Tax News and Horizon Scanning Podcast Series on Tax Disputes

Episode 5: Tax Disputes in Nigeria

Tanja Velling	Hello and welcome to this special podcast series on tax disputes. I am Tanja Velling, co-host of Slaughter and May's regular Tax News podcast. Tax risk across the world is on the rise. What should you be concerned about and how can you prepare? Those are the questions we've set out to answer in this series covering G20 countries on six continents and for this episode we are stopping off in Nigeria. And I am delighted to be joined by my colleague, Tax Partner, Sarah Osprey and Lolade Ososami from Nigeria, which is currently one of the G20 guest countries. Lolade, you are a partner in Nigerian law firm, Udo Udoma & Belo-Osagie. Give us an outline of your career in current practice.
Lolade Ososami	Thank you very much, Tanja. I started my law career as an in-house counsel in an oil-producing company in Nigeria. My first introduction to tax law was while in that role. Nigeria had just introduced the Value Added Tax Act at the time and my task was to advise the company on its implications. I would later move to Udo Udoma & Belo-Osagie where I now lead the tax and mining teams.
Tanja Velling	Oh wow. I think, I have a follow-up question for you on that. But first, Sarah, can you tell us a bit about yourself?
Sarah Osprey	Well, for anyone who listened to the episode on Tax Disputes in India, you will already know a bit about me, so I'll keep this brief. I have been with Slaughter and May since 2013 and I have been a partner here for around a year now. And somewhat inevitably, tax disputes, both purely domestic and also cross-border, have been a decent chunk of my practice.
Tanja Velling	Thank you, Sarah. So, Lolade, as to my follow-up question, you say you're working in tax as well as mining. So for me, just keeping up with tax developments is quite enough. How do you manage to specialise in two areas?
Lolade Ososami	It's interesting that you ask that. It's actually not difficult. As you know, tax is relevant to every sector. Having started out in the extractive sector, it was easy for me to pivot into mining and metals which is also gaining traction as a potential revenue-earner for the Nigerian Government. Also, from my experience in petroleum taxation, there is an interplay between natural resource control, international investment law and the sharing of taxing rights between resource-rich host countries and residence countries. And so, this makes it easy for me to

	combine both practice areas because, at the end of the day, they are both about money.
Tanja Velling	That makes sense. Thinking about tax disputes, are there any particular tax dispute or investigation risks in the sector that our listeners should be aware of?
Lolade Ososami	Not so much in the mining sector as of now. But in the oil and gas sector, there are investigation and dispute risks relating to transfer pricing, especially as it relates to interest on inter-company loans and withholding tax obligations of a foreign company that has taxable presence in Nigeria. As the mining sector develops, however, we expect to see similar issues arising.
Sarah Osprey	And I think we'll end up talking about transfer pricing in quite some detail in a little bit. But could I just ask a totally off-topic question? I wanted to get your view on something we discussed with Indian tax expert, Mukesh Butani. He mentioned that India is very much in favour of international tax co-operation and is supporting the UN's work towards a Framework Convention on International Tax Co-operation. Now, I know that Nigeria proposed the resolution which led to that work. So, what are your thoughts of the proposal and its relationship with the OECD's work on a new taxing right for market jurisdictions and the global minimum tax for large multinationals, you know, so-called Pillar 1 and Pillar 2?
Lolade Ososami	Well, first of all, the proposal by Nigeria didn't come as a surprise. You will recall that, in October 2021 when the OECD published a statement that the Inclusive Framework members of the OECD had reached a consensus on the two-pillar solution, Nigeria, at the time, along with three other countries, including Kenya, did not endorse that statement. And so really there wasn't a full consensus. And the concern, as the Nigerian Government explained at the time, for them and several other developing countries in the Inclusive Framework was that the eligibility thresholds, the thresholds for Amount A could potentially further erode developing countries' tax bases rather than enhance them. I think that was the greatest of several concerns that they had with the two-pillar solution. Also, at the time, they also expressed the fact that the two-pillar solution really didn't address the main issues that they were hoping that the BEPS initiative would tackle. So, I believe that was a trigger for conversations among developing countries which then culminated in the resolution that Nigeria proposed on behalf of the Africa Group at the UN.

	In terms of how this could affect the OECD's work, I believe that the OECD's work will continue and is still continuing and will eventually be concluded. However, the proposed UN Framework Convention will give developing countries more options in determining how they wish to participate in the global discussions that will shape international tax rules and how they wish to implement those rules. So, just like today as a developing country, for instance, with our double tax treaties, you will find that some of the treaties we have tend to follow the OECD Model Treaty whereas some borrow from the UN Model Treaty. So, I think, ultimately at the end of the day, whilst developing countries would most probably drift towards adopting the UN proposed solutions, there will still be an option to also adopt some OECD-led solutions as well.
Tanja Velling	That's very interesting, but I guess we should be moving on to our disputes topics. You have already mentioned transfer pricing as a risk area and we have heard from a number of other local experts, that really across the world transfer pricing is a key risk. And transfer pricing, that is, of course, basically, the requirement to calculate taxable profits by reference to arm's length terms for related party transactions. What are particular risk areas for transfer pricing in Nigeria? In other jurisdictions, there's intra-group financings that are particular risk areas, intangibles, which is a particular risk area in the UK, especially with respect to inbound intangibles where people have been licensing IP from abroad. What do you see in Nigeria?
Lolade Ososami	Quite similarly as well in Nigeria. So, we've seen issues with intangibles and also categorisation of incomes as well, you know, in relation to intangibles: when is a payment considered to be royalty or a service fee for digital services, for instance? Of course, there is also the interest deductibility issue with regard to intra-group financial arrangements as well, and also intra-group services as well. You know, how do you justify the pricing of management services, for instance, and some administrative services? So, these are issues that we've seen that are usually flagged during transfer pricing audits and they are the potential risk areas for most transfer pricing audits. So, I don't think that anything that we see in Nigeria is really different from what's happening in most jurisdictions when it comes to transfer pricing.
Sarah Osprey	And I think I agree with that. Certainly in terms of the UK, Tanja, as you said, the high-risk areas are obviously around things like intangibles. You know, if you

	have a company in the UK which is paying a licence fee abroad or IP is held abroad but it's being used to generate UK sales. And then in terms of the numbers of transfer pricing enquiries we're seeing, I think it's probably been fairly steady since 2017 or so, but we are still seeing a lot of transfer pricing enquiries being opened. Those enquiries can last a long time because they are very, sort of, fact-specific and therefore can be quite document-heavy in terms of what the authorities want to see from taxpayers to back up the pricing that they've chosen.
Lolade Ososami	Absolutely.
Tanja Velling	You mentioned transfer pricing audits. How does an audit typically progress in Nigeria? How does the tax authority identify risks? How do they decide which taxpayers to look at?
Lolade Ososami	In terms of which taxpayers to look at, of, course the multinationals are top on that list because they are the ones that have myriads of intra-group activities going on. Any company that is a member of a group is required, along with filing its company's income tax returns, is required also to file its transfer pricing returns by way of a transfer pricing declaration. The declaration is really just an administrative filing to disclose that you are a member of a group. But in addition to that, you also are required to file your transfer pricing disclosures which is then a more detailed report that discloses the intra-group transactions that have transpired in the course of the financial year. And then in addition to that, you are expected to maintain a local file and a master file. And if you belong to a group that is eligible for the country-by-country report filing, then you also are required to file a country-by-country report notification on an annual basis. So that sums up the obligations of the taxpayer.
Sarah Osprey	That's interesting. You know, in the UK, we only recently introduced a requirement to maintain a master and a local file (and these don't need to be filed with the return). Your transfer pricing disclosure sounds a bit like the annual schedule on cross-border intragroup transactions that HMRC had originally thought about introducing alongside the master and local file requirement. Thankfully, they decided against that here. The other documentary requirement that may still come in is a summary of work undertaken in preparing the local file. But going back to the position in Nigeria, what happens after all the required documents are filed? How might a tax dispute start?
Lolade Ososami	Now, after submitting these documents, the tax authorities would then analyse them, and if they believe that you have not made sufficient disclosures, then that

	could trigger an investigation depending on the extent of the gaps that they believe they have seen in your filing. But ordinarily, it starts with a routine audit. The tax authorities would typically come every year to verify what you have filed and so that's the routine audit. And most of the time that starts with a desktop audit where the tax authorities would send a list of documents that the company is required to provide and, once you provide those documents they do their audit, and if the audit is successful, they send you a letter to confirm that the audit is successful. Hardly do you get a situation where the tax authorities do not try to flag some sort of additional assessment here or there. It's at that point then that you sometimes have potential disputes arising. We've seen situations where a taxpayer would submit an agreement to buttress a particular statement that they've made in their transfer pricing filings and then the tax authorities would interpret their agreement in a completely different kind of way. That is the first port of call for most disputes where, from a commercial perspective, a taxpayer has entered into a contract and perhaps used certain terminologies loosely and then the tax authorities would hold on to that and say, well, this is what we interpret this to mean and by virtue of that, reach conclusions that may end up in a different outcome for the taxpayer. One thing I also should mention is the issue of penalties as well. So, as a member of a multinational group you must be very aware of the timelines because there are huge administrative penalties that could easily be imposed by the tax authorities for simply failing to meet your reporting obligations within the required timelines.
Sarah Osprey	In the UK, the vast majority of transfer pricing disputes will end in a settlement. Is that sort similar?
Lolade Ososami	Yeah, we haven't seen many taxpayers going to court because there's an administrative process by the transfer pricing regulations prescribed for resolving objections that are raised in relation to transfer pricing. So that process is where most disputes tend to be resolved. But if it can't be resolved at that stage, then the taxpayer goes to court.
Tanja Velling	Why do you think it is that not many transfer pricing cases get to court, but most get settled?
Lolade Ososami	The technical nature of transfer pricing is why taxpayers wouldn't rush to court and I think also the fact that, you know, each case can have its own peculiarities such that it would take a certain level of expertise on the part of the judges to understand those issues.

	So, I think by the very technical nature of transfer pricing, both taxpayers and even the tax authorities recognise the fact that disputes are better resolved administratively than being taken to court because again, with the courts, the outcome can be unpredictable. You know, we've seen some, maybe not from a transfer pricing perspective this time around, but we have seen some tax cases where the outcome was completely unpredictable, wasn't really what the tax authorities or even the taxpayer was expecting. So, I think for the very fact that transfer pricing is technical in nature, it's best to just keep the dispute resolution process administrative.
Tanja Velling	Yes, when we've also spoken to experts in the US and Australia where there's been more transfer pricing litigation, one point that they made is that it is an enormous undertaking to litigate a transfer pricing case. It's very costly and just requires so much evidence, expert witnesses, and so is, potentially, as you say, not the most cost-effective way of resolving tax disputes.
Sarah Osprey	And I think that is why we see settlements rather than litigation in the UK as well. I mean, the nature of transfer pricing is that there's very rarely a single right answer which means, sort of as you say, Tanja, that there ends up being a hoard of evidence, economists and all sorts that would need to be paraded before the courts to kind of get to a decision. The most effective and efficient way to get to a resolution, when you are dealing with such a fact-sensitive area, I mean, let's face it, that's going to be by settlement rather than by litigation in most cases, you'd have thought.
Lolade Ososami	Yes
Tanja Velling	If we are thinking about cross-border disputes and how those might get resolved, one way is through mutual agreement, the mutual agreement procedure whereby two or more tax authorities resolve international tax disputes and then, obviously, there's also the possibility of having advance pricing agreements where the taxpayer and one or more tax authorities agree on how transactions should be priced for the periods in question. What is your experience with MAP and APAs?
Lolade Ososami	Prior to BEPS, the BEPS initiative being launched, Nigeria had about 9 double tax treaties in force and each one had an article on MAP. But in practice, I never encountered a MAP in my experience as a tax lawyer until 2021 when a colleague handled a MAP that lasted for over two years and the outcome was not even in favour of the taxpayer at the end of the day. MAPs still are not that common. The FIRS introduced its MAP guidelines in 2023, just last year.
Tanja Velling	And what about APAs?

Lolade Ososami	Nigeria doesn't even have an APA regime in place, although the transfer pricing regulations give taxpayers the right to enter into APAs with the tax authority. I'm not aware of any APA that has been signed with the tax authorities as of yet. I know that the Presidential Committee on Tax Policy Reforms is looking at APAs and we are aware that the tax authorities also are working on introducing some sort of guidelines to negotiate APAs with the tax authorities. So, MAP is not very popular yet and there are no APAs in that we know that have been negotiated with the tax authorities, yet.
Tanja Velling	And do you think when they get started on APAs that will perhaps first be unilateral APAs, just between the taxpayer and the Nigerian tax authority?
Lolade Ososami	Most probably, most probably.
Sarah Osprey	Because I think, in the UK, there's quite an established sort of practice of multinationals obtaining APAs although the number of agreements reached per year has actually steadily declined since 2018/19, but at the same time the number of applications made each year has actually gone up. I touched upon APAs and talked about how useful they were a bit in the India podcast, so I won't go through that again here, but APAs are clearly still seen as an important tool available to multinationals to mitigate or manage, or try to get some certainty in terms of transfer pricing risk. And then in terms of the UK's experience around the mutual agreement procedure, again we see the number of cases going through MAP increasing and I think it was about 130 cases were resolved within each of the last two years, for which the numbers have been published.
Lolade Ososami	Interesting.
Tanja Velling	And then, Lolade, you've referred to the transfer pricing regulations – I believe that there's actually a question mark over whether they are technically valid and, in August 2023, the Nigerian Tax Appeal Tribunal delivered a judgement which some suggest has shaken the very foundation of transfer pricing administration in Nigeria. Tell us a bit more about the case.
Lolade Ososami	Yes. So that would be the case involving a company called *Checkpoint Technologies* and the Tax Appeals Tribunal ruled that, in fact, because the tax authorities didn't have a valid board within a certain space of time (I think between 2012 or thereabouts to 2018), the transfer pricing regulation was not valid, was null and void, as well as the country-by-country reporting regulations. And so that has put a big question mark on whether taxpayers should continue to comply with the reporting obligations under both regulations.

	We have taken the view that it would be expedient for taxpayers to continue to file, to continue to make good their obligations under those regulations. The tax authorities appealed the matter. We are all waiting to hear what the outcome of that appeal would be. But when I look at the argument behind the ruling of the Tax Appeals Tribunal, for me, I doubt that the outcome of the appeal would be in favour of the ruling of the Tax Appeals Tribunal. But as I said, when a matter goes to court, sometimes you really can't tell how it's going to end up. In the unlikely event that the Federal High Court toes the line of the Tax Appeals Tribunal, then that could have significant implications. But of course, you can expect that the tax authorities will probably still appeal to the Court of Appeal and probably all the way to the Supreme Court. So, we haven't seen the end of this yet and it's not easy to predict what could happen in the event that the court rules in favour of the tax authorities.
Sarah Osprey	And I suppose even if it got through all the way to the Supreme Court and the Supreme Court still upheld the Tax Appeal Tribunal's decision, there is always the option that the Government could fix it through primary legislation I suppose as well to effectively put the regulations back on foot?
Lolade Ososami	Absolutely, there is that possibility.
Tanja Velling	And they could do that retrospectively. Would that be a possibility?
Lolade Ososami	There is that possibility. Even though again the issue of, you know, retroactive legislation is controversial. But we have seen them do that in relation to tax laws. So, there is that possibility, yes.
Tanja Velling	To wrap up on this topic, a sort of practical question, if you were someone who operates in Nigeria and you have been complying with the relevant legislation, your advice would be to continue complying?
Lolade Ososami	Yes
Tanja Velling	Yes. And then if you were someone who is operating again in Nigeria, but who perhaps had failed to comply in the past and was threatened with penalties, what should they be doing? Should they do a protective filing to say: look there's been this court decision, these regulations are not valid, those penalties you are trying to impose on me are therefore invalid?
Lolade Ososami	Exactly, you could take that position and say, you know, we'd just like to wait for the outcome of the appeal and then we'll know whether or not these penalties that you have imposed on us are valid. However, I would also advise my client, in that scenario, to just quietly make provision for those penalties. And I know that has its own accounting implications, but nevertheless it is not an easy decision to assume that those penalties would disappear. You just have to wait

	until the outcome, but you can delay the payment of those penalties by saying we are waiting for the outcome of the court's decision on the matter.
Sarah Osprey	Yes, so let's talk a little bit about procedural reforms. Could you start off by telling us a bit about the tax appeals process more generally and, sort of, how speedy or lengthy it is?
Lolade Ososami	The tax appeals procedure at the Tax Appeals Tribunal, there has always been an effort to try and shorten the process. For instance, taxpayers have the option of just submitting documents. So, there is a documentary review process which can actually have a quick outcome where the taxpayer submits all the documents and the Tax Appeals Tribunal carries out a review of those documents, and on the basis of their review, they can quickly come up with a ruling. So at least in terms of the time that it takes for matters to be concluded, that has been helpful. We've seen from experience that that usually takes much less than a year. It could take between two to three months to get a decision on that, which is quite helpful. In terms of actually making an appearance at the Tax Appeals Tribunal as well, compared to the procedures in court, it is also relatively shorter and matters can be concluded within a year, eighteen months to two years. As opposed to, for instance, twenty years in one instance, in a case that involved Shell Petroleum. So, there has been an improvement over time since the establishment of the Tax Appeals Tribunal, and it also helps that you have them in the various geo-political zones in the country. So that has also helped in easing the tax adjudication process.
Tanja Velling	And I think you were involved in quite a landmark case on the appeals process. Do you want to give us just a quick outline of that?
Lolade Ososami	Yes, that had to do with the Tax Appeals Tribunal Rules which required a taxpayer to pay 50% of the disputed amount as a deposit before filing a case at the Tax Appeals Tribunal. And so, you had that provision in the Tax Appeal Tribunal's procedural rules but then you also had the FIRS Establishment Act, Schedule 5 of which provided that certain conditions must be met by the taxpayer before the taxpayer is required to make a deposit.
Tanja Velling	Ok. So, there was a contradiction between the Tax Appeal Tribunal's procedural rules and the provisions in the FIRS Act. And then presumably your argument was that you can't require the taxpayer to pay a deposit under the procedural rules where the taxpayer wouldn't have been required to do so under the FIRS Act. Is that right?
Lolade Ososami	That was the argument that we put forward and, I think, it was a Southeastern Zone of the Tax Appeals Tribunal that ruled in our favour, and there was a similar

	case going on also in the Lagos Tax Appeal Tribunal where a similar outcome was the case. That was helpful at the time. Prior to that, there was a particular taxpayer that had to make a deposit in the billions just for it to be able to file its matter in the Tax Appeals Tribunal. So, it was a major concern for most corporates at the time. So that was what really made it a landmark case and I think it just settled the question as to whether or not the Tax Appeal Tribunal's procedural rules should precedent over the provisions of the FIRS Act and that wasn't the case.
Sarah Osprey	And that "pay-to-play" concept – the idea that you have to pay the tax bill upfront in order to appeal it – does exist in the UK, but not for all taxes. Generally speaking, you do not need to pay an income or corporation tax assessment in order to appeal it. But you do need to pay a disputed VAT bill upfront before you can appeal it, and the UK also has a pay-to-play regime for disputes concerning specific rules aimed at unacceptable tax avoidance. We do occasionally see taxpayers run the argument that they shouldn't have to pay upfront because it is preventing access to justice. These arguments have not been met with much success in the UK, which may be because our pay-to-play rules tend to apply in specific circumstances such as tax avoidance, you know, where you can see a clear policy reason for this being the way it works.
Lolade Ososami	Interesting. You know, the whole pay-to-play concept was challenged in another case in Nigeria. In the Federal High Court rules, you also had this provision that required a taxpayer to pay the amount in dispute before filing a matter in the Federal High Courts and that case challenged that practice, and the Court of Appeal ruled that it was actually unconstitutional to ask a taxpayer to pay money before you can file a matter in court because other citizens have the right to free hearing. And so, asking a taxpayer to put down money before their matter gets heard in court somewhat transpired in a denial of the right to free hearing. It's based on that judicial precedent that the pay-to-play concept has somewhat been suspended, I would say.
Tanja Velling	So, at the moment, it doesn't apply in any tax case anymore?
Lolade Ososami	It doesn't apply, except for cases where certain conditions exist. Then the court can order the taxpayer to make a deposit as security essentially. And that's where, for instance, the taxpayer has a track record of tax evasion or where there's a suspected incident of fraud. Then in that case, the court has to, first of all, issue an order for that deposit to be made, but it's not automatic that a taxpayer must make that deposit.
Tanja Velling	That's quite a significant tightening in favour of the taxpayer.

	But let's move on slightly. Are there any other developments on the horizon that businesses operating in Nigeria should be aware of? I think I've heard some rumours about a possible tax amnesty?
Lolade Ososami	Yes, there is that. So, we've had a tax amnesty programme launched before. That was in 2017. It was supposed to last for 9 months and then it was extended, I think, a couple of times subsequently until August 2020. Now, after the establishment of the Presidential Committee on Tax Policy Reforms, the committee published a list of quick wins, and one of it was to reintroduce a tax amnesty programme. That has been announced, although they are yet to completely publish details, complete details about this amnesty programme. I think it's going to be similar to the previous one, which basically was: come forward, voluntarily disclose and then we'll waive all penalty and interest. But this time around, I think that the administrative process will be different and could probably involve a lot of digitalisation.
Sarah Osprey	And in terms of who can benefit from that amnesty scheme, is it aimed at a particular group of people, you know, could multinational groups benefit from it?
Lolade Ososami	Yes, I believe that multinational groups can benefit in terms of their local subsidiaries coming forward to voluntarily disclose – at least, it benefits them to the extent that they get a waiver of penalties and interest on penalties.
Sarah Osprey	I think over the years there have been a number of settlement programmes in the UK, usually aimed at specific issues. And we've got one ongoing programme which is known as the Profit Diversion Compliance Facility and that's specifically for multinationals with arrangements targeted by our Diverted Profits Tax. But dissimilarly to the programme that you were describing, if a multinational made a disclosure under the PDCF and that led to additional tax being payable, interest and penalties would still apply. So, you might ask the question, why are you using that facility? And I think the answer there would be twofold. First of all, there is, the promise of a faster and more efficient process with higher engagement from HMRC to try and truncate the amount of time it takes to reach a settlement. But the second point is the disclosures should be treated as unprompted or voluntary which means that, whilst you might not get away without a penalty, you should end up with reduced penalties. And I think that's the way disclosure facilities would now tend to work here in the UK in that it would be unusual to forgive interest or penalties, but there may be a reduction in penalties, under the generally applicable rules.
Tanja Velling	And one more point on the PDCF, I believe HMRC has restarted writing to groups to encourage them into the Facility – but we could probably do a whole other podcast on what to do if you received such a nudge letter.

Sarah Osprey	And unfortunately, I think we're coming to the end of our time together. If you'd ask me to recap, I'd certainly mention plans for a possible tax amnesty in Nigeria. As in many countries, transfer pricing is a key risk – although, in Nigeria, there's the added uncertainty of a challenge to the validity of the local transfer pricing regulations. Tax appeals (at least at first instance) can be rather speedy and pay-to-play requirements have been mostly suspended after a number of cases challenging these requirements were decided in favour of the taxpayers. Lolade, thank you very much for joining us today.
Tanja Velling	It's been a real pleasure speaking to you.
Lolade Ososami	Thank you so much for having me.
Sarah Osprey	Thank you.
Tanja Velling	And that leaves me to thank you for listening. This was the fifth of six episodes in our special podcast series on tax disputes. Next week, Tax Partner, Charles Osborne, and Tax PSL Counsel, Zoe Andrews, will speak to Julien Gayral, Partner at Bredin Prat in France. If you subscribe to Slaughter and May's Tax News podcast or our Horizon Scanning show, you'll be notified when the new episode in released. For more insights from Slaughter and May's tax department, please go to the European Tax Blog, www.europeantax.blog, or follow us on Twitter, @SlaughterMayTax. Or just drop us an email.