

International Association of Tax Judges

13th Assembly

September 9, 2023

Appeal within the Court System: Open vs Closed Doors

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1. Introductory Remarks

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- Common vs civil law jurisdiction
- Audit and assessment process
- Administrative appeal levels and processes
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- Open vs closed systems vs hybrid at each level
- Historical background

Q2 - Canada

- Canada is a common law jurisdiction
- Self-reporting tax system
- Taxpayer audit or review by Minister of National Revenue (Canada Revenue Agency – CRA)
 - Very broad audit powers
 - Taxpayer opportunity to make submissions or provide documentation to CRA
 - CRA sends 30 day proposal letter to taxpayer
 - Taxpayer has further opportunity to make submissions or provide documentation to CRA
- Assessment or reassessment by Minister of National Revenue
 - Broad powers to assess and reassess, including arbitrary assessments
 - Subject to specified time limits, with exceptions

Q2 Canada cont'd

- Appeal process:
 - Objection to Minister – administrative appeal as of right to the CRA Appeals Branch
 - Confirmation or further Reassessment
 - Appeal to Tax Court of Canada – judicial appeal as of right – trial de novo
 - Appeal to Federal Court of Appeal – judicial appeal as of right – not trial de novo
 - Standard of review for a question of law is correctness
 - Standard of review for question of fact or mixed fact and law is palpable and overriding error
 - Appeal to Supreme Court of Canada – judicial appeal with leave of the SCC – not trial de novo (same standards of review as FCA)

Q2 NIGERIA

Introduction and Overview

Legal Jurisdiction

- Nigeria is a Common Law Jurisdiction

Assessment

- Self Assessment
- Taxpayer has:
 - (1) Right to raise objection when not pleased with the tax office assessment,
 - (2) Right to be issued tax Clearance certificate where there is no tax outstanding against the taxpayer
 - (3) Right to be given the opportunity to respond to tax queries

Q2 NIGERIA cont'd

Audit

- Desk tax audit/ Desk examination – based on taxpayer’s submitted documentation without visit to taxpayer
- Field audit- visit to taxpayer, verify existence of books and records
- Audit Process:



- If taxpayer, before or at the reconciliation meeting provides further information to support objections to the issues raised, Tax Authority will assess the reasonableness and correctness of such additional information, and where possible, carry out additional audit tests.
- If results of further reviews or audit tests provide reasonable evidence that the taxpayer’s objection is supported by credible information, then Tax Authority will revise assessment accordingly. Following this review, the tax office should write a Letter of Intent and follow it with an additional assessment
- If taxpayer objects to the assessment, the Head of Audit Unit request for management approval to issue notice of refusal to amend the assessment (‘NORA’). Thereafter, refer the matter to the Legal and Prosecution Department.

Q2 NIGERIA cont'd

Tax Appeals - Administrative Appeal Procedure

- No Cost to appeal to tax authority.
- Taxpayer who objects to a tax assessment may within 30 days of receiving notice of the assessment apply by notice of objection to the Federal or State Inland Revenue Service (depending on whether it is a federal or state tax) to review the tax
- Where the relevant tax authority agrees with the objection, the assessment will be amended accordingly. However, where the relevant tax authority disagrees with the objection, it shall issue a notice of refusal to amend ('NORA') ***Section 69 Companies Income Tax Act (CITA) Cap. C21, Laws of the Federation of Nigeria, 2010.***
- Upon a NORA being issued against a taxpayer's objection, the aggrieved taxpayer shall within 30 days of receipt of the NORA file an appeal at the Tax Appeal Tribunal or file an action at the relevant Federal or State High Court, having jurisdiction over the dispute.
- Administrative channels for resolution of tax disputes do not bar proceeding to the Tax Appeal Tribunal or the courts, pending the exhaustion of the administrative process. ***Oando Supply and Trading Limited v. Federal Inland Revenue Service (2011) 4 TLRN 113.***

Q2 NIGERIA cont'd

Tax Appeals – Courts/Tribunals

- Tax disputes in Nigeria are primarily resolved by a system which includes the use of administrative procedures, statutory tribunals and constitutional courts.
- **Tax Arbitration?**: Tax disputes have been held by the Nigerian courts to be outside the purview of arbitration and other alternative dispute resolution mechanisms. Court of Appeal in the case of *SNEPCO and 3 Ors. v. Federal Inland Revenue Service and Anor. CA/A/208/2012. Judgment delivered on 31 August 2016*, upheld the decision of the Federal High Court that *disputes over company taxation are exclusive to the Federal High Court and, thus, are not arbitrable as they pertain to the revenue accruing to the sovereign government.*
- The Federal High Court ('FHC'), State High Courts, Customary Courts, Magistrate Courts, the Revenue Courts of the various local government councils, Revenue Tribunals of States, and Tax Appeal Tribunal ('TAT') are vested with jurisdiction to hear and determine tax disputes to some degree or another. The jurisdiction of any particular court or tribunal over tax disputes derives from whether the taxes are federal, state or local government taxes.
- In practice, for federal taxes (whether collectible by federal or state government): after exhausting the internal administrative channels afforded by the tax authority itself, appeals lie in the first instance to the Tax Appeal Tribunal. Thereafter, appeals from the Tax Appeal Tribunal lie to the Federal High Court, appeals from the Federal High Court and State High Courts lie to the Court of Appeal, while appeals from the Court of Appeal lie to the Supreme Court, which is the apex and final court in the country.

Q2 NIGERIA cont'd

Tax Appeal – Courts/Tribunals - Jurisdiction

- **Personal Income Tax:** Disputes relating to personal income tax may be commenced before State Revenue Tribunals, Magistrates' Courts, state High Courts, the Tax Appeal Tribunal or the Federal High Court. The choice of court depends on the jurisdiction of the court, the amount of tax involved and the nature of the parties.
- **Company Income Tax:** Company Income Tax is a federal tax and all disputes relating to its payment are commenced before the Tax Appeal Tribunal or the Federal High Court.
- **Indirect Taxes:** Indirect taxes in Nigeria include value added tax (VAT) and Customs and Excise Duties. Disputes are commenced at the Tax Appeal Tribunal and the Federal High Court.
- **Stamp Duty:** Disputes over stamp duties may be commenced before the State High Courts, the Tax Appeal Tribunal or the Federal High Court depending on whether the duties accrue to the federal or state government and whether they involve individuals, partnerships or corporation.

Q2 NIGERIA cont'd

Tax Appeals-Courts/Tribunal: Open v Closed at Each Level

- **Tax disputes can be commenced either by the taxpayer or by the relevant tax authority.**
- **Tax Appeal Tribunal:** jurisdiction to hear and entertain disputes and controversies arising from the operation of the Federal Tax Legislation. Acts as first instance Tribunal from the tax authority. On criminal matters, the TAT is obliged to pass on any information or evidence it discovers during adjudication of any dispute to the Attorney General of the Federation or the Attorney General of any relevant state or other relevant law enforcement Agency. The procedure at first instance to the Tax Appeal Tribunal is **“open door”**. There is no requirement of leave to appeal the administrative decision of the tax authority. Appeals from the Tax Appeal Tribunal to the Federal High Court do not require leave of the Tax Appeal Tribunal. The Rules provide that a party dissatisfied with a decision of the Tribunal may appeal to the Court on Points of Law by filing a Notice of Appeal at the Tribunal
- **Federal High Court:** Has exclusive jurisdiction over criminal and civil causes and matters connected with or pertaining to the taxation of companies or other bodies established or carrying on business in Nigeria and all other persons subject to federal taxation. Acts as first instance tax court but also hears appeals from TAT in appellate capacity. Appeals lie as of right from the Federal High Court to the Court of Appeal Appeals in the circumstances as provided under **Section 241(1) of 1999 Constitution**. See *Idakula v Adamu (2001)1 NWLR (Pt.694) 322* . In the case of *Impresit Bakolori Plc. v. Abdulazeez (2003) 12 NWLR (Pt.834) 307* by virtue of section 241 of the Constitution of the federal Republic of Nigeria 199, an appeal lies from decisions of the Federal High Court to the Court of Appeal as of right in final decisions in any civil or criminal proceedings before the Federal High Court when sitting at first instance. See also *Timothy v Fabusuyi (2013) 1 NWLR (Pt.1335) 379*.
- **The Constitution does not prescribe whether one notice of appeal can be filed for the two separate rights (leave and of right), or two separate notices of appeal. Courts have held that the procedure would be cumbersome to request for two separate notices. One is sufficient to be filed and contain all the grounds of appeal.**

Q2 NIGERIA cont'd

Tax Appeals-Court/Tribunals: Open v Closed at Each Level

- **State High Courts:** have appellate jurisdiction over decisions of Magistrate Court the jurisdiction of State High Court is unlimited except for matters within the jurisdiction of Federal High Court. Appeal against the final decision of State High Courts to Court of Appeal is within 3 months of delivery of judgement. State High Courts Appeals lie as of right from the High Court to the Court of Appeal.
- **Court of Appeal:** *s. 241 of the Constitution* has appellate jurisdiction over tax disputes from the Federal High Court and State High Courts. Tax appeals to the CA may be as of right or with leave. Appeals lie as of right to the Court of Appeal where they are either **(1)final decisions of the Federal High Court or State High Court (whether of law or of fact and law) if lower court is sitting at first instance (2)the ground of appeal involves questions of law alone** (whether final decision or not), and (3)questions as to the interpretation of the Constitution; (4)questions of whether Fundamental Human Rights (has been, is being or is likely) to be breached, (5) where an injunction is granted or refused. **So interlocutory appeals (apart from injunctions) or appeals from appeals from TAT will require leave). No leave needed for matters of fact alone or mixed law and fact once it's a final decision from FHC sitting in first instance.** In all other cases, leave of court must be obtained to appeal **Section 242 of the 1999 Constitution**. By the provisions of Order 7 Rule 4 of the Court of Appeal Rules 2011, application for leave to appeal must first be made to the lower Court (High Court or Federal High Court) whose decision is being appealed against except if there are special circumstances which makes it impossible or impracticable to apply to the lower Court. In such cases, the application may then be made first to the Court of Appeal. Where the application for leave to appeal is refused by the lower court, then by the provisions of Order 7 Rule 3 Court of Appeal Rules 2011, a similar application may be made to the Court of Appeal within fifteen (15) days of such refusal by the lower Court. Appeals from the Court of Appeal lie to the Supreme Court. Appeal against the Court of Appeal decision to Supreme Court is within 3 months of delivery of judgment as provided in **Section 27 of the Supreme Court of Appeal Act**. Where an appeal comes to the FHC in its `appellate capacity i.e. from the TAT and that case is further appealed to the CA ,the CA may dispose of the need for the oral hearing of an application for leave if it feels it is in the interest of justice to do so.
- **Supreme Court:** created under s.233(1) Constitution, is the apex and final court in Nigeria. Tax appeals from the decisions of the Court of Appeal lie to the Supreme Court either with leave or as of right. Under s.233(2) Constitution, they are **as of right** where they are on (1)questions of law alone, (2)questions as to the interpretation of the Constitution, (3)pertains to breaches of Fundamental Human Rights. Appeals outside these are with leave, which may be sought both at the lower Court of Appeal and also at the Supreme Court. Appeals of mixed law and fact from Court of Appeal to Supreme Court must always be with leave. After filing the application for leave to appeal the SC, a party would normally argue his application for leave orally, however the SC may decide to hear the application in chambers without need for an oral hearing if SC feels that interest of justice does not require an oral hearing of the application **s.233(4) Constitution**.

Q2 France

- France is a civil law jurisdiction
- Taxpayer audit or review by the tax administration (Ministry of finance/General directorate for public finances)
 - ✓ Taxpayer opportunity to make submissions or provide documentation to tax administration
 - ✓ Tax administration sends 30 day proposal letter to taxpayer
 - ✓ Taxpayer has further opportunity to make submissions or provide documentation to tax administration
- Assessment or reassessment by tax administration
- A mandatory administrative appeal
 - ✓ Taxpayer must lodge a claim against the tax assessment to the tax administration
 - ✓ Lodging a claim does not suspend obligation to pay. Deferment of payment granted subject to the provision of financial guarantees.
 - ✓ Time limit for lodging a claim: December 31st of second year following tax assessment
 - ✓ Should the administration fail to sufficiently motivate its answer within six months of the claim, no time limit shall be opposed to the taxpayer when she refers the matter to the judge

Q2 France cont'd

- Tax cases in France are dealt with by the 42 administrative tribunals:
 - ✓ judicial appeal as of right – trial de novo
 - ✓ 12509 tax cases in 2022: 5.4% of the tribunals' overall caseload.
- Appeals against judgments handed down by those tribunals are dealt with by the 9 administrative courts:
 - ✓ judicial appeal as of right – trial de novo
 - ✓ 3162 tax cases in 2022: 9.9% of the courts' overall caseload.
- *Conseil d'Etat* (supreme court) level:
 - ✓ Judicial appeal as of right
 - ✓ But tough filtering system and *cassation* control only
 - ✓ 1230 tax cases in 2022: 12,5% of the *Conseil d'Etat's* overall caseload.

Q2 Trinidad and Tobago: Overview

- The national judicial system for revenue disputes involves both administrative and judicial mechanisms
- Administratively, the revenue authorities enjoy varying times from 6 to 24 months to determine an objection to a tax assessment depending on the type of tax with e.g. VAT or indirect taxes having to be determined not later than 6 months from an objection being lodged and which also requires the taxpayer to deposit a sum equivalent to the disputed amount (unless this is waived) and the revenue authorities enjoying a period of up to 24 months to determine the objection which is required by law to state precisely the grounds upon which an assessment is being challenged

Q2 Trinidad and Tobago: Overview cont'd

- If the objection is not successfully resolved, the taxpayer may choose to appeal to the Tax Appeal Court, which is a Superior Court of Record
- Alternatively, a taxpayer may elect to bring a dispute before the High Court if the ground of challenge are typically based on a judicial review e.g. for a breach of a constitutional right
- Further appeals lie from either the Tax Appeal Court or the High Court to the Court of Appeal and thereafter to the Judicial Committee of the Privy Council: in such instances, leave is not normally required
- The Tax Appeal Court may vary or annul the assessment in which case the appeal is normally allowed or remit the appeal back to the revenue authorities, for example where there had been an initial refusal to consider an objection to an assessment because it was considered to be time barred

Q2 Trinidad and Tobago: Access to the Tax Appeal Court

- As a superior court of record, the Tax Appeal Court is the only national court dealing with appeals from administrative authorities in relation to both direct and indirect taxes, customs and excise duties, value added tax, property tax and stamp duties, anti-dumping and other taxes
- There is sometimes a perception that taxpayers do not always receive a fair hearing when objecting to an assessment due to the lack of an adequate opportunity to produce or tender supporting documents to displace or reduce an assessment and these are often made available during this judicial phase
- The tax officers deputed to review objections to assessments are not structurally part of an independent body but are also part of the same Government department reviewing colleagues' assessments and thus the Tax Appeal Court is regarded as being an impartial arbiter to whom taxpayers can refer when initiating an appeal against the administrative review process (determination of an objection)

Q2 Trinidad and Tobago: Open v Closed Doors

- Tax cases before the Court are not open to the public due to the sensitive and confidential nature of the financial information and evidence which is frequently adduced before the Court and this is enshrined in the Court's Act and Rules
- During Covid-19 and the ensuing lockdown and restriction on in-person Court proceedings, various measures including the enhanced use of online hearings were implemented and many litigants and attorneys still prefer to operate in this way
- This also impacted in-person filings with the Court albeit that judicial services were deemed an essential service and thus permitted to operate during this time

Q2 Trinidad and Tobago: Open v Closed Doors

- All proceedings before the Court are *in camera* and thus only the parties and their representatives are permitted to be present
- When documents are filed by either an appellant taxpayer or a State authority, personal identifying information including witnesses are disclosed on all pleadings, witness statements, and other Court documents
- However, both on the Court's database of cases as well as its law reports, the identity of the appellant is coded/redacted unless an appellant expressly consents to the revelation of such information
- Rule 20(1) of the Court's Rules also prevents the names and other particulars of taxpayers being published without their consent hence law reports produced by the Court redact such information
- However, the *in camera* do not apply to proceedings before the High Court or upon further appeal to the Court of Appeal/Privy Council and the shield is ironically the higher one climbs on the judicial ladder

Q2 Trinidad and Tobago: Burden of proof in an appeal

- Section 8(2) of the Court's Act states that "the onus of proving that the assessment or other decision complained of is excessive or wrong is on the appellant"
- It should be noted that this is only half the story in that, during the course of a hearing, the evidential burden often shifts to the revenue authorities to displace or challenge the evidential and legal assertions of an appellant
- Both parties are expected to file full pleadings but the appellant has the last word in filing an Answer to the State respondent's statement of case which locks in the issues to be determined by the Court

Q2 Trinidad and Tobago: Waiver of in camera evidence

- Section 8(1) of the Court's Act specifies that hearings are *in camera*
- As a general rule, only parties and their legal representatives are permitted to attend Court sittings and, where virtual hearings are held, such attendees must identify themselves and switch their cameras on
- The right of a taxpayer to be protected by the *in camera* rule may be waived at the discretion of the taxpayer though in practice this is not normally done

Q2 Trinidad and Tobago: Raising new issues

- Section 7(6) of the Court’s primary legislation provides that “Immediately after receiving the notice of appeal the Board of Inland Revenue or other respondent shall forward to the Appeal Board copies of all documents relevant to the decision appealed from.”
- However, there are two key exceptions: under Section 7(5) of the Court’s Act, if, on the hearing of the appeal the appellant desires to go into any ground of appeal which was not specified in the notice of appeal, and the omission of that ground from the notice was in the opinion of the Appeal [Court] not **wilful or unreasonable**, the Appeal [Court] is mandated to take a liberal approach to such matters: “[the Court] **shall not** by reason of anything in subsection (4) be precluded from allowing the appellant to go into that ground or taking it into consideration.” [sub-section 4 prescribes that the Notice of Appeal shall set out the grounds of appeal]

Q2 Trinidad and Tobago: Tendering additional documents

- Further, under Rule 13(1A) of the Court's Rules, "The appellant **shall not**, at the hearing of the appeal, **introduce a document or other evidence which was not produced to the Board of Inland Revenue** or other respondent during the period of objection or other appeal unless the Appeal [Court] is of the opinion that **exceptional circumstances** exist that warrant the introduction of the document or other evidence."
- Such additional information is often exchanged by the parties during discussions off the record but, during a trial, the revenue authorities have tended to take a strict approach to permitting evidence which was not formally part of the record filed previously
- However, the Court itself tends to take a liberal approach to applying this rule so as to enable taxpayers to fully ventilate their case provided an equal opportunity is also provided to the revenue authorities to counter any additional evidence

Q2 Trinidad and Tobago: Considering violations of taxpayer rights

- If it is contended that the constitutional rights of a taxpayer have been violated, that may raise issues for a formal judicial review before the High Court
- However, if the contention is that a taxpayer has been deprived of the right to a fair hearing, the Tax Appeal Court can take such contentions into account in coming to its decision provided the Revenue authorities are afforded an opportunity to respond
- Other consequences may often turn on the weight that the Court may attach to the evidence adduced by the parties such as the inability to cross-examine a witness due to the witness' unavailability or even the refusal to testify

Q2 UK: summary of assessment and appeals

- England/Wales/Northern Ireland: Common law jurisdiction
- Scotland: hybrid common law/civil
- UK tax appeal system is UK wide and statutory
- Taxpayer “self-assesses”
- Tax authority can open enquiry within time limit into self-assessment and amend assessment, or if out of time, can issue “discovery” assessment if certain extra conditions met
- Taxpayer must first appeal to tax authority, after which either the taxpayer or tax authority can request/offer a review, or the taxpayer can appeal to First-tier Tax Tribunal.
- Decisions following a review can also be appealed to the tribunal
- Different process for indirect tax appeals – can appeal decision straight to tribunal

Q2 UK: Appeal levels and processes

- Basic 4 tier system of appeals from tax authority's assessment/assessment amendment

First tier Tribunal ➔ Upper Tribunal ➔ Court of Appeal/Session ➔ Supreme Court

- Possible for some cases to start off in UT, and also for appeals to “leapfrog” from UT to SC
- “Open door” at first instance, “closed doors” thereafter

Q2 UK: Appeal level and processes

- To appeal beyond first-instance tribunal need, either permission of tribunal/court which made decision, OR, if they refuse, then permission of appellate tribunal/court
- For example: can appeal to UT if either FTT grants permission or (if FTT refuses permission) UT grants permission. Same pattern true for higher appeals.
- In UT applicants generally gets two attempts: if unsuccessful on papers, can apply for oral reconsideration (typically done as virtual hearing).
- However, if when UT refuses on papers judge designates application as “totally without merit” then no right to oral reconsideration.

Q2 UK: appeal process

- *Permission test*: appeals must be on errors of law (but errors of fact e.g. making finding of fact with no/insufficient evidence can constitute error of law in certain limited circumstances)
- *Doors get harder to open the higher up you go*: additional/different filter tests for higher appeals
- e.g. to get to Court of Appeal must raise “important point of principle or practice” or must be “other compelling reason” to hear appeal).
- To get to the Supreme Court must be an arguable point of law of general public importance
- Indicative numbers in 2022 (unofficial as compiled by my own searches!): SC:5, CA: 28 UT: 55 FTT: 312 (published - with many more issued but not published)

Q2 Portugal: Tax audit and assessment

- **Portugal** is a **civil law** jurisdiction
 - Tax assessment:
 - ✓ By the taxpayers (IRC, VAT);
 - ✓ By the Tax Administration (ATA):
 - Regular assessment (IRS);
 - *Ex officio* assessment, when no tax return is filed;
 - Corrective assessment, following an inspection.

Q2 Portugal: Tax audit and assessment

- **Tax assessment by the tax administration (ATA):**

- ✓ Time limitations*;

- ✓ Burden of proof rests with the Tax Administration;

- ✓ Principle *in dubio pro* taxpayer.

} Only when tax returns and accounting records comply with the law!

*The Administration's right to assess taxes lapses if the assessment is not validly notified to the taxpayer within a period of four years.

Q2 Portugal: Tax audit and assessment

- **Administrative appeals**

- Administrative claim (120 days) and hierarchical appeal (30 days);
- In principle, not mandatory (exceptions for the *a.c.*);
- Free of charge, same grounds as judicial action;
- Devolutive effect;
- *Ex officio* review (*revisão oficiosa*) procedure that can be triggered by the taxpayer, with longer deadlines (4 years) (art. 78.º LGT)

Q2 Portugal: Appeal process

- **First tier courts**

- 16 first tier tax courts, 15 aggregated, as they include an administrative and a tax section, and in Lisbon, a tax court of Lisbon (not aggregated)
- Complexity – roughly 15 different legal actions in tax matters available for the legal protection of the taxpayer
- Nevertheless, consensus that the constitutional command for “effective jurisdictional oversight” is fulfilled by the existing jurisdictional actions
- Tax assessments - “judicial impugnation” - a judicial relief of “mere legality”.

Q2 Portugal: Appeal process

- **Court appeal levels**

- Two levels:

- 2 second tier courts: * Tribunal Central Administrativo Sul (TCAS) and *Tribunal Central Administrativo Norte (TCAN) (each with two sections, administrative and tax) – soon a 3rd 2nd tier court will be installed (Tribunal Central Administrativo Centro);
- Supreme Court: * Supremo Tribunal Administrativo (with two sections, administrative and tax).

Q2 Portugal: Appeal process

- Appeals

Designation	Type	Appealed court	Court of appeal	Scope	Norm
" <u>Apelação</u> "	Ordinary	First-tier court	Second-tier court	Facts and law	280/1-CPPT
Review <i>per saltum</i>	Ordinary	First-tier court	Supreme Administrative Court	Law	280/1-CPPT
Opposition of judgments	Ordinary	First-tier court	Second-tier court/STA	Law	280/3-CPPT
Appeal for the standardization of case law	Extraordinary	Second-tier court/STA	Supreme Administrative Court	Law	284-CPPT
Extraordinary review	Extraordinary	Second-tier	Supreme Administrative Court	Law	285-CPPT
Judgment revision	Extraordinary	Any court	The appealed court	Law	293-CPPT

Q2 Portugal: Appeal process

- **Types of appeals:**

- Since the 2019 legislative reform, it is also possible to file an appeal before State courts against decisions handed down in tax arbitration:
 - Before the TCAS, to obtain the “annulment” of the decision (grounds of nullity);
 - Before the Supreme Administrative Court (grounds of opposition with a TCA or STA decision).

Q2 Germany

- Germany is a civil law jurisdiction
- Audit and assessment process
 - Taxpayer declares his income to the tax authorities
 - Tax authorities issue a tax assessment, which is either (1) final or (2) can be subject to further examination.
 - (1) The taxpayer can file a notice of objection to the tax authorities
 - (2) The taxpayer can file a notice of objection to the tax authorities and/or
the tax authorities can audit the taxpayer and issue a new tax assessment based on the findings of the audit, which can in turn be subject to appeal by the taxpayer

Q2 Germany cont'd

Administrative appeal process

- Time limit is a month after receiving the tax assessment

If the tax assessment is sent by mail within Germany or electronically, it is deemed as disclosed on the third day after sending (by mail outside Germany: one month after sending), unless it was not received or received at a later date. If the taxpayer claims to have received the decision on a later date or not at all the tax authorities have the burden of proof. But if the decision was allegedly received on a later date the taxpayer has to give facts that allow reasonable doubts as to the timely delivery of the decision.

- Appeal has to be in written or electronic form or can be made orally in front of the tax authorities who put it down in written form
- No legal representation required

Q2 Germany cont'd

Administrative appeal process cont.

- Administrative appeal does not suspend the obligation to pay taxes
But the tax payer can file a motion to suspend the implementation of the tax assessment (i.e. the obligation to pay). The motion has to be filed with the tax authorities, and if denied, with the local tax court. The motion is granted if there is sufficient doubt the tax assessment is correct. If the motion is not granted by the local tax court, appeal to the Federal Tax Court is possible if the tax court grants leave to appeal. If leave to appeal is not granted by the tax court, there is nothing the taxpayer can do.
- Administrative appeal is free of charge.
- The tax authorities review the case in its entirety. The ruling can be to remedy the appeal, to amend the tax assessment in favor of the taxpayer or even to the detriment of the taxpayer, if he was warned in advance and given the chance to withdraw the appeal.

Q2 Germany cont'd

Judicial appeal at the local level

- Time limit for judicial appeal is a month after receiving the decision on the administrative appeal

If the decision on the administrative appeal is sent by mail within Germany or electronically, it is deemed as disclosed on the third day after sending (by mail outside Germany: one month after sending), unless it was not received or received at a later date. If the taxpayer claims to have received the decision on a later date or not at all the tax authorities have the burden of proof. But if the decision was allegedly received on a later date the taxpayer has to give facts that allow reasonable doubts as to the timely delivery of the decision.

- Appeal can be made in written form or orally; lawyers and tax advisors have to submit appeals, motions etc. electronically
- No legal representation required

Q2 Germany cont'd

Judicial appeal at the local level cont.

- Judicial appeal does not suspend the obligation to pay taxes
But again the tax payer can file a motion to be granted the right not to pay until the case is resolved. The motion has to be filed with the tax authorities, and if denied, with the local tax court. The motion is granted if there is sufficient doubt the tax assessment is correct. If the motion is not granted by the local tax court, appeal to the Federal Tax Court is possible if the tax court grants leave to appeal. If leave to appeal is not granted by the tax court, there is nothing the taxpayer can do.
- The tax payer has to make an advance payment for the court fees. To avoid this he or she can apply for legal help (Prozesskostenhilfe).

Q2 Germany cont'd

Judicial process at the local level

- 16 local tax courts (Finanzgerichte), one in each State (Bundesland) with the exception of Northrhine-Westphalia (three local courts), Bavaria (two local courts) and Berlin and Brandenburg (one joint local court in Cottbus/Brandenburg)
- No legal representation required
- The case is assigned to one of the chambers according to an organizational chart for the tax court, which has to be finalized at the beginning of each year.
- Within the chamber, which consists of three judges, the case is then assigned to one of the judges, again according to an organizational chart for the chamber.

Q2 Germany cont'd

Judicial process at the local level cont.

- Hearing before the chamber with the three judges plus two laymen (or single judge if the case is considered not too complex) is preceded by exchange of arguments in writing
- If necessary, the judge gives advice to the parties as to what needs to be submitted, explained or proven.
- If the parties do not submit information the judge finds necessary, he or she can try to obtain it himself/herself by issuing orders
- Hearing takes place in the courtroom, but the parties can apply to attend by video call. The head of the chamber decides on the motion. The motion can be dismissed without giving reasons.

Q2 Germany cont'd

Judicial process at the local level cont. 2

- Hearings are held in public, unless the taxpayer requires it to take place behind closed doors. This motion has to be granted.
 - If both parties agree, the case can be decided without a hearing based on the written arguments.
 - If the case is considered not too complex, the single judge or the chamber can issue a written decision without the consent of the parties. In this case either party can file a motion for a hearing which then has to take place.

Q2 Germany cont'd

Judicial process at the local level cont. 3

- Ways of ending the trial:
 - The taxpayer can withdraw his claim at any time.
 - The tax authorities can remedy the appeal or amend the tax assessment in favor of the taxpayer at any time. Amendment to the detriment of the taxpayer is not allowed on court level.
 - Taxpayer and tax authorities can find an understanding on formerly disputed facts and put the case to rest.
 - The chamber or single judge issues a decision at the end of the hearing after deliberation. The decision in writing, consisting of a summary of the facts and the reasons, is sent to both parties soon after the hearing.
 - The party who loses has to cover all costs of the trial including the other party's costs (including lawyer's/tax advisor's costs). If the taxpayer wins, the advance payment will be repaid to him.
 - The decision is usually published if leave to appeal was granted.

Q2 Germany cont'd

Leave to appeal to the Federal Tax Court

- Leave to appeal must be granted by the tax court if
 - the case is of general interest
 - a decision by the Federal Tax Court is needed
 - In order to develop the law or
 - to secure a uniformity of legal findings by the tax courts
 - the taxpayer claims that the tax court has violated procedural regulations, the violation has indeed taken place and has influenced the decision
- No special motion needed, the tax court decides on the leave to appeal ex officio
- If leave to appeal is granted, this will be pronounced in the decision. The reason can – and should – be given, but this is not compulsory
- If leave to appeal is denied, this is usually not pronounced in the decision and consequently the reason for denial is not given.

Q2 Germany cont'd

Leave to appeal to the Federal Tax Court cont.

- If the local tax court denies leave to appeal, it can still be granted by the Federal Tax Court itself
- Here a motion to the Federal Tax Court is necessary.
- Time limit for leave to appeal is a month after receiving the decision from the local tax court.
Decisions by the local court are not sent by post but either sent electronically or disclosed publicly. If the decision is sent electronically it is deemed as disclosed on the third day after sending, unless it was not received or received at a later date. If the taxpayer claims to have received the decision on a later date or not at all the tax authorities have the burden of proof. But if the decision was allegedly received on a later date the taxpayer has to give facts that allow reasonable doubts as to the timely delivery of the decision
- The taxpayer has to state which of the requirements for leave to appeal are given, not criticize the decision itself.

Q2 Germany cont'd

Leave to appeal to the Federal Tax Court cont. 2

- The Federal Tax Court comes to a decision, either
 - grant leave to appeal
 - deny leave to appeal.
- The decision is made by a “small chamber” consisting of three Justices.
- The decision shall contain reasons, unless the reasons will not clarify the conditions under which leave to appeal must be granted or if leave to appeal is granted.
- The decision will be published, if the reasons are of general interest. Mostly, the decision is not published, especially if no reasons are given.

Q2 Germany cont'd

Judicial process at the Federal level

- The Federal Tax Court is situated in Munich and consists of eleven chambers with five Justices each.
- Assignment of cases and judicial process are the same as before the local tax courts with the exception that no fact finding takes place.
- The Federal Tax Court reviews a case not in its entirety, but only under legal aspects. It is bound by the facts found by the local tax court. If the Federal Tax Court is of the opinion that more – or other – facts must be found it will send the case back to the local tax court to amend the facts.
- When a hearing takes place, no laymen are involved.
- Ways of ending the trial are also the same as on local level.
 - The Federal Tax Court regularly asks the parties to agree on a decision in writing. If they do not agree usually a decision in writing without consent of the parties is issued. Either party can file a motion to have a hearing which then has to take place.
- Decisions are usually published.

Q2 Germany cont'd

Judicial appeal to the Supreme Court (Bundesverfassungsgericht)

- The Supreme Court is a constitutional Court. It does not review a case in its entirety, but only decides if the constitution (Grundgesetz) was violated.
- The Supreme Court consist of two chambers with nine Justices each.
- No formal leave to appeal for a claim before the Supreme Court is necessary. But the Supreme Court decides whether a case is worth taking on. If it is not, the case is dismissed by written decision of a “small chamber” (three Justices). This decision is final and not subject to objection.
- If the Supreme Court accepts the case, an oral hearing will take place.

3. How does the appeal process work in practice?

- Simplified vs complex procedure rules?
- Monetary thresholds?
- Oral hearing or writing?
- How is evidence taken?
- Paper vs. electronic evidence and submissions?
- Are virtual or hybrid hearings permitted?
- Is legal representation required?
- Are there Court filing fees?
- Case management?
- Settlement process?
- What form do decisions take?
- Are decisions published?
- How interventionist can judges be (e.g. can judges consider issues which parties haven't)?
- Can costs be awarded?

Q3 NIGERIA

Tax Appeal Process - 1st Tier - Tax Appeal Tribunal Caseload

CASELOAD ANALYSIS 2020-2023

DETAILS	2020	2021	2022	2023	TOTAL
New Cases	72	217	210	75	574
Concluded	79	116	234	116	574
Pending	147	248	224	380	999
TOTAL	298	581	668	571	2118

Q3 NIGERIA

Tax Appeal Process 1st Tier - Tax Appeal Tribunal

- **Commencement:** Appellant files a notice of appeal in the zone of the Tax Appeal Tribunal where the facts of the case arose. Appellant may also file the appeal at any other zone of the Tribunal, but must head it in the name of the zone in which the facts of the case arose. The zone in which it is filed shall then transmit to the correct zone. An appellant may also file his appeal online vis the TAT platform.
- Respondent has a consequential right to respond to the Notice of Appeal by filing a Reply. Thereafter, Tribunal can direct the appeal for hearing. In the absence of a Reply, the Tribunal will hear the Appellant and render a decision on the appeal.
- Pre-trial conference at the commencement of case at Tribunal for the purpose of narrowing down the issues before trial also permits an amicable settlement of the issue(s) between the parties

Q3 NIGERIA

Tax Appeal Process 1st Tier – Tax Appeal Tribunal

- **Documents only Procedure ('DOP')**: appeal can be determined based only on specified documents submitted by the parties, without any oral examination of witnesses. DOP can only be implemented if the parties request for it prior to the start of the trial.
- Also, FIRS may on its own or at the request by any person directly affected by a FIRS' decision, refer any question as to the interpretation of the tax laws to the Tribunal. Also, the FIRS may reserve any question of law for the consideration of the Tribunal.
- **Summary Appeal Procedure ('SAP')**: a party can invoke summary proceedings using the TAT SAP Form to recover a debt or a liquidated amount where the party believes the other party has no defense. The Tribunal shall consider it and, if satisfied, shall enter the appeal under the SAP. Upon receipt of the Notice of Appeal under the SAP Form, the Respondent, if it intends to defend the appeal, shall file a Notice of Intention to Defend.
- **Determination of Appeal and Review of Decision** Order XXI Rules provides for a period of 6 months to determine an appeal from the time of its commencement. Tribunal has the latitude to limit or extend the period beyond six (6) months.
- Further, within 14 days of the Tribunal's judgment, there is a power to review, correct, rescind, or amend judgment. On a party's request or suo motu, the Tribunal may modify, revise, or retract its decision based on an error, ambiguity (to the degree of the ambiguity or error), or fraud Order XXI Rule 7.

Q3 NIGERIA

Tax Appeal Process 2nd Tier – Federal High Court

- FHC issued Federal High Court (FIRS) Practice Directions 2021 (Practice Directions) for effective case management system and the expeditious determination of tax matters, with a special procedure for FIRS to apply for far reaching and wide Orders of the Federal High Court against tax payers.
- The PD applies to situations where the FIRS invokes the original jurisdiction of the Federal High Court to hear and determine criminal and civil causes and matters connected to the taxation of companies, bodies and other persons under federal taxation. Makes it attractive to circumvent 1st tier TAT
- Cases are commenced by motion ex parte for: an interim order of forfeiture on a tax payer's immovable Property; freezing of tax payer's bank account; to have access to tax payer's books, documents, servers, billing systems and bank accounts; or to have access to a business premises of tax payer and/or to seal the business premises or other known place of business of tax payer.
- PD tenable to abuse because ex parte applications for interim Orders are by nature made by one party to a dispute (without hearing notice to or hearing the other party) to preserve the Status quo between parties until a named date or until the motion on notice is heard.
- An ex parte application for an Order for interim forfeiture of immovable property is by nature given to a government agency where there is fear of dissipation of assets, Otherwise, a motion on notice is sufficient to apply for such Order. Ordinarily a violation of the tax payer's right to own property under section 43 of the Constitution, the Order falls under one of the exemptions in section 44(2)(a) of the Constitution. To sufficiently fall under the exemptions as contained under Section 44(2)(a) of the Constitution, the Court must be satisfied that the imposition or enforcement of tax is finally due. Section 86 of the Companies Income Tax Act (CITA), an assessment is not enforceable until it becomes final and conclusive a period of 30 (thirty) days has elapsed since the service of a Notice of Assessment by the FIRS on a tax payer along with a demand notice and the tax payer does not object to the Notice of Assessment or file an appeal against such assessment with the TAT. Similar provisions are contained in section 33 of the FIRSEA and Section 104 of PITA.

Q3 NIGERIA

Tax Appeal Process 2nd Tier - Federal High Court

- In ***Ama Etuwewe***, FHC/WR/CS/17/2019) the Federal High Court held that the FIRS can instruct a bank to freeze a customer's account only for the purpose of seizing the proceeds of tax fraud or tax evasion and that the freezing must be made pursuant to a court order. Because tax fraud and tax evasion is an offence under Section 40 and 43 of the FIRSEA, a taxpayer must be tried and convicted before an application for an interim Order of Freezing of Bank Accounts may be made by the FIRS (See Section 36 of the Constitution)
- A wide Order for access to tax payer's books and documents including those in electronic formats and computer records might constitute a breach of tax payer's privacy rights. According to Section 50 FIRSEA, Persons of the FIRS are obliged to keep tax payer's records relating to profits, secret and confidential. The Practice Directions imply that before an Order is given to the FIRS for access to the tax payer's business premises, proof must be shown that the tax payer is unwilling to grant access.
- An Order to seal the tax payer's business premises should only be made when the Notice of Assessment is Final and Conclusive (see *Guaranty Trust Bank v. Ekiti State Board of Inland Revenue*(2018) LPELR – 46307 (CA)) otherwise it amounts to a deprivation of the tax payer's constitutional rights to Fair Hearing.
- All the Orders permitted under the Practice Directions for the FIRS to apply for are such that an ex parte application is essentially unnecessary and a motion on notice is sufficient to apply for such Order. It is also foreseeable that most of such orders given on an ex parte application will be considered invalid. As there is no date when an interim Order under the Practice Directions is vacated and the Order (s) given under the Practice Direction pends until determination of the Motion on Notice the possible injustice suffered by a tax payer is ominous. Tax payer might suffer considerable loss and possibly irreparable damage before an application to discharge or vary an Order of the Federal High Court under the Practice Directions is heard.
- It is advised that the entire Practice Directions should be revised to protect the tax payer against abuse. Rather than forcing the enforcement of taxes through processes that may be objectionable. Though in Order 1 Rule 3, one of the objectives of the Practice Directions is to encourage the settlement of tax debts or liability between the FIRS and tax payers.

Q3 NIGERIA

TAX APPEAL TRIBUNAL (1st Tier)

The **procedure** rule is **simplified** in detailed Rules: Tax Appeal (Procedure) Rules 2021.

FEDERAL HIGH COURT (2nd Tier)

The **procedure** is **simplified** Federal High Court (Tax Appeal) Rules 2022 Procedure Rules and in Federal High Court (Civil Procedure) Rules 2019. Quicker and fixed time limits. 7 days in between processes for each party to file their responses.

Appellant must pay fees for compilation and transmission withing 7 days of filing NOA. Records to be compiled by TAT Secretary within 30 days of filing NOA. App may apply to Secretary of TAT to allow him compile records by himself, if granted App must compile within 15 days, if refused same application can be made to the CA. Upon transmission of records, the appeal is entered into register of tax appeals at CA and Registrar of CA shall serve on the Respondent within 7 days of filing. **Reduction of timeline for service of brief of arguments:** appellant is required to file and service a written brief of argument on the respondent within 15 days (previously 30 days) of service of the records of appeal on him. Respondent required to file and serve his brief of argument within 15 days of the service on him.

Order V Rule 6 of the FHC Tax Rules, makes it mandatory that judges give **accelerated hearing** to tax matters. Power to abridge the time for doing anything under the Rules.

Q3 Nigeria

TAX APPEAL TRIBUNAL (1st Tier)

Monetary thresholds: No. There are no monetary thresholds to the value of cases that can be brought.

Security Deposit for Prosecution of an Appeal:

Order III Rule 6(a). Requirement for taxpayer appellants to pay 50% deposit as a condition precedent to the Hearing of an Appeal filed against the FIRS.

***Potential violation of taxpayers' rights to a fair hearing and access to justice.**

Paragraph 15 (7) of the Fifth Schedule to the FIRS Act only vest the Tax Appeal Tribunal with the discretion to order payment of the 50% deposit as security for the prosecution of tax appeals before it, upon satisfactory proof by the FIRS of certain specified conditions. At the hearing and only on application. Not automatic.

FEDERAL HIGH COURT (2nd Tier)

Monetary threshold: No. There are no monetary thresholds to the value of cases that can be brought on a tax appeal from the Tax Appeal Tribunal to the Federal High Court or at first The Federal High Court does not have a specific cash threshold. Magistrate court below has a monetary limit of N10,000,000, so FHC monetary limit is N10,000,001 (US\$13,000) and above.

Security Deposit for Prosecution of an Appeal: taxpayer appealing against the decision of the TAT, shall deposit the *full* sum contained in the decision in an interest yielding account maintained by Chief Registrar of the Court and the appeal shall only be heard where there is evidence of deposit of the sum contained in decision. Where there is no evidence is compliance the appeal is liable to be struck out or dismissed.

***Potential violation of taxpayers' rights to a fair hearing and access to justice.**

Q3 Nigeria

TAX APPEAL TRIBUNAL (1st Tier)

Is it by oral hearing or in writing? Both. Order XI Rule 4 the hearing of the application and delivery of judgment may be held remotely, via virtual means, using such communication technology or application as may be directed by the Tribunal to ensure fair hearing.

How is evidence taken? Written and Oral. Order XVII Rule 5, the Tribunal shall admit all relevant evidence, oral or documentary, adduced by the appellant or the respondent or any person appearing on their behalf.

Paper v Electronic evidence and submissions. Yes. Order VII Rule 5. A notice or process shall be deemed to have been properly served if sent by email or such other electronic means as the Tribunal may direct or permit.

FEDERAL HIGH COURT (2nd Tier)

Is it by oral hearing or in writing? Both. Order V Rule 2(b) Hearing of the Appeal will be in writing. Oral argument shall only be allowed at the Hearing of the Appeal to emphasize or clarify the Written Argument contained in the Briefs already filed.

How is evidence taken? Written and Oral. Order 20 Rule (1) any fact required to be proved at the trial of any action shall be proved by written deposition and oral examination of witnesses in open court.

Paper v Electronic evidence and submissions. Yes. – Order VII (1)(d) electronic service of court processes and hearing notices by SMS, emails, WhatsApp, or any other platform that the Court recommends.

Q3 Nigeria

TAX APPEAL TRIBUNAL (1st Tier)

Are virtual or hybrid hearings permitted? Yes. Order XVII Rule 9 - power to conduct such hearing remotely, via virtual means, using such technology or application as may be directed by the Tribunal to ensure fair hearing.

Is legal Representation required? No. Order V Rule 5 - A party *may* be represented at all stages of the proceedings before the tribunal by a legal practitioner or a Chartered Accountant or an Adviser.

Are there Court filing fees? Yes. Order 24; but not high fees

FEDERAL HIGH COURT (2nd Tier)

Are virtual or hybrid hearings permitted? Yes. Federal High Court Practice Direction Rule Part F. - Virtual proceedings can be either by Zoom, Skype or any other audio – visual platform approved by the Court.

Is legal Representation required? No. Order 9 Rule 34 - any act may be done either by the party in person, his legal practitioner or his agent unless an agent is expressly barred under the Rules.

Are there Court filing fees? Yes. Order II Rule 2; but not high fees.

Q3 Nigeria

TAX APPEAL TRIBUNAL (1st Tier)

Case Management? Yes. Case Management Order XVII Rule 2 - powers to conduct a pre-trial conference for the purpose of narrowing down the issues before trial and facilitate settlement.

Settlement process? Yes. Order XXI Rule 9 permitting parties to settle tax disputes themselves amicably. Accordingly, the Terms of Settlement reached by the parties amicably would, upon the application and consent of both parties, be adopted as a consent decision, unless the Tribunal considers their terms unreasonable or inconsistent with the extant laws.

FEDERAL HIGH COURT (2nd Tier)

Case Management? Yes. Under the FHC Practice Directions 2021

Settlement process? Yes. Order 18 (1) (2) where a matter comes before the Court for the first time, the Judge shall in circumstances where it is appropriate grant to the parties, time, not more than thirty days within which parties may explore possibilities for settlement of the dispute. (2) Where parties fail to settle within thirty days or such other period as Court may grant, the case shall without more, proceed to trial.

Q3 Nigeria

TAX APPEAL TRIBUNAL (1st Tier)

What form do decisions take? Reasoned and in writing. ORDER XXI Rule 4 Tax Appeal of Tribunal (procedure) rules 2021 the decision of the tribunal shall be recorder in a document which save in the case of a decision by consent, shall contain a statement of the reasons for the decision and shall be signed by the Chairman. Fifth Schedule paragraph 15 (8) of the FIRS Act states that the Tribunal may after giving the parties an opportunity of being heard confirm, reduce, increase or annul the assessment or make any such order as it deems fit.

FEDERAL HIGH COURT (2nd Tier)

What form do decisions take? Judgment are to be delivered in open Court and orders are to be signed and dated. While there is no express provision for writing the provisions for dating and signing suggest that the form should be in writing, which is also the practice Order 23 and 24 of the Federal High Court Civil Procedure Rules.

Q3 Nigeria

TAX APPEAL TRIBUNAL (1st Tier)

Are decisions published? Yes. The TAT publishes decisions on its website and also has its own law reports.

Can judges consider issues which parties haven't?

Yes. Order XXV Rule 1. While considering an appeal, the Tribunal may not be confined to the issues raised in the appeal, but may have the power to consider any matter arising out of or relevant to the appeal: Provided that both parties to the appeal shall be given an opportunity to be heard on such matters raised.

FEDERAL HIGH COURT (2nd Tier)

Are decisions published? Yes. published on the official website of the Federal High Court and in private law reports

Can judges consider issues which parties haven't? No. A judge cannot consider issues which are not pleaded by the parties, judges adjudicate on matters which are before the court; neither can they on appeal give judgment on a claim that was not before the lower court, *Re Diamond Bank 2002 17 NWLR*.

Q3 Nigeria

TAX APPEAL TRIBUNAL (1st Tier)

Can cost be awarded? Yes.

Order XXII parties are responsible for their own costs except in two situations: (1) where in any proceedings costs are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default. The Tribunal may award cost against any party, representative of a party, or legal practitioner whom the Tribunal considers to be responsible and; (2) cost shall be at the discretion of the Tribunal to determine by whom and to what extent the cost are to be paid.

FEDERAL HIGH COURT (2nd Tier)

Can cost be awarded? Yes. Order 25 FHC (Civil Procedure Rules) 2019 the cost of and incidental to any proceeding in the court shall be at the discretion of the Judge, and the Judge shall have full power to determine by whom and to what extent the costs are paid. Order 25 the Court may if it thinks it just to do so, order the Plaintiff or the defendant to give such security for the plaintiff's or the defendant's cost of action or other proceedings. Where anything is done or an omission is made improperly or unnecessarily by or on behalf of a party the Judge may award cost against parties or against counsel .

Q3 The appeal process in France

- A low-cost and easy to access appeals process:
 - ✓ No leave to appeal
 - ✓ No monetary thresholds
 - ✓ No court filing fees
 - ✓ Legal representation not required at the tribunal level. Mandatory higher up the chain.
 - ✓ No formal settlement process but informal agreements where the tax administration gives up on penalties
 - ✓ Costs can be awarded but usually amount to 1000 to 3000 euros only
- Case management is done by the judge, not by the parties:
 - ✓ Written procedure
 - ✓ Electronic evidence and submissions are the rule but individuals still allowed to use paper
 - ✓ No virtual or hybrid hearings

Q3 France : a tax judge of “full jurisdiction”

Lower courts will take a thorough look at the case

- Court must verify *ex officio* which law is applicable (*ratione materiae & ratione temporis*)
- Court must apply *ex officio* tax treaty which prevents taxation by French tax administration
- Both tax administration and taxpayer may put forward any new points of law as well as new facts at both the administrative tribunal and the administrative court of appeal levels
- This can sometimes lead to quashing the tax assessment but it can also lead to find a new legal basis for an otherwise illegal assessment:
 - ✓ The judge can operate a substitution of legal basis, at any time of the procedure, including for the first time before the court of appeals (same facts and same tax assessment but a different article of the tax code) or a substitution of reasoning (same applicable law but other facts or interpretation).
 - ✓ The substitution of legal basis is only possible on the express request of the tax administration and if the taxpayer has been able to benefit from all the procedural guarantees attached to the new legal basis invoked by the administration (for example: consultation of the independent departmental tax commission) and after having been debated before the court.
- Lower courts' decisions have to be motivated. Anonymized versions are published on the internet.

Q3 UK: How it works in practice – first-instance

- Different procedure for “default paper” “basic” “standard” and “complex”
- No monetary thresholds
- Apart from “default paper”, cases heard orally (unless parties and tribunal consent to dealing with on papers)
- No formal rules of evidence: way in which evidence taken varies according to type of case: e.g. basic case “turn up and talk”, complex and some standard cases – witness statements filed in advance, witness sworn in, evidence in chief taken as read and then witness cross-examined
- Virtual hearings permitted – matter for judge taking account of views of parties
- Legal representation not required. Taxpayers often represent themselves or are represented by tax adviser in smaller cases
- No filing fees

Q3 UK: How it works in practice -first-instance

- Case management principally through standard directions or agreed directions. Case management hearings take place in more complex cases
- Taxpayer can withdraw appeal or settle at any stage. Tribunal rules encourage facilitation of ADR
- FTT Decisions are of “persuasive” precedent value and not binding
- Written although oral decisions given in more basic cases and also possible to give summary form decision
- Decisions are generally published and not anonymised (but provision for hearings to be heard in private in which case the decision is not published or is anonymised so as not to compromise the privacy sought)
- Adversarial system although in more informal cases with unrepresented taxpayers some judges take on more inquisitorial role
- Parties generally bear costs at first instance apart from in certain complex cases or where party’s conduct unreasonable

Q3 UK: how it works in practice – what's different on higher appeal?

- Appeal is on points of law: no re-hearing of evidence, rare for new evidence to be allowed
- Case management through standard directions or agreed directions which apply irrespective of the case's category at first-instance. Usually no need for case management hearing.
- Substantive hearings usually heard in person with panel of two judges
- Withdrawal/ settlement of appeals rare at this stage
- Full written decisions always given and always published. UT decisions and higher create binding precedent
- Legal representation not required but in UT and higher, tax authority always legally represented
- Tribunal deals with case put to it: fairness issues arise if judges or parties seek to raise new points especially if they turn on evidence
- Full discretion to award costs: normal practice is that loser pays winner's costs

Q3 Portugal: Appeal process in practice

- **Simplification:**

- The appeal rules were recently made easier, by way of their approximation to the rules of civil procedure, but there are no “simplified” (shortened) procedures.
- There is no settlement process.

Q3 Portugal: Appeal process in practice

- **Electronic files and proceedings:**

- The process is electronic, and it is mandatory for lawyers and for the tax administration to submit all written files electronically (exception to odd format documents)
- Virtual or hybrid trials are not allowed, but the plenary of the superior courts meets virtually in alternate sessions.

Q3 Portugal: Appeal process in practice

- **Representation:**
 - In appeals and cases filed in higher courts, representation is mandatory (State provided financial support is available, if proof of “economic insufficiency” is made).

Q3 Portugal: Appeal process in practice

- **Financial requirements:**

- Court filing fees are mandatory and the losing party must pay the costs of the proceedings (State financial support available);
- The value of the cause must exceed the “value of jurisdiction” (€ 5.000,00 first-tier courts/€ 30.000,00 second-tier courts) – there are exceptions!
- When the appealed decision relates to the merits of the case, the appeal is only admitted if the value of the ***loss of suit*** surpasses half of the value of the jurisdiction

Q3 Portugal: Appeal process in practice

- **Deadlines:**

- Ordinary appeals must be lodged within 30 days of notification of the contested decision (+ 10 days, when testimonial evidence is challenged), and extraordinary appeals must be filed within a certain period after the contested decision becomes final.

Q3 Portugal: Appeal process in practice

- **Object of the appeal - contested decision:**
 - The existing model in Portugal is one of re-weighting, with the appeal having as its object the decision of the Court of first instance and not the reexamination of the cause, or the repetition of the instance.
 - For that reason, the parties cannot raise “new issues” in the appeal, which have not previously been raised before the first-tier court – new issues won’t be considered.

Q3 Portugal: Appeal process in practice

- **Object of the appeal - contested decision:**
 - For the same reason, if the appeal is not targeted against the contested decision, it will not be considered.
 - Also, the judgement on the appeal doesn't have to consider all the arguments formulated by the parties.

Q3 Portugal: Appeal process in practice

- **Substitution standard:**

- The appeal regime is based on a ***substitution*** and not a mere “repeal” standard, that is, whenever possible, the superior court does not simply annul the contested decision but decides the case without the appealed court having to intervene again.
- However, this will only happen if all the needed evidence is already available, otherwise the appealed decision will be annulled, and the case returned to the first-tier court for the evidence to be taken.

Q3 Portugal: Appeal process in practice

- **Structure of the appeal:**

- The appeal must include allegations and conclusions:
 - allegations set out/explain the grounds for the appeal
 - conclusions delimit the object of the appeal, and obey to specific formal requirements
- If the conclusions are deficient, obscure, complex or do not contain specifications required by law, the rapporteur judge must invite the appellant to complete, clarify or summarize them, within a period of 5 days, otherwise the appeal *will not be considered*
- If the appeal has no conclusions at all, it will be *immediately rejected*.

Q3 Portugal: Appeal process in practice

- **Structure of the appeal of the decision on the facts:**
 - When the decision on the facts of the case is challenged, the appellant must identify **(i)** the precise points of fact considered incorrectly judged, **(ii)** the specific means of evidence that impose a different decision, **(iii)** the decision that should be given on the disputed factual issues.
 - If recorded evidence is at stake, the appellant must also accurately specify the passages of the recording on which the appeal is based, being able to transcribe the excerpts considered relevant.
 - If these requirements aren't complied, the appeal will be ***immediately rejected*** in this segment.

Q3 Portugal: Appeal process in practice

- **Structure of the appeal of the decision on the facts:**
 - Only exceptionally will witness evidence be repeated on the second-tier court:
 - When there are serious doubts about the credibility of the witness or the meaning of the testimony;
 - When there is a well-founded doubt about the evidence carried out
 - This is different when the appeal is not related to the tax assessment!

Q3 Portugal: Appeal process in practice

- **Judgment:**
 - The appeal judgments are always written, and they can be published on the internet (*www.dgsi.pt*), after anonymization.

Q3 Trinidad and Tobago: How does the appeal process work in practice

- After an appeal is heard and determined by the Court, a further right of appeal lies to the Court of Appeal and finally to the Privy Council which is considered part of the domestic appellate process
- In practice, most decisions of the Tax Appeal Court are not appealed and those which are have tended to be upheld or abandoned during case management

4. Leave to appeal/filter policy & Practice:

- (a) What is the policy rationale for leave/filters?
 - Why do we have them?
 - What works well, what doesn't?
 - Ideas /pressure for reform?

- (b) Who sets the leave to appeal/filter rules?
 - Are they codified in statute/ secondary legislation / court rules/ guidance?
 - What influence do judges have in design of system?

- (c) Who makes decisions on leave to appeal/filters?
 - Single judge vs panel?
 - Same judge as hearing appeal?
 - Are leave decisions published?
 - Are reasons given?
 - Can leave decisions be appealed?

4. Leave to appeal/filter policy & Practice:

- (d) What types of leave/filter rules apply in practice in an open system?
- (e) What types of leave/filter rules apply in practice in a closed system?
- (f) What issues/grounds may be raised at each level of appeal?
- (g) What role does the other party (who is not applying to appeal) have in the permission/case control mechanism?

Q4 NIGERIA

- **What is the policy rational for leave/filters?** Constitutional
- **Why do we have them?** To regulate caseload, to limit the number of frivolous applications
- **What works well?**
 - The rules of leave to appeal works well because they are clearly stated in *Constitution*. As such, parties is guided.
 - The Constitution also provides for instances where a judge can grant leave at his discretion and gives instances e.g. where there is a real and substantial complaint which the trial judge though may not agree with, nevertheless considers arguable; that is, capable of being seriously canvassed and opposed on appeal, the trial judge may grant leave to appeal.
 - By seeking leave to appeal it enables the Judge to filter some appeals thereby cross checking whether or not the appeal met the criteria provided to appeal. Where the appeal is obviously frivolous the court can refuse to grant such leave to appeal but where it does not, the court will grant leave to appeal to higher court who will then review the trial court's leave decision.
- **What doesn't?** Ability to file at lower court and then repeat the appeal at higher court. this would lead to docket duplication and the courts would be congested.
- **Ideas/Pressure for reform?** Reform in application for an extension of time. For instance, the rules state that when a party is out of time to file an appeal, he can file an application for an extension of time to seek leave of the Court of Appeal. Only the Court of Appeal is empowered to extend the time for filing an appeal and not the High Court (trial court) as provided by *Order 7 Rule 10 of the Court of Appeal Rules 2011*. if the High Court can review/determine an appeal from the lower courts they should also be allowed grant leave for extension of time of an appeal to make appeal easier and faster.

Q4 NIGERIA

Who sets the leave to appeal/filter rules? Constitution and Judges.

- **Are they codified in statute/Secondary legislation/court rules/guidance?** Yes
 - The leave to appeal at the Federal High Court is codified in **Sections 241 and 242 of the Constitution**.
 - Though all Courts are established by the Constitution, the Courts also have their respective legislations (e.g. FHC Act, Supreme Court Act, Court of Appeal Act which provides for structure, organisation and composition and gives power to make Rules of Court which prescribes practice and procedure of the Courts.
- Court of Appeal may dispose of any application for leave to appeal from any decision of the Federal High Court or a High Court in respect of any civil or criminal proceedings in which an appeal has been brought to the Federal High Court or a High Court from any other court after consideration of the record of the proceedings, if the Court of Appeal is of the opinion that the interests of justice do not require an oral hearing of the application.
- **What influence do judges have in design of system?** Judges do not have a direct influence under the circumstances where leave as of right and is codified in the Constitution. **Where the right to file an appeal is by leave of Court, the power of a judge to grant leave to appeal is discretionary.** Rules often provide for the Court or Tribunal to have a discretion to grant extension of time in deserving circumstances.

Q4 NIGERIA

Who makes decisions on leave to appeal/filters?

- **a.** Decision on leave to appeal by Federal High Court Rule is by a single judge.
- **b. Same judge as hearing appeal? Yes,** Under the Federal High Court by the provisions of Order 7 Rule 4 of the Court of Appeal Rules 2011, application for leave to appeal must first be made to the lower court (High Court or Federal High Court). In this instance the same judge whose decision is being appealed against will hear the application for leave. Where leave is not granted by the lower court (High Court or Federal High Court) in special circumstances which makes it impossible or impracticable to apply to the lower court. The application for leave is made to the Court of Appeal. In such cases, the application is heard by a judge of the Court of Appeal. If the leave is granted the same judge will hear the substantive appeal.
- **c. Are the decisions published?** At Federal High Court the decision for leave to appeal are given as Rulings and not judgments and so they are not published.
- **d. Are reasons given? Yes.** in the Ruling of the court
- **e. Can leave decision be appealed? Yes.** Where the application for leave to appeal is refused by the lower court, then by the provisions of **Order 7 Rule 3 of the Court of Appeal Rules 2011**, a similar application may be made to the Court of Appeal within fifteen (15) days of such refusal by the lower court.

Q4 NIGERIA

What types of leave/filter rules apply in practice in an open system?

- **Appeal as of Right:** No Leave Required to appeal to TAT as 1st Tier. No leave required to appeal to FHC AS 2ND Tier.
- Appeals lie as of right from the High Court to the Court of Appeal under **Section 241(1) of Constitution**. Section 242 deals with cases in which appeal lies with leave:
 1. an appeal against the final decision of Federal/State High Court that determined the matter originally, it is inconsequential whether the grounds of appeal border on law, facts or mixed law and facts the appeal shall be as of right.
 2. question of law alone, even though not a final decision
 3. Final decisions in any civil proceedings before the High Court sitting at first instance. **Section 241 (1(a))**
 4. Where the ground of appeal involves questions of law alone (could be a final decision or even an interlocutory decision. **Section 241(1)(b) Attamah V. Anglican Bishop of the Niger Ors. (1992) 12 Pt. 633.**
 5. Decisions on questions as to interpretation of the Constitution.
 6. Decisions of the court in an action for enforcement of Fundamental Human Rights under Constitution.

Q4 NIGERIA

What types of leave/filter rules apply in practice in a closed system?

- **Appeals *with Leave*:**
- Appeal against Consent judgment
 1. Appeal against judgment as to cost alone
 2. Double appeal for example an appeal against a decision of the High Court sitting on appeal from a decision of a magistrate court, see Section 242 of 1999 Constitution of Federal Republic of Nigeria.
 3. Interlocutory appeals on grounds of facts only
 4. Persons interested in a matter not being a party to the case, ***Section 243 of Constitution***
 5. Matters not coming under section 241(1) CFRN, appeal in such cases requires the leave of court.
- Periods for giving notice of appeal or notice of application for leave are 14 days for interlocutory decision and 3 months for a final decision.

Q4 NIGERIA

Where the right to file an appeal is by leave of court, the power of a judge to grant leave to appeal is discretionary. The principles which a judge should follow in exercising his discretion to grant leave were stated in ***Adamolekun v Dike (2018) LPELR – 45631 (CA)*** as follows:

1. Leave should be granted where the question is one of general principles decided for the first time; or
 2. Where there is a real and substantial complaint which the trial judge though may not agree with, nevertheless considers arguable; that is, capable of being seriously canvassed and opposed on appeal
 3. The court should refuse leave where the complaint is obviously frivolous.
- Whenever leave of court is required for an appeal, an application for such leave must be made first to the trial court, and if refused, to the appellate court. However, an application for leave to appeal can be made to the appellate court in the first instance where the time limited for such an application at the trial court has expired ***NNPC v. Odidere Enterprise (Nig.) Ltd. (2008) 8 NWLR; (Pt 1090) 583***

Q4 NIGERIA

What issues/grounds may be raised at each level of appeal?

- **TAT to FHC** – As of right on question of law only. May appeal part or whole of Decision of TAT. Not contain a vague ground but may include specifically grounds *“that the Decision is against the weight of the evidence”*
- **FHC to CA** – As of right on question of law, fact or facts or mixed law and facts (when final decision of the court sitting at first instance); question of law when sitting in appellate jurisdiction. In other instances, leave is required where at the discretion of the judge he believes that there is an arguable appeal.
- **CA to SC** - As of right where the ground of appeal involves questions of law alone and questions as to the interpretation of the Constitution, breach of Fundamental Human Right. Outside this leave is required. Leave also required where question of mixed law and fact.
- **What role does the other party (who is not applying to appeal) have in the permission/case control mechanism?** Other party may oppose the motion/application to appeal or he may choose not to contest it and file a notice not to contest.

Q4 France: a tough filtering system at the *Conseil d'Etat* level

- Decisions handed down by the 9 administrative court of appeals can be referred to *Conseil d'Etat* by the losing party
- *Conseil d'Etat* is the supreme court for administrative law in France
- 1376 tax cases in 2022: 11,8% of *Conseil d'Etat's* overall caseload.
- Still no leave to appeal but taxpayer needs to hire an *Avocat au Conseil d'Etat et à la Cour de cassation*, who have a monopoly on *recours en cassation* appeals before *Conseil d'Etat*

Q4 France: a tough filtering system at the *Conseil d'Etat* level

- Appeals to Conseil d'Etat are subject to a filter: *Preliminary admission procedure of article L. 822-1 Code de justice administrative*)
- The filter's main goal is to allow Conseil d'Etat to spend less time on worthless cases
- The appeal is not communicated to the other party
- Admission is refused:
 - ✓ by a non-motivated, final, judicial decision, rendered after a hearing by a panel of three judges panel, where the *rapporteur public* gives an independent opinion...
 - ✓ if the appeal is “inadmissible” (late appeal, no “*Avocat au Conseil d'Etat*” ...)...
 - ✓ or if the appeal is “not based on serious grounds”:
 - i. Conseil d'Etat applies this last test in a rigorous way: only cases that raise a new question of law or blatantly violate settled jurisprudence will make it through the filter
 - ii. Minor procedural mishaps by the lower courts may be willingly overlooked
- Only 33% of appeals to Conseil d'Etat made it through the filter in 2023

Q4 France: after the filter, *cassation* is no full review

- Having survived the filter is just the beginning...
- The “*recours en cassation*” is not a third full look at the case: its aim is to verify the lower court’s work:
 - ✓ Thus no new point of law or fact can be raised.
- Conseil d’Etat will only look at errors of law, including:
 - ✓ Violations of judicial procedural guarantees by the lower courts
 - ✓ Violations of tax law already discussed before the lower courts
 - ✓ Only errors in applicable law or applicable treaty will be raised *ex officio*
- Conseil d’Etat will not look at facts
- Conseil d’Etat will however look at *qualification juridique des faits* (legal classification of the facts):
 - ✓ Facts as described by the administrative court of appeals’ ruling will be not be discussed but Conseil d’Etat will verify the ensuing applicable legal regime

Q4 UK: Appeal/filter policy and practice

- Resource control – appeal courts devote limited resources to cases which meet requirements for appeal
- System generally works well at weeding out cases which don't involve arguable point of law
- But unrepresented parties sometimes struggle with understanding what is meant by error of law
- Risk that some permission applications turn into “mini-hearing” of substantive issue undermining object of having filter
- Pressure comes indirectly from case control concerns in other non-tax areas e.g. immigration

Q4 UK: Who sets leave to appeal rules

- Combination of primary legislation , tribunal procedure rules, (as interpreted by case-law) and practice statements and guidance
- Legislation is subject to public consultation
- Committee which makes tribunal procedural rules includes judicial representation, draft rules are also consulted on
- Leadership judge formulates practice statements and guidance

Q4 UK: Who makes leave decisions

- **First-tier Tribunal decision:** normally the FTT judge who heard the case, and then if permission pursued to UT, single salaried UT judge who will also hear any renewed oral application too
- **Upper Tribunal decision:** panel who heard case decides application

Q4 UK: What types of leave rules apply?

- **Content:** file form with grounds and specified documents such as FTT decision
- **Time limits:**
 - FTT decision: 56 days to apply to FTT for permission, if that is refused, 1 month to apply to UT, if that is refused, then 14 days to apply for oral renewal of permission application)
 - UT decision: 1 month to apply to UT for permission, if UT refuses 28 days to apply to CA (E&W) and CA NI, 42 days to Court of Session (Scot)

Q4 UK: what issues/grounds can be raised

- Issue principally framed by pleadings: e.g. at first-instance, taxpayer's notice of appeal and tax authority's Statement of Case, in UT, notice of appeal/grounds of appeal, respondent's response
- After first instance, appeal must concern error of law in decision appealed
- Tribunal/court has discretion to allow new grounds to be argued that weren't raised before. More likely to be granted if involves point that would not have altered shape of evidence at first-instance

Q4 UK: permission decisions

- Permission decisions not usually published unless they raise a wider point of principle
- Full reasons are given if permission refused (particularly if in UT judge designates appeal “totally without merit”). Grants of permission typically just say permission granted. Beyond UT level reasons for refusal get briefer.
- Permission decision must clearly state which grounds are granted / which are refused
- No right of appeal against permission decisions although can be judicially reviewed (but following reforms apply to UT permission refusals now on very limited grounds such as bias). In practice UT permission refusal marks end of road

Q4 UK: role of other party (Respondent)

- No role in FTT permission, or UT paper permission stages (unless otherwise directed, or if issue of permission application being out of time) but Respondent is notified of permission decisions
- Respondent may attend UT oral renewal permission hearings but not obliged to.

Q4 Portugal: leave to appeal/filter policy

- **Policy rationale for filters in an open system**
 - The formal requirements of the appeal itself are meant to control admission, and avoid appeals without serious grounds and/or dilatory maneuvers from the appellants;
 - The interpretation of some of the filter rules is left to the discretion of the judges (by use of indeterminate concepts – like deficient, *obscure*, or or *complex* conclusions), who have different sensibilities, leading to different results, and possibly mitigating its deterrent effect.

Q4 Portugal: leave to appeal/filter policy

- **Setting of the filter rules:**

- Filters are codified;
- The influence of judges on the design of the system varies – from the (mandatory) formal opinions given by the Superior Council during the legislative process to the participation of judges in *think tanks* created by the government, preceding the legislative process;
- The discussion of relevant issues in public forums often proves to be relevant.

Q4 Portugal: leave to appeal/filter policy

- **Decision making on filters:**
 - The judge of the appealed Court verifies the existence of the formal requirements of the appeal, being able to reject it;
 - The decision to accept the appeal may be reviewed by the reporting judge at the Court of Appeal **and** the decision to reject the appeal may be challenged before the reporting judge of the higher court;
 - The decision of the reporting judge to reject the appeal may also be challenged before to the conference.

Q4 Portugal: leave to appeal/filter policy

- **Decision making on filters:**

- A decision on the requirements of the “extraordinary review” is taken by the Supreme Administrative Court through a summary preliminary assessment, made by a panel of three judges among the most senior judges of its Tax Litigation Section.

Q4 Portugal: leave to appeal/filter policy

- **Decision making on filters:**

- All judicial decisions - including those of rejection of the appeal - must be substantiated, otherwise they will be declared null;
- The legislation does not impose the publication of the judgments, so although the publication on internet (www.dgsi.pt) is recommended by the Superior Council, the final decision on publication rests with the reporting judge.

Q4 Portugal: leave to appeal/filter policy

- **Decision to filter in an open system**

- Filtering is done through the verification of formal requirements of the appeal;
- For each type of appeal, it is necessary to verify the existence of the several corresponding requirements, general or specific (appeal structure; divergence in jurisprudence; appraisal of an issue that, due to its legal or social relevance, is of fundamental importance or when the admission of the appeal is clearly necessary for a better application of the law...)
- The other party may raise objections related to the procedural requirements

Q4 Germany: Who sets leave to appeal rules

The rules are set by the Bundestag and can be found in the Code of Fiscal Procedure

Q4 Germany: role of the other party

The other party really is the other party and is given the opportunity to submit their opinion as to why leave of appeal should not be granted

Q4 Trinidad and Tobago: Leave to appeal

- Any decision of the Court can be appealed but only on a point of law and no leave is required
- The process is to request a case stated within 21 days of the decision
- Normally no new points not argued before the Tax Court can be raised

5. Other Case Load Control Mechanisms:

- (a) Do any of the following have a material impact on case load control?
- court filing fees or costs
 - the requirement of legal representation
 - procedural rules
 - case management
 - settlement processes
- (b) Are there mechanisms to control group litigation on similar issues
- Stays behind “lead” case, formal lead case procedures, group litigation orders
- (c) What other mechanisms are there to control case loads or manage what goes to a full hearing?
- Strike-outs, preliminary issue hearings, time limits?

Q5 NIGERIA

Other Case Load Control Mechanisms

- **Do any of the following have a material impact on case load control?**
- **Court filing fees or costs** – Not the filing fees as they are minimal. Non-award of costs to a winning party may discourage Appellants of small amounts.
 - **the requirement of legal representation** – No requirement, therefore self-represented parties may appear so it encourages more appeals.
 - **procedural rules** – Rules are simplified, but payment of Security for Prosecuting Appeal may be a limiting factor.
 - **case management** – makes its easy for parties to narrow issues and explore settlement
 - **Settlement processes** – party determined so no court intervention until request for consent judgment.
- **Are there mechanisms to control group litigation on similar issues** – No rules on this. Not used in practice
 - **Stays behind “lead” case, formal lead case procedures, group litigation orders** - No

Q5 NIGERIA cont'd

- **What other mechanisms are there to control case loads or manage what goes to a full hearing?**
- **Strike-outs, preliminary issue hearings, time limits?**

At the TAT -

- 1 - Appeal must be filed time limits of 30 days from the decision which is being appealed unless extension of time is granted otherwise case struck out.
- 2 - Strike for lack diligent prosecution by Appellant.
- 3-Case Management Conference to narrow issues and encourage settlement.

At Federal High Court -

- 1-Appeal from TAT must be filed within 30 days of judgment. Time-limit of 3 months of delivery of judgement from FHC to CA
- 2-Where a tax debtor is appealing against the decision of the tribunal, he shall deposit the sum contained in the decision in an interest yielding account maintained by Chief Registrar of the Court and the appeal shall only be heard where there is evidence of deposit of the sum contained in decision. Where there is no evidence is compliance the appeal is liable to be struck out or dismissed. Order 5 of Federal High Court Tax Appeal Rule
- 3- If an Appellant fail to file his Brief within the time provided for by the Rules or within the time as extended by the Court, the Respondent may apply to the Court for the Appeal to be struck out and/or dismissed for want of diligent prosecution. . Order 5 of Federal High Court Tax Appeal Rule
- 4- Where the Appellant omit to do an act or take any step within the time prescribed by the Rules, the Court may be moved to strike out or dismiss the Appeal. Order 6 of Federal High Court Tax Appeal Rules

Q5 France

- **On top of the *procedure d'admission des pourvois en cassation* (the filter), other tools can impact the case load at Conseil d'Etat:**
- The administrative court of appeal's ruling can only be appealed with the help of an expensive *Avocat au Conseil d'Etat et à la Cour de cassation*
- Conseil d'Etat will organize exchanges between the parties, set deadlines and if deadlines are not met, can set a hearing date and issue a ruling without any submission from the defendant
- Should they identify a new question of law that is raised in many cases, lower courts can ask the Conseil d'Etat to issue an advisory ruling within three months:
 - ✓ This mechanism is often used for recent laws where few or no case law is available
 - ✓ All lower courts usually wait for Conseil d'Etat to rule before proceeding with their cases
 - ✓ Once Conseil d'Etat issued its advisory ruling, lower courts can deal with their cases without fear of being overruled and having to do the work again

Q5 France: a path to a leave-to-appeal system?

- The Cour de cassation (French supreme court for civil, commercial and criminal law) - swamped by cases - has asked Parliament to create a leave-to-appeal system
- The French Parliament opposed it in 2016 almost unanimously
- In 2019, the Government officially renounced such plans
- Politicians in France all oppose any system which would allow for an illegal decision from a lower court to stand
- The filtering system in place at Conseil d'Etat has managed so far to allow for proper caseload management while still allowing to fight erroneous lower courts' rulings
- Only a doubling or tripling of the number of cases in France would entice Parliament to move to a leave-to-appeal system.

Q5 UK: other case control mechanisms

- Group litigation:
 - FTT has power to stay cases behind a “lead” case (but FTT decisions not binding so may need to be appealed to UT before has real effects)
 - If “Rule 18” direction made in respect of “common or related issues” the lead case decision will be binding on those issues on the “related cases” which will have been stayed behind it (unless party applies for a direction to the contrary within 28 days).

Q5 UK: Group litigation – legislative control

- Government introduced legislation in 2014 (“Accelerated Payment Notices” and “Follower Notices”) to incentivise scheme users to resolve their case.
- APNs require scheme user to pay upfront. FNs are issued where the tax authority considers they have final judicial ruling in their favour which shows the scheme doesn’t work– if the FN recipient does not settle, they risk penalties.
- Scheme users have right to make representations on notices which tax authority must consider but no right of appeal to tribunal (would have to proceed by way of judicial review). Penalties related to APNs and FNs can be appealed

Q5 UK: other case control mechanisms

- In practice tools are most relevant at first-instance level:
 - Preliminary issue hearings
 - Strike out
 - Lack of jurisdiction
 - No reasonable prospect of success
 - Challenge is to avoid “mini-trial” / spending just as much time as would have if had full hearing
 - Legislative control:
 - certain decisions do not give rise to any statutory right of appeal to tribunal
 - Some FTT decisions are prevented from being appealed further by statute

Q5 Portugal: Other Case Control Mechanisms

- **Material impact on case load control**
 - Court filing fees and costs, mandatory legal representation and procedural rules have a material impact on case load control
 - There are no specific mechanisms to control group litigation regarding jurisdictional appeals

Q5 Germany

Group litigation

- There are no special regulations for group actions in Germany.
- If a legal problem (i.e. the question if a certain regulation violates the constitution) arises in a number of cases, the tax authorities can
 - issue provisional tax assessments, which can be amended without the taxpayer filing a notice of objection, after the legal question is dissolved
 - if a notice of objection was already filed, with the consent of the taxpayer adjourn the proceedings.

Where proceedings are pending at the Court of Justice of the European Union, the Federal Constitutional Court or a highest federal court with respect to the constitutionality of a legal norm or to a legal question, and where the objection is based upon this, the objection proceedings shall be adjourned to this extent.

Q5 Germany

Group litigation

- The tax court (both the local tax court and the Federal Tax Court) can
 - decide to adjourn the proceedings without consent of the parties (objection possible, can be overruled by the court)
 - decide to suspend the proceedings, if
 - both parties file a motion in this respect and
 - the court finds that the suspension is appropriate

Q5 Germany

Control of case load

- To speed up the proceedings the judge can set deadlines for the taxpayer
 - to amend his claim insofar as not all requirements for an admissible claim have been met (if the taxpayer does not comply the claim is inadmissible)
 - to state the facts through the consideration or non-consideration of which he feels aggrieved, to clarify specific matters which need clarification or to specify evidence or to present documents insofar he is obliged to do this (if the taxpayer does not comply facts, clarifications and evidence will not be considered)

Q5 Germany

Control of case load cont.

- To avoid a formal hearing before a full chamber the judge can
 - issue a preliminary opinion, which may lead to the taxpayer's withdrawal of the claim or the tax authorities' amendment of the tax assessment in favor of the taxpayer and thus end the case
 - invite the parties to an informal meeting – not in the courtroom, no robes – to discuss the case, which may lead to a mutual understanding on formerly disputed facts and thus end the case.
 - decide the case on the basis of the written arguments without a hearing and thus end the case unless one of the parties files a motion to hold a hearing

Q5 Trinidad and Tobago: Other case control mechanisms

- Matters pertaining to the breach of constitutional rights or human rights are ventilated before the Supreme Court
- However, issues pertaining to whether a taxpayer has received a fair hearing can be raised before the Tax Court

6. To what extent do constitutional or human rights impact on appeal processes and the ability of Courts to control their case loads?

Q6 NIGERIA

- **To what extent do constitutional or human rights impact on appeal processes and the ability of Courts to control their case loads?** The codified requirement for leave. Human Rights arguments on presumption of innocence, access to justice and right to property, have been canvassed against the need to pay security for prosecution before the hearing of the appeal at TAT and FHC.

Q6 France : the constitutionality and EU-compatibility of tax law have filters and fast-tracks of their own

- The Conseil d'Etat filter is compatible with article 6 ECHR (ECHR, 03.09.1999, SA immeuble Groupe Kossier c/ France, n° 38748/97)
- There is no filter and no possible caseload control when it comes to the compatibility of the law with the Constitution and EU law:
 1. *Conseil constitutionnel* can strike down laws which are not compatible with the French Constitution:
 - ✓ Lower courts send a *Question prioritaire de constitutionnalité* (QPC) to *Conseil d'Etat*
 - ✓ When it is “serious”, the question is referred within three months by *Conseil d'Etat* to the *Conseil constitutionnel* , which rules within four months on the respect of constitutionally guaranteed rights and freedoms which Parliament may have infringed.
 - ✓ Tax laws are often stricken down by *Conseil constitutionnel* for violating:
 - i. The right to an effective remedy (article 16 of the Declaration of the Human Rights and of the Citizen (DDHC))
 - ii. The principle of non-retroactivity of penalties and sanctions and the principle of proportionality of offences and penalties consecrated (article 8 of DDHC)
 - iii. The principle of equality before public charges (article 13 DDHC, which bans excessive taxation)
 - iv. The principle of equality before the law (article 6 DDHC)
 - v. Or property rights (article 2 DDHC).
 2. Any court in the European Union can refer questions to the Court of Justice of the European Union (ECJ) for a preliminary ruling on the interpretation or assessment of the validity of acts of European Union law. As of January 1st 2023, ECJ had 17 ongoing cases referred by *Conseil d'Etat*, four of which related to tax law. *Conseil d'Etat* has no influence on the ECJ schedule...

Q6 Portugal: constitutional impact

- **Constitutional impact**

- Portuguese Constitutional Court has stated that *outside the (i) scope of sanctions and (ii) when the **violation of fundamental rights by the court decision** is not in question, the Constitution does not impose the enshrinement of the right to appeal, with the legislator having the power to regulate, with a large margin of freedom, the appealability of court decisions.*

Q6 Portugal: constitutional impact

- **Constitutional impact**

- Therefore, the right to appeal *must be granted* (red lines) when:
 - i. sanctions, *or*
 - ii. the violation of fundamental rights by the court decision are at stake
- Otherwise, the legislator has the power to regulate, with a large margin of freedom, the appealability of court decisions (the right to appeal isn't absolute).

7. How does tax assessment appeal system compare with the resolution of other tax disputes?

- Judicial reviews of discretionary decisions of tax authority, or where tax authority's conduct is challenged as unlawful
- Disputes relating to taxes imposed by other levels of government?

Q7 NIGERIA

How does tax assessment appeal system compare with the resolution of other tax disputes? Some special procedures for tax appeal to expedite them at FHC level

- **Judicial reviews of discretionary decisions of tax authority, or where tax authority's conduct is challenged as unlawful** – Faster procedure and accelerated hearing at FHC
- **Disputes relating to taxes imposed by other levels of government?** – Generally, federal Courts for federal taxes and state courts for state taxes but some overlap because the TAT has a subject matter based jurisdiction.

Q7 France

- Courts can deal with tax outside of tax litigation *per se*:
- “Abuse of power” (*recours pour excès de pouvoir*) allows for the annulment of general and impersonal acts such as :
 - ✓ Regulations about litigation procedure or the organisation of the tax administration.
 - ✓ A tax instruction, even if it is limited to summarising the changes made by the legislator to a tax system, is likely to be referred to the judge of abuse of power. The judge may on this occasion review the compatibility of the law with international conventions that the circular reproduces identically or its constitutionality, in which case the QPC is referred to the Constitutional Council (CE, 9 July 2010, M. and Mrs M., No. 339081, T.).
 - ✓ The appeal against a tax instruction is the opportunity for the taxpayer to obtain in a few months directly before the Conseil d’Etat an answer to a complex tax question that would otherwise take years to obtain while waiting to be able to contest her tax assessment.
- “Abuse of power” can also be used to fight government decisions that are separable from the taxation procedure:
 - ✓ the refusal to be recognised as a taxable person for VAT purposes;
 - ✓ certain positions taken by the tax administration on a factual situation ("rescripts" which, in the interests of legal certainty, make it possible to obtain a position from the administration that will be enforceable by the taxpayer when these positions are likely to have significant non-tax effects).
- A taxpayer may hold the state *liable* if he or she has suffered damage other than the payment of tax.

Q7 Portugal

- **Other tax disputes**

- The appeals of the judicial decisions on actions related to the enforcement process are the same;
- Noteworthy differences regarding appeals against decisions in actions regarding other tax administrative acts, which follow the procedural regime of the Code of Administrative Procedure and appeals against decisions regarding tax administrative offences
- Tax assessment appeal system guarantees effective jurisdictional oversight of those of their rights and interests that are protected by law.

8. Closing Remarks

- What's working vs what's not working
- Ideas from other countries
- Ideas for reform

Q8 NIGERIA

Closing remarks

- **What's working vs what's not working?** Multiple courts and tribunals having jurisdiction could be better streamlined, parties sometimes confused on where to go
- **Ideas from other countries?**
- **Ideas for reform?**

QUESTIONS?