

THE TAXING POWERS OF THE GOVERNMENT ON VALUE ADDED TAX (VAT) IN NIGERIA

Background

It is a truism that no government can function properly without revenue. Revenue helps government meet its numerous responsibilities of improving the quality of life of the citizenry. Cost of governance can only be financed through sustainable source of revenue by the government. One of the major ways a government can actualize and sustain this revenue generation drive is by asking its citizens and corporate entities within its domain to compulsorily contribute a percentage of their income to the coffers of government. This compulsory levy on the citizens and entities is called tax.

In recent times, there has been a sustained drive by the Nigerian government to diversify the economy and reduce its over-dependence on crude oil revenues owing to the volatile nature of the international oil market characterised by fluctuations in oil prices and compounded by dwindling oil reserves. It has thus become risky to continuously depend on the major cash cow of crude oil for sustainable development, as such there has been a consistent effort to shift to other sources of revenue, chief amongst which is taxation.

As a federation with constituent Federal, States and Local Government, Nigeria is yet to fully resolve controversies surrounding powers to enact laws regulating certain taxes between the Federation and the State Government. Recently, this tax conflict raised its head in respect of the administration and collection of the Value Added Tax (VAT). This was amplified by the decision of the Port Harcourt Division of the Federal High Court which held that State Government is empowered to enact laws for the administration and collection of VAT and not the the Federal Government.¹ This decision is now a subject of Appeal.

This article will attempt a holistic review of VAT regime in Nigeria in order to unravel how VAT as a consumption

tax found its way into Nigerian tax Lexicon and the position of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (hereinafter “the 1999 Constitution”).

2.0 Value Added Tax in Nigeria

VAT is a form of consumption tax that is chargeable or payable on the supply of goods and services. It is paid when goods are purchased and services rendered. It is a kind of tax collected at each stage of the production and distribution process, the ultimate burden of which is passed down to or rests on the final consumer of the goods and services. VAT was first introduced by Germany and France during the 1st World War, with the modern variation first implemented in Ivory Coast (Cote d’Ivoire) by France in 1954. VAT has since then been accepted and implemented by various countries.²

VAT is a relatively new tax in Nigeria. It was introduced in 1993 to replace the Sales Tax administered by the States Government and the Federal Capital Territory.

The sales tax just like the VAT was a consumption tax chargeable to the ultimate consumer of goods made in Nigeria and circulating in Nigeria. Our Apex Court in giving life to this proposition stated in the case of A.G. OGUN STATE V. ABERUAGBA & ORS.³ that: *“Sales Tax is Tax chargeable to the Purchaser or rather, the ultimate consumer of goods, made in Nigeria and circulating in Nigeria. Such ultimate consumer will exclude the manufacturer or the wholesaler or indeed the retailer who is a middle man between the wholesaler and the consumer”*.

Upon our transition to civilian rule, the VAT decree became known as the VAT Act.⁴ By the Act, VAT is paid on all goods and services supplied in Nigeria at the rate of 7.5%⁵ except those stated in the First Schedule to the Act. This Act, it should be noted had

1 In A.G. Rivers State v. Federal Inland Revenue Service & Anor, Suit No: FHC/PH/CS/149/2020) per Justice Sephen Dalyop Pam

2 Agbonika, J. A. M & Agbonika, J. A. A. 2018. Understanding the ABC of taxation: The Nigerian perspective. Topical issues on Nigerian tax laws and related areas. Vol 2. Eds. Agbonika, J. A. M, Agbonika, J. A. A & Olokooba, S. M. Lokja: College of Law, Salem University. 1-92 at 68

3 (1985) LPELR-3164(SC) Per Kayode Eso, JSC at PP. 88-89, paras F-B)

4 Cap. V1 LFN 2004. This is in compliance with Section 315 of the 1999 Constitution which in conformity with the Constitution gives all exiting laws on matters which the National Assembly could make the status of an Act of the National Assembly.

5 Raised by virtue of the amendments made in the Finance Act, 2019 from 5 %



been in existence before the promulgation of, the 1999 Constitution. The Act placed the administration of VAT in a Federal Government body or agency known as the Federal Board of Inland Revenue⁶ (the Board) and the revenue is required to be distributed among the three tiers of government (i.e. 15% to the Federal Government, 50% to the States Government and the FCT, 35% to the Local Governments⁷).

It could therefore be argued that the drafters of the VAT Act intended that it should be administered and collected by the Federal Government through its Agency. This argument is even well fortified by the provisions of Part I of the Schedule to the Taxes and Levies (Approved List of Collection) Act⁸ (as amended) which expressly provides that VAT is to be collected by the Federal Government. This culture was maintained even after the 1999 Constitution was enacted and in 2007, the Federal Inland Revenue Service was established by the Federal Inland Revenue Service (Establishment) Act, 2007 (hereinafter 'FIRS Act')⁹ and this Service replaced the Board¹⁰. The FIRS was therefore empowered by virtue of Section 25 (1) FIRS Act to administer all the enactments listed in the First

Schedule to the Act and any other enactment or law on taxation in respect of which the National Assembly may confer on the FIRS including but not limited to Value Added Tax Act.

The question at this juncture is whether, in the light of the copious provisions of the 1999 Constitution, the drafters intended that the powers to make laws on VAT, its administration and collection should continue to be the exclusive preserve of the Federal Government irrespective of the provisions of Section 25 (1) of the FIRS Act empowering the FIRS to administer VAT Act? Does VAT Act have a legal basis in the light of constitutional provisions? This we will attempt to address. For a proper understanding of these issues, it is apposite to briefly discuss the powers to make laws on tax matters in Nigeria.

3.0 The Taxing powers of the Government

In a federal system of government such as in Nigeria, legislative powers trickle down to or are exercised by the legislative arms of the various tiers of government

6 See Section 7 of the Value Added Tax Act

7 Section 40 of the Value Added Tax Act

8 Cap. T2, LFN 2004

9 See Section 1 (1) FIRS Act

10 Section 62 (2) FIRS Act

especially the Federal and State Governments. This is aptly captured in the 1999 Constitution which gives directions as to which tier of government can impose what tax.

The 1999 Constitution provides in Section 4 (1) & (2) that, the legislative power of the Federal Republic of Nigeria is vested in the National Assembly for the Federation, which consists of Senate and House of Representatives. They are to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to the Constitution. The making of laws on matters in this list is to the exclusion of the Houses of Assembly of the States. Also, they have the power to make laws in respect of any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to the Constitution to the extent prescribed in the second column opposite thereto¹¹.

In respect of the State Houses of Assembly, they are empowered to make laws for the peace, order and good government of the State or any part thereof in respect of any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to the Constitution and any matter not included in the Exclusive Legislative List¹². By this, along with the matters in the concurrent list which they are empowered to legislate over, they have residual powers to make laws in respect of those matters that are not left exclusively to the National Assembly and those matters not stated in the concurrent list.

These provisions of the Constitution have been further solidified by several judicial authorities like CHIEF DENIS C. OSADEBAY v. THE ATTORNEY GENERAL OF BENDEL STATE¹³ where the Supreme court held that; *“The scheme of exercise of legislative powers in this country is very much like in all other federations. It is based on legislative lists. Some*

items on the list are reserved for the exclusive legislative competence of the Federal Government and others for State Governments. A State Government or Authority can only legislate over a matter on the Federal exclusive

legislative list if it is expressly empowered so to do by the competent federal authority”.

The taxing powers of the governments are as contained in the various Schedules to the 1999 Constitution highlighted below:

- (a) The Exclusive Legislative List (Part I of the 2nd Schedule) specifically makes it the exclusive preserve of the National Assembly to make laws on tax items such as Customs and Excise duties (item 16), Export duties (item 25), Stamp duties (item 58), Taxation of incomes, profits and capital gains (item 59).
- (b) The Concurrent Legislative List (Part II of the 2nd Schedule) in its paragraph 7 (a) & (b) provides that in exercising its powers to make laws as it relates to capital gains, incomes or profits of persons other than companies and documents or transactions by way of stamp duties, the National Assembly may provide that such tax should be collected or the tax law administered by the State Government. It also provides in paragraph 9 that the State House of Assembly may make provisions for the collection of any tax, fee or rate or for the administration of the law providing for such a collection by a local government council.

4.0 The power to impose and collect VAT

Having transversed the gamut of the legislative powers delineated in the 1999 Constitution and highlighted the provisions in the 2nd Schedule to the 1999 Constitution, what is clear is that whilst items such as customs and excise duties, export duties, stamp duties, taxation of incomes, profits and capital gains were mentioned, VAT was not one of the items specifically stated in or mentioned in the Exclusive Legislative List in respect of which the National Assembly has the exclusive power to legislate. As discussed, VAT is not a tax imposed on incomes or profits neither is it a capital gains tax, so it could not by any stretch of the imagination be brought under item 58 of the Exclusive Legislative List.

Whilst it could be argued that it is the intention of

¹¹ Section 4 (4) of the Constitution

¹² Section 4 (6) & (7) of the Constitution

¹³ (1991) LPELR-2781(SC)

drafters of the VAT Act to put it under the purview of the Federal Government to impose and collect VAT as stated earlier, that can not be said to be the case upon the coming into force of the 1999 Constitution. If the drafters of the Constitution were keen on giving the Federal Government of Nigeria the power to make laws for imposition and collection of VAT, then they could have expressly included it among the items contained in the Exclusive Legislative List. This position is on the firm footing of the law that the express mention of one thing in a statutory provision automatically excludes any other which otherwise would have applied by implication with regard to the same issue. See the case of *EHUWA V. O.S.I.E.C.*¹⁴ where the apex Court held: “It is now firmly established that in the construction of a Statutory provision, where a statute mentions specific things or persons, the intention is that those not mentioned are not intended to be included. The latin maxim is ‘*Expressio unius est exclusio alterius*’ - i.e. the expression of one thing is the exclusion of another.” Going by this, it is the opinion of the writers that VAT is not required to be within the exclusive legislative domain of the National Assembly.

Again, whilst it could be argued that an interpretation of items 62 (a), 67 & 68 of the Exclusive Legislative List should be construed as giving the National Assembly the power to impose VAT, it is the opinion of the writers that the argument is faulty on all fronts. Item 62 (a) gives the National Assembly the power to make laws on “*Trade and commerce, and in particular - (a) trade and commerce between Nigeria and other countries including import of commodities into and export of commodities from Nigeria, and trade and commerce between the states*”, item 67 provides that the National Assembly is to make laws in respect of “*Any other matter with respect to which the National Assembly has power to make laws in accordance with the provisions of this Constitution*” and item 68 states that “*Any matter incidental or supplementary to any matter mentioned elsewhere in this list*”. As stated

earlier, the drafters of the 1999 Constitution did not intend that VAT should be one of those matters. This is on the strength of the law that in the interpretation of tax laws, there is no presumption about a tax¹⁵. In the case of *BASINCO MOTORS LTD V. WOERMANN LINE & ANOR*¹⁶ the Supreme Court held that:

“The rules or principles governing the interpretation of statutory provisions are as follows: 1. It is the intention of the legislature that should be sought, and same is to be ascertained from the words of the statute alone and not from other sources. 2. Where the word used in the provisions of a statute, are simple and unambiguous, they should be given their simple, natural and ordinary meaning. 3. The Court is not concerned with the result of its interpretation, that is, it is not the Court’s province to pronounce on the wisdom or otherwise of the statute but only to determine its meaning. 4. The Court must not import into a legislation words that were not used by the legislature, and which will give a different meaning to the text of the statute as enacted by the legislature. 5. The Court must not bring to bear on the provisions of a statute its prejudices as to what the law should be, but rather should interpret the law from the clear words used by the legislature. 6. The Court must not amend the statute to achieve a particular object or result”.

Also, if items 68 and 69 of the Exclusive Legislative List are to be reckoned with in this discourse, the 1999 Constitution did not empower the National Assembly to make laws on consumption taxes, and VAT was not mentioned in the list, so no law incidental to it can be within and under the exclusive legislative powers of the National Assembly.

Furthermore, the power to impose and collect VAT was not mentioned in the Concurrent Legislative List. It is opined that if the drafters of the 1999 Constitution had intended that both the National Assembly and

¹⁴ (2006) 10 NWLR (PT.1012) 544

¹⁵ See *FBIR V. INTEGRATED DATA SERVICE LTD* (2009) LPELR - 8191 (CA)

¹⁶ (2009) 13 NWLR (Pt. 1157) 149 per Adekeye, JSC

the State Houses of Assembly are to have concurrent powers to legislate on VAT, it could have been contained in the Concurrent Legislative List. This is not the case. Since the power to impose and collect VAT is not in the Exclusive and Concurrent Legislative lists (in Part I and II of the Second Schedule to the 1999 Constitution) as argued previously, suffice it to say therefore that it is a matter within the residual powers of the State Governments through the State Houses of Assembly to legislate on. That being the case, the provisions of the Taxes and Levies (Approved List of Collection) Act (as amended) and the FIRS Act which empower the Federal Government to collect VAT in every part of Nigeria through the FIRS is liable to be set aside.

It is trite law as provided in Section 1 (1) & (3) of the 1999 Constitution and fortified in a plethora of judicial authorities¹⁷ that the Constitution is Supreme, and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria. Any law that is inconsistent with the provisions of the constitution is null and void to the extent of its inconsistencies. What this portends in essence is that any tax law which is not enacted in line with the provisions of the Constitution as to the taxing powers of the various tiers of government will be liable to be set aside for being inconsistent.

Having said that, while some might argue that the issue of the VAT Act being consistent with the provisions of the 1999 Constitution had been laid to rest, it is interesting to note that prior to the recent action instituted by the government of Rivers State in *A.G. Rivers State v. Federal Inland Revenue Service & Anor*¹⁸, no action had been filed to challenge the legitimacy of the VAT Act to support the opinions expressed above by the writers. The case where this issue might, perhaps, have been laid to rest is the notorious case of *A.G LAGOS STATE V. EKO HOTELS LTD. & ANOR*¹⁹. In that case, Eko Hotels Ltd had from 1994 to 2001 been collecting tax on sales and services from its consumers and remitting same to the Federal Board of Inland Revenue (FBIR)²⁰ pursuant to the provisions of the VAT Act without let or hindrance. However, in 2001, Eko Hotels Ltd received a letter from the Lagos State Government demanding that the tax collected be remitted to it rather than to

the FBIR. The Lagos State Government relied on the provisions of the Sales Tax Law Cap. 175 laws of Lagos State and the Sales Tax (Schedule Amendment) Order 2000. Confused by this development, Eko Hotels Ltd took out interpleader proceedings seeking the court to determine whether it should remit the money collected as tax from its customers to the FBIR or to the Lagos State Government. The drawback in that case was that, neither the constitutionality of the Sales Tax Law of Lagos State nor the validity of the Value Added Tax Act was made an issue for determination. So the Supreme Court never pronounced on same but held that the VAT Act had covered the field on the issue of sales tax.

5.0 Conclusion

In conclusion, VAT is not one of the items of tax in the Exclusive Legislative List and it is not contained in the Concurrent Legislative List. The National Assembly cannot, therefore, make laws for the collection of VAT in any State of the Federation. The VAT Act could at best be restricted in its application to the Federal Capital Territory.

It is also important to highlight that, the 1999 Constitution could be amended to bring the power to impose and collect VAT within the exclusive domain of the Federal Government. Also, if for any reason a conclusion is reached by our apex court that though VAT is not listed as one of the items in the Exclusive Legislative List, it is a matter that could be legislated upon by both the National Assembly and the State Houses of Assembly, then the VAT Act will be taken to have covered the field on the matter of VAT administration in Nigeria and all the laws enacted on consumption tax by some States after the decision of the Federal High Court, Port Harcourt Division will be inoperative. This is in the light of the trite position of the law that where a State House of Assembly in the exercise of its constitutional powers enacts a similar law making the two existing laws in pari materia, the State legislation will be inoperative for the period that the law made by the National Assembly is in existence. This was laid to rest in the cases of *A.G LAGOS STATE V. EKO HOTELS LTD. & ANOR*²¹ and *ATTORNEY-GENERAL OF ABIA STATE & ORS v.*

17 See *Abacha v Fanwehinmi* (2000) LPELR – 14 (SC)

18 Suit No: FHC/PH/CS/149/2020

19 (2018) 7 NWLR (Pt. 1619) 518

20 The predecessor of the present FIRS

21 (SUPRA)



ATTORNEY-GENERAL OF THE FEDERATION²² where the Supreme Court held thus:

“the phrase ‘covering the field’ means precisely what it says. Where a matter legislated upon is in the concurrent list and the Federal Government has enacted a legislation in respect thereof, where the legislation enacted by the State is inconsistent with the legislation of the Federal Government, it is indeed void and of no effect for inconsistency. Where however, the legislation enacted by the State is the same as the one enacted by the Federal Government, where the two legislations are in pari materia, I respectfully take the view that the State legislation is in abeyance and becomes inoperative for the period the Federal legislation is in force. I will not say it is void. If for any reason the Federal legislation is repealed, it is my humble view that the State

Legislation, which is in abeyance, is revived and becomes operative until there is another Federal legislation that covers the field.”

²² (2002) LPELR-611(SC); See also HON MINISTER FOR JUSTICE AND ATTORNEY GENERAL OF FEDERATION v. HON ATTORNEY GENERAL OF LAGOS STATE (2013) LPELR-20974(SC)

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