RETHINKING THE NON-ARBITRABILITY OF TAX DISPUTES IN NIGERIA: IMPLICATIONS FOR PRODUCTION SHARING CONTRACTS

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Abstract

It has always been the rule that there is no provision under the Petroleum Profit Tax Act (PPTA) under which the parties to the Production Sharing Contract (PSC) can refer tax disputes to arbitration in Nigeria. The mechanism provided for the resolution of such disputes is the Tax Appeal Tribunal and thereafter, the Court of Appeal. It is recognised as a matter of public policy that matters relating to tax, crime, matrimonial causes, winding-up of a company or bankruptcy are of such nature that cannot be settled by arbitration. There was no consideration whatsoever of matters or issues relating to contractual relations of parties. This work employs the doctrinal and analytical approach in examining research materials like tax legislations, judicial decisions, textbooks, journal articles and internet sources. The paper found that an arbitral tribunal, being a creature of contract, is not endowed with general and wide jurisdiction bestowed on a regular court. Therefore, non-contractual issues, regardless of their implication for their transactions cannot be submitted to arbitration. Currently, the position of Courts in Nigeria though still controversial, is that disputes amongst parties with regards to who has what rights and obligations under a product sharing contract (PSC) is clearly a contractual dispute and amenable to be determined by an arbitral tribunal.

Keywords: Arbitration, Tax, Dispute, Production Sharing Contract, Agreement, Statutory.

2. Introduction

It is undisputed that before a matter is referred to arbitration, same must first be seen to be arbitrable.[1] The dispute must not relate or cover matters of law which are not permitted to be settled by other dispute regulation mechanisms other than the court.[2] It is important to note that the Arbitration and Conciliation Act[3], does not demarcate between disputes that are arbitrable or otherwise. In *BCC Tropical (Nig) Ltd v Govt of Yobe State of Nigeria & Anor*[4], it was judicially recognized as a matter of public policy that there are certain disputes[5] by their nature that cannot be settled by arbitration.The arbitrability of tax disputes is contentious because tax laws had provided a mechanism for the resolution of tax disputes which does not include arbitration. This made the jurisdiction of Tax Appeal Tribunal in tax matters, just like the regular courts on the issues of fraud, financial, malpractices and collusion which is iron-clad. Tax disputes have serious

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[1]Unreported case of *Emerging Markets Telecommunication Services Ltd v Anambra State Rural and UrbanTransmission Supervisory Unit & 3 or*sin Suit No A/248/2017.

[2]*Mekwunye v Lotus Capital Ltd &Ors (*2018) LPELR-45546 (CA)

[3] Cap A18 Laws of the Federal Republic of Nigeria (LFN), 2004.

[4] (2011) LPELR – 9230 (CA)

[5] The matters include matters relating to crime, matrimonial causes, winding up of a company or bankrupting.

consequences to the public policy and therefore reserved for the special tribunals and courts.[6]

Arbitral tribunal being a creature of contract is not endowed with the general powers to deal or adjudicate in complex issues and competent to offer the reliefs sought by the parties in dispute. The agreement activating arbitration jurisdiction must not cover matters which by the law of the state are not allowed to be settled privately or by arbitration. This is usually because this will be contrary to public policy.[7] In *Kano State, Urban Development Board v Fanz Construction Ltd*[8], the Supreme Court held that a criminal matter like the allegation of fraud raised by the respondent in the instant case does not admit of settlement by arbitration. The courts have been handing down sweeping decisions whether *per incuriam* or not whenever tax dispute are involved on the reasoning that is related to a very critical aspect of the fiscal sovereignty of the Federal Republic of Nigeria.

2. The Concept of Tax

Taxation spans over a gamut of human activity and is essentially aimed at providing the requisite revenue for the socio-economic development of a nation. Taxation[9] is the composition or assessment of tax. It is the means by which the state obtains the revenue required for its activities. Tax is a pecuniary burden laid upon individuals or persons or property to support the government which is exacted by a legislative authority.[10] It is a compulsory monetary charge imposed by the government on persons, entities, transactions or property to yield public revenue[11]. It is a demand made by Government of a country for a compulsory payment of money by the citizens of the country.[12] Whenever issues come up requiring a determination of whether a person either natural or artificial is liable to pay taxes, the court is duty bound to explore the relevant tax legislations and apply them accordingly.[13] It is certain and well settled in our jurisprudence that taxation issues are not on all comers' affairs or an arbitrary issue. No tax can be imposed on the subject without the word in an act of parliament clearly showing an intention to lay a

[6] Federal Inland Revenue Service (Establishment), FIRS (E), Act, 2007, S.59
[7] CO Obi-Okoye, "The Question of Arbitrability in Nigeria" in OD Amucheazi &CA Ogbuabor (eds) *Thematic Issues in Nigerian Arbitration Law and Practice*, (Enugu: Snaap Publications 2008) 117.
[8] (1990) 4NWLR (pt.142) 1 at 33
[9] BA Garner (ed) *Black's Law Dictionary,* 10th ed; (USA, Thomson Reuters St Paul MN, 2014) 1688
[10] IA Ayua, Nigerian Tax Law (Ibadan: Spectrum Law publishing, 1996) 9
[11] BA Garner (ed) *Blacks Law Dictionary*,op.cit.
[12] CS Ola, *Nigerian Income Tax law and Practice* (Ibadan, MacMillian Pub, 1983)13.
[13] *Best Children Int'l Schools v FIRS* (2019) 40 TLRN 33

burden on the subjects.[14]Agbonika[15] stated that for there to be command for the payment of tax, the following features or characteristics must be visible;

i. It must be compulsory levy
ii. There must be a legislation backing the demand for such payment.
iii. The levy must be certain and show a basis for calculating the payment.
iv. Payment must be for a public authority with tax jurisdiction known as the Relevant Tax Authority.
v. Payment must be for the common good of all and not for any individual use.
vi. There must be penalties for non-compliance with the law
vii. Payment could be in money or money's worth such as goods or free labour.

3. The Concept of Arbitration

This is the reference of a dispute between two or more parties for determination in a judicial manner by a person or persons. It is the process of dispute resolution in which an arbitrator renders a decision after a hearing at which both parties have an opportunity to be heard.[16] It is the use of an arbitrator to settle a dispute. Arbitration is based on an agreement of the parties that a dispute between them be settled by a tribunal of their choice.[17] Halsbury's laws of England defines arbitration as the reference of a dispute or differences between not less than two parties for determination after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction.[18]In *Collins v Collins*[19], arbitration was defined with reference also to the decision of one or more persons either with or without an umpire of a particular matter in difference between the parties. The precise definition was opined by Fulton[20] and it read thus:

> Arbitration is a private process whereby a private disinterested person called an arbitrator, chosen by the parties to a dispute….acting in a judicial fashion but without regards to legal technicalities, applying either existing law or norms agreed by the parties and acting in accordance with equity, good conscience and the perceived merit of the dispute make an award to resolve the dispute.

[14]*A Authority v Regional Tax Board* (1970) All NLR 177, *Scottish Widows Plc &ors v Commissioner for her Majesty Revenue and Customs (SCOTLAND) ors*(2011) LPELR-17822 (UK) and *VODACOM BUSINESS Nig Ltd v FIRS* (2018) 35 TLRN 01 at 18.
[15] JAM Agbonika& J AA Agbonika, Understanding of ABC of Taxation the Nigerian Perspective in JA M Agbonikaetal (ed) *Tropical Issues on Nigerian Tax Laws and related Areas*, Vol 2. Ababa Press Ltd, (2018) p2.
[16]*SPDCN Ltd v Ajuwa* (2015) 14 NWLR (pt 1480) 403
[17] R Berstein, *Handbook of Arbitration Practice* (London: Sweet &Maxwells, 1987) p.8
[18] See GC Nwakoby, *The law and Practices of Commercial Arbitration in Nigeria* (Enugu: Snap Press Ltd: 2004) p4
[19] 28 LJCH 186
[20] Fulton Maxwell J. *Commercial Alternative Dispute Resolution* (London: The Law Book Co. Ltd, 1989) p55.

It is noted that an arbitrator or an arbitral tribunal derives its jurisdiction from the agreement of the parties. However, whereas, the parties must be in agreement to arbitrate, some arbitration proceedings are commenced by the provisions of a statute, for instance, the Nigerian Industrial Arbitration for settlement of individual trade dispute. Nwakoby[21] identified two fundamental clauses in arbitration to be the arbitration clauses by which parties agree to arbitrate and the clause on actual submission of a particular dispute to the authority of named arbitrator.

Generally all disputes which can be decided by a civil court, involving private rights, can be referred to arbitration. Thus disputes about property and money or about the amount of damages payable for breach of contract and others alike can be referred to arbitration. However, following the general practice the following matters are not referred to arbitration:

a. Matrimonial matters like divorce or restitutions of conjugal rights.
b. Matters relating to guardianship of a minor or other person under disability.
c. Testamentary matters, for example, questions about the validity of a will.
d. Insolvency matters, such as insolvent
e. Criminal proceedings
f. Matters falling within the purview of the monopolies and restrictive trade practices Act.
g. Questions relating to charities or charitable trusts;
h. Dissolution or winding up of a company

The reason for the exclusion of the above-listed is that it is believed that they are matters involving morality, status and public policy which are non-arbitrable.

4. Tax Dispute Resolution Mechanism in Nigeria

Tax Appeal Tribunal (TAT) is not named under the Constitution[22] where there is a comprehensive listing of the nation's superior courts of record. In this regard, the Nigerian Constitution[23] recognizes the rights of every Nigerian to submit disputes to the courts for adjudication whether or not he is a tax payer. Other than the general disputes, there are specialized processes relating to the resolution of tax or fiscal disputes between taxpayers and tax revenue authorities. The tax appeal process is an integral and important part of tax administration process provided for under the relevant tax legislations.[24] The appeal process is available to every taxpayer who is aggrieved or dissatisfied with a

[21] G C Nwakoby, The law and Practice of Commercial Arbitration in Nigeria, op cit p5. He further posited that the two clauses are and is always preferred to distinguish them rather than use them as though they were identical and interchangeable clauses.
[22] Constitution of the Federal republic of Nigeria (CFRN), 1999 as amended, S.6(5) (a)- 9(i)
[23] CFRN 1999 as amended, S.6 (6) (6) and 271(i)
[24] Federal Inland Revenue Services (Establishment) Acts, S.59 and the 5th Schedule, Companies Income Tax (Amendment) Act, 2007, S.18,Personal Income Tax (Amendment) Act, 2011, S.60; Petroleum Profit Tax Act, S.4(91); Value Added Tax Act, S.20 (1) –(5).

decision or ruling made by the tax authority. This could relate to the tax status of such taxpayer, the interpretation or application of tax laws and other matters affecting the rights and status of the taxpayer. It is noteworthy that the jurisdiction of the Tax Appeal Tribunal has been subjected to criticisms.[25] The initial attacks on the jurisdiction in *StabiliniVisionini Ltd v FBIR*[26] and *Cardbury (Nig) PLC v FBIR*[27] raised the issues that the Tribunal is: a) not a court but an administrative tribunal ; b) a fact-finding tribunal

The only issue with the classification on the jurisdiction of TAT is that as a fact finding tribunal, the tribunal can only make recommendations to another body.[28] The Tax Appeal Tribunal (TAT) is not a fact finding tribunal.[29] The reason is that in the judicial powers of court under the constitution of the Federal Republic of Nigeria, 1999,[30] the jurisdiction of TAT is not preserved. A fact finding tribunal can only recommend possible solutions and not venture into giving judgement as TAT has done. On this ground the existence of TAT is seen to be violating the provisions of the Constitution.[31] But the decision in *CNOOC Exploration and Production (Nig) Ltd & Anor v NNPC & Anor*[32] has calmed nerves on the contentious issue of TAT's jurisdiction. The court of Appeal in the case relied on the decision in *Shell Nigerian Exploration and Production &ors v FIRS & Anor*[33] and *Esso Exploration and Production Nigeria Ltd & Anor v Nigerian National Petroleum Corporation*[34] and held that TAT is a vital step towards the resolution of tax related disputes. It is a procedure established for resolving claims and objections; that is, when an assessment is made and the party is not satisfied, it can serve a notice of objection with the relevant tax authority.

5. Non-Arbitrability of Tax Disputes in Nigeria

In domestic tax disputes, tax matters are not arbitrable but in the international tax disputes, it is arbitrable. Internationally, arbitration of tax-related disputes proves much a reality despite doctrinal objections. The scholarly debate notwithstanding, arbitrators routinely address tax issues in the context of ordinary commercial contracts as well as claims by foreign investors brought against host states.[35] The disputes in tax matters are

[25] K J Bielu, The jurisdictional Question on the status the Tax Appeal Tribunal: Reflections on CNOOC Exploration and Production (Nig) Ltd & Anor v NNPC, IRIJ 2(3) 2020, 70-75
[26] (2009) 2 CLRN 269
[27] (2010) 1 CLRN 215
[28] K J Bielu, Legal Regime for Achieving an Effective Tax Revenue Generation in Nigeria; Issues and Prospects, a PhD Research presented to the faculty of law, Nnamdi Azikiwe University Awka, August, 2017, P.234
[29] *Cardbury (Nig) PLC v FBIR* (supra)
[30] CFRN, 1999, as amended, S 6 (6) (d
[31] CFRN, 1999, as amended, S 1 (2) & (3) and 251 (1) (a) & (b)
[32] (2017) LPELR- 43800 (CA). Although the argument is that if TAT is to be a civil court for all purposes then the National Assembly introduced, a statutory fiction and all adjudicating bodies are enjoined to proceed on the assumption that such a state of affairs exists from the date the legislation took effect.
[33] Unreported judgement in Appeal No CA/A/208/2012 delivered on 31/8/2016.
[34] Unreported judgement in Appeal No CA/A/507/2012 delivered on 22nd July, 2016.
[35]

distinguished into three broad categories of fiscal arbitration. These include, tax controversies arising from business relationships, overlapping tax on some transaction by two or more countries and disputes implicating tax issues between a foreign investor and host state. In country to country arbitration under income tax treaties endorsed by international organizations such as organization for Economic Corporation and Development (OECD) and International Chamber of Commerce (ICC) as well as National Fiscal authorities like Austria, Belgium, Canada, Germany and US, provides tax treaty arbitrations[36].

In Nigeria, tax disputes are not arbitrable on grounds of public policy given that a tax dispute would likely touch on the revenue of governments. Tax issues implicated and impacted on public interest and related to a very critical aspect of the fiscal sovereignty of the Federal Republic of Nigeria, which is that is sensitive and inappropriate to entrust them to an arbitral tribunal. Tax disputes belong to the kind of disputes which by law are not permitted to be settled by other disputes resolution mechanisms other than in court. In *BCC Tropical (Nig) Ltd v Government of Yobe State of Nigeria & Anor*[37], it was recognized as a matter of public policy that matters relating to crime, matrimonial causes, winding up of a company or bankruptcy cannot be settled by arbitration. It is trite that the dispute which is the subject of an arbitration agreement must be arbitrable. In other words, the agreement must not cover matters which by the law of the state are not allowed to be settled privately or by arbitration.

In *Shell (Nig) Exploration and Production Co Ltd & 3ors v Federal Inland Revenue Service & Anor,*[38] the Court of Appeal permitted the Federal Inland Revenue Service (FIRS) which was a non-party to the arbitration proceedings to successfully challenge an award in such proceedings on the basis that the issues in dispute which appeared to be contractual disputes were infact tax disputes and therefore not arbitrable. However, in

[36] L Mechionna, Arbitrability of Tax Disputes, IBA Section on Business Law, Arbitration and ADR Committee Newsletter 21(May 2004) p3.

[37] (2011) LPELR- 9230 (CA). In *B J Export & Chemical Company Ltd v Kaduna Refining & Petrol chemical Company Ltd *2002) LPELR-12175 (CA) cited with approval in Mkwunye v Lotus Capital Ltd &Ors (2018) LPELR- 45546 (CA); it was held that the jurisdiction of regular court on dispute concerning issues of fraud, financial mal practice and collusion is iron-clad.*

[38] Appeal No CA/A/208/2012 delivered on 31st August 2016. The Appellants as contractors, entered into a production sharing contract (PSC) with NNPC (the 2nd Respondent) in respect of Deep Offshore oil mining lease 118 (OML 118 PSC) to explore oil in Nigeria's deep-water acreages. Any crude discovered was to be allocated between the parties in accordance with the lifting allocation contained on OML 118 PSC, based on Royalty Oil, Cost oil, Tax oil and Profit oil. The contractor alleged that NNPC was in breach of its obligations under the OML 118 PSC since May 2007 and had continued to lift crude oil in excess of it entitlement. Therefore, the contractor commenced arbitration proceedings against NNPC. On becoming aware of the proceeding the FIRS filed an originating summons; see also Esso Exploration and Production Nigeria Ltd &Anor V NNPC; Unreported Appeal No CA/A/507/2012 judgement delivered on 22nd July ,2016.

that case it was held regarding arbitrability that when the Nigerian Arbitration and Conciliation Act is read alongside section 251 (1) (a) and (b) of the Constitution of the Federal Republic of Nigeria 1999 as amended it becomes evident that tax disputes are not arbitrable. The reasoning of the court is that dispute about payment of Petroleum Profits Tax is statutory not contractual. The court did not agree with the contractors' argument that the arbitral panel can determine issues relating to the payment of Petroleum Profit Tax under the PSC. This was rejected on the basis that FIRS had the exclusive power to administer tax legislation including the Petroleum Profit Tax Act. It had power to assess, collect, account and enforce payment of tax due to the Government of Nigeria or any of its agencies from persons including companies and enterprises chargeable with tax.[39]

In FIRS v NNPC & 3 ors,[40] the Court held that tax issues are statutory and in the case at hand, they form part of the terms and conditions of the PSC and the PSC is anchored on the laws of Nigeria. The laws of Nigeria are explicit on the forum for the resolution of Tax disputes and Arbitration is not one of them. The constitution also to the contrary is the grund norm and confers exclusive jurisdiction of tax matters and revenue of the Federal High Court. It is not therefore intended by the constitution of the Federal Republic of Nigeria that issues of taxation or tax matters should go to arbitration. In *FIRS v NNPC & 2 ors*.[41] The decision of the court was that the law does not recognize arbitration as one of the methods of resolving tax disputes. To that extent, any tax related dispute will not be arbitrable or subject to arbitration under Nigerian law.

6. The Paradigm Shift for Production Sharing Contracts

A turning point on this issue of arbitrability was in *Esso Petroleum and Production Nigeria Ltd & Anor v FIRS & Anor*[42] as the Court of Appeal made a turnaround from its previous position that disputes arising out of production sharing contracts having tax implications are tax disputes which are not subject to arbitration. The court's position now is that disputes arising out of the rights and obligations of parties to prepare

[39] The Court of Appeal held that although the primary dispute in the appeal was contractual, some of the reliefs sought by the Contractors before the tribunal was birthed from issues which were in substance, tax disputes and therefore out of the jurisdiction of the arbitral tribunal. The court however, stated that the relief seeking an order of the tribunal that corporation ceases from making tax returns in-consistent with the PPT returns prepared by the contractor, takes away the discretionary power of the FIRS to accept returns filed with it and assess a tax payers tax liability vested in it by sections 35, 36, 37 and 43(1) of the PPT Act. This will also defeat the operation of sections 52 and 53 of the PPT Act which makes the filing of it inaccurate PPT returns an offence. The award of damages and interest to cover the value of crude oil over lifted Tax oil that was used to pay PPT to the FIRS on their behalf and such an award disregards the provision of section 23(1) and (2) of the Federal Inland Revenue (Establishment) Act No 57 of 2007 which vests the authority to decide on what is eligible for a tax refund the extent of tax refund.

[40] (2012) 6 TLRN 1

[41] (2012) 6 TLRN 87 at 109, the court further held that it is the Nigerian Law that governs the agreement between the parties particularly the arbitration clause contained in the Production Sharing Contract (PSC). There is noprovision under Nigerian Law such as the Petroleum Profits Tax Act under which the parties to the PSC can refer tax disputes to arbitration.

[42] Unreported Appeal No CA/A/402/2012 judgment delivered on 10th March, 2007.

Petroleum Profit Tax returns and determine the volume of Tax Oil allocated in accordance with a production sharing contract was essentially a contractual dispute and not tax dispute, therefore, the arbitral tribunal has jurisdiction to determine the dispute.

In Esso Petroleum case, Esso Exploration and Production Ltd, Shell Exploration and Production Ltd (the contractors) and Nigerian National Petroleum Corporation (the corporation) entered into a Production Sharing Contract (PSC) aimed at the exploration of oil from the OML 133 contract area. The Production Sharing Contract (PSC) contained provisions for the allocation of oil produced from the contract area to be allocated to parties. By virtue of the PSC, Cost oil was to be lifted by the contractors and Tax oil to be lifted by the Corporation in accordance with the lifting allocation prepared by the Contractors as under PSC, the contractor has the right to prepare the Petroleum Profit Tax (PPT) returns and deliver to the Corporation which shall inturn submit returns to FIRS. On the allegation that the Corporation was lifting more tranches of oil (including tax oil) than it was entitled and that the corporation had unilaterally prepared and submitted PPT returns to the FIRS in breach of the PSC, the contractors initiated arbitration. The FIRS filed an action at the Federal High Court challenging the jurisdiction of the arbitral tribunal to hear and determine the subject matter of the dispute on the basis that the matters were direct tax matters or matters relating to tax, which is within the exclusive jurisdiction of the Federal High Court amongst other reliefs. The Federal High Court on 9th March 2012, delivered judgement in favour of FIRS, holding that the subject matter of the arbitration related to tax and therefore not subject to the jurisdiction of the arbitration[43].

The court in its decision in *Esso Petroleum and Production Nig Ltd v FIRS & Anor*[44]examined the Notice of Arbitration and the Statement of Claim before the arbitral tribunal and came to the conclusion that the dispute amongst parties was as regards who had what rights and obligations under the Production Sharing Contract (PSC) and being such, the dispute was clearly contractual dispute. The complaint of NNPC violating the contractual provision for the preparation of the PPT returns. The court noted that the preparation of PPT returns and the determination of tax oil that should be allocated would be with regards to the PPTA, the Deep Offshore and inland Basin Production sharing contracts Act and other relevant tax legislations. The court further reasoned that the fact that the parties guide themselves by the provisions of the said tax legislations in determining the lifting allocation of tax oil or in making PPT returns does not render the basic contractual dispute on the obligation not to lift beyond the prescribed allocation of

[43] The Federal High Court in the decision considered section 251(1) (a) and (b) of the Constitution of the Federal Republic of Nigeria, 1999 as amended and Section 3(g) of the PPTA in conjunction with sections 41 and 42 of PPTA.
[44] Supra

any tranche of crude oval (including tax oil) and the right to prepare PPT returns, a tax dispute.

The reasoning of the court refused to follow its earlier division in *ESSON v NNPC*[45] *and SNEPCPO vs. FIRS*[46] which were decided on the basis of similar claims on substance with the present case that the disputes were centrally and effectively tax matters. The earlier positions on the arbitrability of the issues from the PSC'S were reached *per incuriam*. The implication of the decision is that an arbitral tribunal will have jurisdiction to hear and determine disputes arising out of PSCS regardless of the fact that such dispute may relate to the tax obligations of parties.

Again, the decision has erased corrected the notion of any clash on the jurisdiction of arbitral tribunal and the federal High Court. It settled the previous problematic decision on the reliance by court on section 251 of the Constitution as the basis for declaring all tax disputes unarbitrable which would have in practice suggest that all the subject matters over which the Federal High Court has exclusive jurisdiction such as disputes relating to banking, copyrights, patents, passing off, industrial designs and merchandise marks, admiralty shipping may not be arbitrable. Any claim before the tribunal arising out of these matters would necessarily impinge on statutory duties or jurisdiction and must be excluded from the matters to be submitted to arbitration.

7. Conclusion

Today in Nigeria the scope and effectiveness of an arbitration clause in Nigeria PSC's had been made clearer. The recent position of the Court of Appeal could be said to be a deliberate attempt to settle the question of the appropriate forum for the resolution of intra-parties disputes which relates amongst parties and relating to PSC. The decision has distinguished purely tax disputes and dispute in relation to the interpretation of a commercial contract which may touch on tax provisions rather than being an issue within the government's sole prerogative. Clearly disputes between the parties for instance, the NNPC's unilateral preparation and filing of tax returns to FIRS contrary to the PSC is arbitrable.

On the strict interpretation of disputes touching on the provisions of legislations including Petroleum Profit Tax Act, to assess, demand, collect, account and enforce payment of taxes due to the Government ofNigeria or any of its agencies from persons including companies and enterprises chargeable with tax are in the realm of taxation and therefore non-arbitrable.

[45] Supra
[46] Supra