sup>41</sup>

This congressional action, along with a desire for greater efficiency, has brought about the development of mediation and arbitration programs designed to supplement the existing Appeals process. In response to this, the US Internal Revenue Service (“IRS”) has initiated several ADR processes designed to encourage effective resolution of dispute between the IRS and taxpayers. Mediation is the preferred choice of IRS' ADR programme designed to assist it realise its goal of reducing time, cost, and taxpayer burden often incurred at a greater percentage when settlement of tax dispute is carried out through litigation. Specific IRS' ADR programmes, which utilises mediation, for resolving tax disputes are Fast Track Settlement (“FTS”), Fast Track Mediation (“FTM”), and Post-Appeals Mediation.

### ***Canada***

A Canadian taxpayer who disagrees with the amount of tax assessed has two ADR procedures at his disposal, which may be used to bring about a satisfactory change in the tax authorities' position:<sup>42</sup>

- The Settlement Process for Appeals is a form of negotiations. After receiving information about the amount of tax assessed the taxpayer may raise his objections.

<sup>37</sup>Internal Revenue Service, Department of The Treasury, Publication 556, Examination of Returns, Appeal Rights, and Claims for Refund (1999 Publication, 556], available at <http://www.irs.gov/pub/irs-pdf/p556.pdf> (accessed on Sept. 23, 2003).

<sup>38</sup>See Internal Revenue Manual § 8.6.1.2.3, available at <http://www.irs.gov/irm/index.html> (last visited Sept. 23, 2003).

<sup>39</sup>Ibid.

<sup>40</sup>See Administrative Dispute Resolution Act, 5 U.S.C. §§ 571-84 (1998) see also Scherer, *supra* note 2, at 215 (noting how the ADR "has enhanced the recent trend toward the implementation of ADR procedures"); see also Wei, *supra* note 6, at 552 (noting that the purpose of the ADRA is "to encourage federal agencies to 'reap the benefits of ADR processes'") (citing Robin J. Evans, Note, The Administrative Dispute Resolution Act of 1996: Improving Federal Agency Use of Alternative Dispute Resolution Processes, 50 ADMIN. L. REV. 217, 233 (1998).

<sup>41</sup>See IRS Publication . No. 105-206, 112 Stat. 685.

<sup>42</sup>Revenue Canada, Taxation Operation Manuals (Ottawa: The Department) (looseleaf), s. 7011.8(1), cited in Janice A. McCart, "The Art of the Deal, Pt. 2: Audit and Appeals" (1994) Can. Tax Found. 31:1 at 31:14.

Once his objections have been considered, the Appeals Branch within the Canada Revenue Agency (CRA) is authorized to confirm, revoke or change the amount of tax assessed. The taxpayer may begin negotiations with the CRA. Should a solution be reached which is satisfactory for both parties, an agreement is signed under which the taxpayer renounces the right to appeal to the Tax Court of Canada.

- The Mediation Process for Appeals is more formalized than the settlement process. The taxpayer files a request with the Appeals Branch for the commencement of mediation. Next, a written agreement is concluded, specifying the issues subject to mediation.<sup>43</sup> An independent third party is the mediator. The process is not binding. Should it lead to an agreement, it is written up in contractual form, and if not, the CRA has the power to change or sustain the original tax assessment against which an appeal may be filed with the court. Neither of the above procedures has any grounds in the applicable rules of procedure but has been worked out through the CRA's practice. The authority encourages taxpayers to share their doubts before filing a request for instituting either procedure.

### **South Africa**

On 11 July 2014, the South African Revenue Service (SARS<sup>44</sup>) published new rules which now regulate the procedure for filing objections, appeals against assessment. It also covers the procedure for conducting alternative dispute resolution, the conduct and hearing of appeals, and application on notice before a Tax Court.<sup>44</sup> It also covers the procedure for conducting alternative dispute resolution, the conduct and hearing of appeals, and application on notice before a Tax Court.<sup>45</sup> The new tax rules is relevant any time a taxpayer disagrees with an assessment or decision of the SARS.

Under the South African tax rules, a discontent taxpayer has limited period within which he/she is expected to lodge an objection against an assessment or decision relating to his/her returns. Once the objection is delivered, SARS explores ADR mechanism, especially mediation, in resolving the dispute between it (SARS) and a discontent taxpayer.

### **Nigeria**

Nigeria is yet to join the counterpart in the use of ADR in tax dispute resolution. Both the FIRS and different States' Board of Internal Revenue in Nigeria are not statutorily mandated to explore the use of ADR in the settlement of tax disputes. It is evident that no form of ADR is formally explored by Nigerian Tax authorities in resolving tax dispute.

<sup>43</sup>See Chris Jaglowitz, "Mediation in Federal Income Tax Disputes," online: Canadian Forum on Civil Justice <<http://cfcj-fcjc.org/>> (accessed on 9 July 2014).

<sup>44</sup>See, Nicole Paulsen and Gigi Nyanin, "New Tax Dispute Resolution Rules - the Wait is Finally Over", online: Tax Students in Administration available <<http://taxstudents.co.za/new-tax-dispute-resolution-rules-wait-finally/>> (accessed on 9 July 2014); and Price water house Coopers South Africa, "Synopsis Tax Today, July 2914", online: PricewaterhouseCoopers, South Africa available at <<https://www.pwc.co.za/en/assets/pdf/synopsis-july-2014.pdf>> (accessed on 9 July 2017) .

<sup>45</sup>See, Nicole Paulsen and Gigi Nyanin, "New Tax Dispute Resolution Rules - the Wait is Finally Over", online: Tax Students in Administration available <<http://taxstudents.co.za/new-tax-dispute-resolution-rules-wait-finally/>> (accessed on 9 July 2014); and PricewaterhouseCoopers South Africa, "Synopsis Tax Today, July 2914", online: Price water house Coopers, South Africa available at <<https://www.pwc.co.za/en/assets/pdf/synopsis-july-2014.pdf>>(accessed on 9 July 2017) .

In Nigeria, a taxpayer (individual or corporate) that is aggrieved by the assessment by a Relevant Tax Authority (“RTA”) may file an *objection* to the assessment issued by the RTA. The RTA will then amend or refuse to amend the assessment. Where the RTA refuses to amend the assessment, the RTA will then issue a Notice or Refusal to Amend (“NORA”). Upon receiving the NORA, and within 30 days, the taxpayer may file an appeal with the Nigerian Tax Appeal Tribunal (“NTAT”).<sup>46</sup>

The identified common practices amongst the countries examined represent the global trend in the settlement of tax dispute. Unfortunately, Nigeria is yet comply with the global trend of settling tax dispute.<sup>47</sup>

Though there is serious need for Nigeria to join the counterparts in applicability of ADR to tax dispute, it should be bore in mind that such applicability, notwithstanding the numerous benefit, is not encompassing in the resolution of all manners of tax dispute. There are kinds of tax dispute that cannot be efficiently resolved under the purview of ADR. There is therefore need to understand the contour of ADR applicability to tax dispute.

### **Understanding the Contour of ADR Applicability to Tax Dispute**

There is an argument for Nigeria to follow the trend as there is no room for the use of ADR in the settlement of tax dispute in Nigeria.<sup>48</sup> Both the FIRS and different States’ Board of Internal Revenue are not statutorily bound to explore the use of ADR.<sup>49</sup> In canvassing the importance of the applicability of ADR to tax dispute resolution, there is need to delineate the contour of the applicability. No matter how persuasive and pervasive the argument for the ADR incursion into tax dispute maybe, it cannot detract from the fact that the approach is not suitable to all kinds of tax dispute. It has been submitted that the nature of tax dispute is classified into different categories. Each category is characterised by distinct kind of tax dispute and as such would require a different distinct approach in the resolution of the dispute.<sup>50</sup>

Administrative tax dispute usual arise from the administrative process of taxation embroiled in the problem of tax assessment. Matter of this kind is suitable for ADR. ADR can be adopted as an in house mechanism by tax authorities in resolving tax dispute without necessarily resulting to litigation.

Matters of jurisdictional tax dispute are certainly unsuitable for ADR. It has been emphasized that this kind of dispute is rooted in the legitimacy of the imposition of any kind of tax; an inquiry into the legality or otherwise of every tax organ of government to impose tax. The controversy most times results in constitutional interpretation of the

<sup>46</sup> See Section 59 the Nigerian Federal Inland Revenue Establishment Act (FIRSEA) No. 13 of 2007, Section 11 of the Fifth Schedule to the FIRSEA and Paragraph 5 of the Tax Appeal Tribunals (Establishment) Order of November 25th, 2009 (TAT Order).

<sup>47</sup> Odinkonigbo & Ezeuko, “Does Nigeria Follow the Contemporary Global Trend In Tax Dispute Resolution Strategy?” op citp. 173.

<sup>48</sup> Ibid. see also SPA Ajibade, “Recent Developments on the Arbitrability of Tax Dispute in Nigeria” available at [www.spaajibade.com/resources/recent-developments-on-the...](http://www.spaajibade.com/resources/recent-developments-on-the...) (accessed on 18 March, 2018).

<sup>49</sup> Odinkonigbo & Ezeuko, “Does Nigeria Follow the Contemporary Global Trend In Tax Dispute Resolution Strategy?” op cit.

<sup>50</sup> See page 8-9 above.

taxing powers of government and or the interpretation of any law of act imposing tax. This type of matter is not suitable for ADR, no arbitral panel, conciliator or mediation would have jurisdiction to interpret the Constitution or an Act of Parliament with regards to the taxing powers of government; such is an inherent power of the court which cannot be usurped by the palatability of any ADR process. There will always be litigation on points of principles, policies and technical uncertainty.

Another limitation to ADR applicability to tax dispute is the issue of agreement to arbitrate. Who is the appropriate party to arbitrate when there is tax arbitration clause in a contract agreement? This issue was the bone of contention in the case of *Shell (Nig.) Exploration and Production Ltd & 3 others v. Federal Inland Revenue Service*<sup>51</sup> where parties entered into production sharing contract (PSC) with tax arbitration clause. It was held that under section 8(1)(a) and (b) of the Federal Inland Revenue Service Act<sup>52</sup> FIRS shall have exclusive powers of assessing, collecting, and enforcing payment of tax due to the Government of Nigeria or any of its agencies. Accordingly, tax authorities are saddled with the responsibility to arbitrate tax dispute where the need arises. The court further held that matters pertaining to taxation of companies can only be adjudicated upon by the Federal High Court and no tribunal has jurisdiction to pronounced upon them as they are not arbitrable.

Similarly, in *Statoil (Nigeria) Limited & Anor v FIRS & Anor*,<sup>53</sup> the Court of Appeal held that the FIRS had standing to interfere with arbitration proceedings when it constituted an infringement of the Constitution or other Nigerian laws or impede FIRS' statutory functions or powers.

It is our respectful view, on the plethora of cases decided above, that tax dispute is only arbitrable if there is an agreement between the tax authorities and the taxpayer to arbitrate before the emergence of a tax dispute;<sup>54</sup> If there is any law mandating the tax collecting body to refer a tax dispute to arbitration, persons, organisations that are not authorized under the law to administer tax cannot arbitrate or negotiate tax dispute for the existing authorities.<sup>55</sup> Such person lacks the *locus standi*. It is only FIRS and SBIR of states that have the power to administer or collect tax and any contravention of the power is null and void.

Another striking point on the contour of ADR in tax dispute is the criminal element of tax offence. It has also been submitted that there is limitation to the applicability of ADR to the resolution of public matters; matter of public concern is not suitable for arbitration.<sup>56</sup>

<sup>51</sup> Unreported Appeal No. CA/A/208/2012; handed down by the Court of Appeal, Abuja on 31st August, 2016.

<sup>52</sup> Federal Income Revenue Services (Establishment Act) supra.

<sup>53</sup> (2014) LPELR-23144(CA)

<sup>54</sup> In the absence of any agreement to arbitrate, arbitration will not be invoked. However the provisions of various High Courts have provided for the reference of matter to ADR by the judge. Thus, where there is non pre-agreement to arbitrate, there can be post agreement to arbitrate even when the matter is already in the court. It can be on the advise of the judge or both parties may agree.

<sup>55</sup> Unfortunately, there is no such law.

<sup>56</sup> See Gaus Ezejiolor, *The Law of Arbitration in Nigeria* op cit , p.3. See also Chineze Obi-Okoye "The Question of Arbitrability in Nigeria" in O.D Amuchezi (eds) *Thematics Issues in Nigeria Aritration Law and Practice* (Onitsha: Varsity Press,2008) pp117-153.

Taxation is a matter of public concern. There is limit to the use of ADR in this kind of matter. ADR is mostly suitable as an in-house administrative mechanism before it comes out to the full glare of the public and become a public concern as a result of litigation. According to Ogbuabor et al, the use of alternative dispute resolution (ADR) in the civil justice context is a common and accepted phenomenon, however, the same cannot be said of ADR within the criminal justice context especially in common law jurisdictions based on accusatorial or adversarial criminal procedures such as Nigeria.<sup>57</sup>

In *BJ Exports & Chemical Processing Co v Kaduna Refining and Petrochemical Ltd*,<sup>58</sup> it was held by the Court of Appeal that arbitration and other forms of ADR are so far restrictive to civil matters. According to the Court of Appeal, per Mohammed JCA:

It is trite that disputes which are the subject of an arbitration agreement must be arbitrable. In other words, the agreement must not cover matters which by the law of the state are not allowed to be settled privately or by arbitration usually because this will be contrary to the public policy. Thus a criminal matter, like the allegation of fraud raised by the respondent in this case, does not admit of settlement by arbitration as was clearly stated by the Supreme Court in the case of *Kano State Urban Development Board v Fanz Construction Ltd*.<sup>59</sup>

Notwithstanding the above position, it is submitted that the sphere of ADR cover criminal tax offences. It is opined that ADR is now an entrenched part of the Nigerian Criminal Justice System, primarily because it is indigenous to the various peoples of the Nigerian State.<sup>60</sup> The law has also encouraged the use of ADR in resolution of criminal matter. For instance, section 25 of the High Court Law of Enugu State of Nigeria provides that *in criminal cases, the court may promote reconciliation and encourage and facilitate the settlement in an amicable way, of proceedings for common assault or for any other offence not amounting to a felony and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed*.<sup>61</sup>

Criminal matters have been resolved through plea bargain. In *FRN v Cecilia Ibru*,<sup>62</sup> the EFCC was able to recover 199 assets and N190 billion naira through the plea bargaining process.<sup>63</sup> It is therefore suggested that where a criminal matter emanating from taxation includes tax evasion and non remittance of appropriate tax fund, it maybe administrative

<sup>57</sup>Ogbuabor, Obi-Ochiabutor Okichel, "Using Alternative Dispute Resolution (ADR) in the Criminal Justice System: Comparative Perspective" International Journal of Research in Arts and Social Sciences, Vol.7, No. 2, (2004)pp.306-324.

<sup>58</sup>2003, FWLR (Pt.165) 445 at 465; 2003, 24 WRN 74.

<sup>59</sup>1990, 4 NWLR (Pt.142) 1 at 32-33.

<sup>60</sup>See Ogbuabor, Obi-Ochiabutor, E.L Okiche, "Using Alternative Dispute Resolution (ADR) in the Criminal Justice System: Comparative Perspective" op cit.

<sup>61</sup>Cap 92, Revised Laws of Enugu State, 2004. The same is reproduced in section 45 of the Magistrate Court Law, Cap 113, Revised Laws of Enugu State, 2004. See also sections 127 – 130 of the Criminal Code.

<sup>62</sup>FHC/L/297C/2009.

<sup>63</sup>Plea bargain gained notoriety in Nigeria when it was first used by EFCC in 2005 to resolve the corruption case against former Inspector-General of Police, Tafa Balogun. See K Oladele, "Plea Bargain and the Criminal Justice System in Nigeria?" Available at [www.vanguard.com/2010/10](http://www.vanguard.com/2010/10) (visited 04/7/2017).

efficient to employ plea bargain and negotiate the payment or remittance of such tax fund while the matter is withdrawn from court. In this regard, ADR is very appropriate in the resolution of the criminal nature of tax dispute. But where it is a dispute arising from obstructing a tax officer from carrying out his lawful duty, where there is no collection of tax fund and the law has imposed a sanction as a deterrent to ensuring tax compliance, plea bargain could be very inappropriate.

It has however been argued that the position of plea bargain is anchored more on moral justification other than legal basis as there is no provision of the law supporting it.<sup>64</sup> This view however has been taken care of by the Administration of Criminal Justice Act, 2015. Section 270(1) of the Act provides that notwithstanding anything in this Act or in any other law, the Prosecutor may:

- a) Receive and consider a plea bargain from a defendant charged with an offence either from that defendant or on his behalf;
- b) Offer a plea bargain to a defendant charged with an offence.

### **Conclusions**

Applicability of ADR to the resolution of tax dispute is very efficient and effective to Nigerian tax administrative system. There is need to review the laws relating to tax collection and administration in order to accommodate this reality. There is need to think with the provision of the Constitution, especially with section 251, to allow other efficient administrative mechanisms in the resolution of tax dispute. Arbitration and Conciliation Act should either be reviewed to recognise other ADR processes like Mediation and Negotiation or a new law should be legislated to give mediation, negotiation and other informal forms of ADR a statutory recognition.

It has been canvassed that people are averse to tax payment which gives rise to tax dispute. One of the reasons is the fact that there is no visible dividend of tax payment. Tax should be a price for social goods. The absence of social amenities is disincentive to payment. There should be aggregate utilization and accountability of tax fund in order to ameliorate incidences of tax dispute.

There is need for a clear legislation that will determine the powers and functions of every tier of government with regards to tax collection. This will help to ensure certainty in the number of taxes collectible amongst every tier of government and reduces jurisdictional tax dispute

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<sup>64</sup>The statutory provisions which seem to justify the use of plea bargain include section 180(1) Criminal Procedure Act, Cap C41 LFN, 2004, Section 14(2) of Economic and Financial Crime Commission Act, Cap E1 LFN, 2004. These provisions are submitted to be construed in an implied manner which borders on disingenuousness. See Chris Wigwe, "The Law and Morality of Plea Bargaining," *Rivers State University Law Journal*, 2, 7.

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