

Review

Unending Vat War under Nigeria's Federal Constitution: Exploring the Contours of Nigeria's Fiscal Federalism and Sociology

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Nigeria's Federal High Court recently disrupted the sleep of the federal executive government when it decided that consumption tax is not on the exclusive list of the Constitution and as such an item for State legislative competence. This decision has been challenged and we must await the Supreme Court decision on the final word. While nations have the inherent powers of taxation derived from their sovereign status, the presence of multiple levels of government means there should be an agreement among them on who imposes or collects certain taxes. This is why the Constitution of federated states is usually preceded by the phrase *we the people* or an analogous expression to affirm an accord. This paper examines the various taxing powers shared among the different levels of government in Nigeria. It will interrogate the federal government's capability to impose and collect the Value added tax. It will also examine what options are available to end the VAT war while also appraising the prospects of State VAT laws.

Keywords: Retail sales tax, VAT, Consumption tax, fiscal federalism, constitution

INTRODUCTION

Tax is as old as ancient civilization and has been paid with every fungible item over many decades. While income tax is more popular, in today's economy, transactions like barter, property gift, or digital currency exchange¹ will also attract a tax as governments around the world continually eliminates tax gaps in pursuit of more taxable income. As taxable income has been hidden from the taxman, governments have also turned to consumption tax as an alternative. The elusive nature of income tax explains the attraction of consumption taxes to all levels of government.

It is beyond debate that taxing powers ought to be shared by all levels of governments in a federated union as different levels of governments owe their people public

goods which can only be delivered if they have funds. So how much fiscal powers should be dispersed among these different levels of government? This question needs elaborate answers knowing fully well that fulfilling the social contract depends on how well a government can respond to and provide for its people.

Tax can be levied on income or consumption patterns among others. Economists assert that our expenses rise in lockstep with our earnings, thus the imposition of taxes on consumption is not surprising. Sales tax at the State level can be a veritable tool for income generation in Nigeria as VAT has proven to be over the years. More effective and broader enforcement of VAT by subnational governments could bring in more revenue to governments, but the ability of the people to pay such taxes should also be considered.

The imposition and sharing of VAT by Nigeria's Federal Government has frustrated the effective imposition of

¹Despite the momentum of our digital currencies, they won't qualify for tax remittance purposes as they are virtual assets that qualify only as capital gains and therefore taxed accordingly.

Sales tax by willing subnational governments. There have been many unsuccessful attempts (*Ogun State v Aberuagba* (1985))² challenging the VAT until recent (*Lagos State v Eko Hotels and Anor* (2017))³ pro-States judgments. Those attempts are commendable with the *Eko Hotels* suit leading to the birth of the Approved List for Collection Amendment Order. It is important to note however that the legitimacy of the substantive law itself (Taxes and Levies Act) has been held to be unconstitutional by a court (*Uyo Local Government Council v Akwa Ibom State Government and Anor* (2020)).⁴ Many will agree that testing perceived non-compliance or maladministration of the law can only lead to a better society. These efforts have been seen in some quarters as an attempt to weaken the federal government but this is only an emotional statement if the basis of the effort is constitutional provisions which make them legally right.

The concept of federalism connotes a system of the national government in which legislative, executive, and judicial powers are designated to the central government and replicated at the state level (Okorodudu 1986).⁵ The central government is mostly saddled with the responsibility of protecting the country from external aggression and making federal laws and regulations, while the states take responsibility for regional or state governance. Federalism is aimed at uniting separate subnational governments within an overarching political system such that they can maintain their integrity. It emphasizes coordination among several power centres and it stresses the virtue of these power centres as a means of safeguarding individual and local liberties. It is important that the coordination also factors in how these different subnational governments will survive. This is where taxing powers become relevant to them. Because governments that were meant to survive on their own originally have joined forces for a much more realistic centre for vigour and attraction, they need to be able to have some level of self-funding within their territory through taxing powers. A constitutional academic, KC Wheare 1953,⁶ defines it as a method of dividing powers such that general and regional government are each, within a sphere, co-ordinate and independent. The last word in that definition 'independent' should get attention in any federal system. To be 'independent' is to be self-governing in this instance.

Fiscal federalism, therefore, becomes important since it

guides the assignment of taxing powers and expenditure responsibilities to the different levels of government in a federal structure. As taxation is one of the means of funding an independent government, it is quite a significant subject of interest to all the levels of government in a federated union.

Nigeria's federalism is still evolving, as a result, several subnational governments are largely reliant on the government at the centre. This is a distortion of the principles of federalism and role change for state governments. This is not the contemplation of the constitution of Nigeria, rather there is a skewed application. The quasi-federalism we have practiced for decades now has suffocated subnational governments as a result of lopsided power dispersion.

Fiscal federalism and revenue sharing have always been a problem in the Nigerian government setup. Many have argued for and against at all times. It is the opinion of a writer that the current VAT war is being fought by centripetal and centrifugal forces (Adedayo 2021).⁷ They are however not new, as these ideas have always stood in the way for long.

Beyond these obvious problems, it has been suggested that Nigeria is probably too big to operate a monolithic taxing system with its several variations of cultures and ethnic practices Sanni (2010).⁸ Unfortunately not much is been done to establish the normative approach to federalism, rather the status quo has gained notoriety in our governance. It is submitted here that the unlikelihood of having an effective monolithic taxing system as raised by the last author is a reason why federalism ought to be ensured, such that local practices could be used to solve local problems. Local and traditional taxing methodologies can be used by the decentralized governments within the known and acceptable standards in each locality rather than foisting an alien taxing approach on residents of each state. Research shows after all, that the tax yield in the North used to be better than that of the South. This was because the North's majority Hausa ethnic group has stronger tax morale embedded in Islamic religious obligations of zakat (Kate (2016)),⁹ which truly served the essence of taxation as a wealth redistribution strategy. This has been the practice even at a time when direct taxation in the South led to tax revolts including the Aba Women's riot. It is noteworthy however that at the said time the South was already used to an indirect taxing system of tolls, tributes, and trade

² Notably Attorney General, *Ogun State v Alhaja A. Aberuagba* (1985) 3 NWLR 395

³ Attorney General of Lagos State v Eko Hotels and Anor (2017) LPELR 43713 and Attorney General for Rivers State v FIRS & Anor in Suit No FHC/PH/CS/149/2020 decided 9th August 2021

⁴ *Uyo Local Government Council v Akwa Ibom State Government & Anor*. (2020) LPELR 49691 CA

⁵ Margaret Okorodudu, 'Constitutional demarcation of federal and state taxing powers – Suggested reforms' [1986], University of Ibadan Law Review, (1)

⁶ KC, Wheare, Federal Government, 4th ed. (London OUP 1953)

⁷ Festus Adedayo, 'VAT as story of lazy grasshopper and workaholic ant'. Tribune Online (Lagos 12th September 2021, <<https://tribuneonlineng.com/vat-as-story-of-lazy-grasshopper-and-workaholic-ant/>> accessed 12th September 2021

⁸ Abiola Sanni, 'Division of taxing powers. CITN Nigerian tax guide and statutes', (CITN 2010)

⁹ Meagher Kate, 'Taxing times: Taxation, divided societies and the informal economy in Northern Nigeria' 2016 Journal of Dev studies. <http://eprints.lse.ac.uk/68064/8/Meagher_Taxing%20times_author_LSERO.pdf> accessed 12th September 2021.

taxes, and the introduction of direct taxes seemed to be overkill. Needless to state therefore that resort to localized taxing methodologies can be promising.

It is most desirable that the central government of a federal structure like Nigeria imposes a uniform consumption tax to avoid the shifting of a tax base or the movement of individual taxpayers in a tax-jurisdiction shopping attempt (Anderson (2021)).¹⁰ Technology has added a layer of taxing problems with remote jobs and the cyberisation of the workplace, but uniformity can be guaranteed if the federal government imposes the taxes and States merely collects. It is an aberration that a federal government will arrogate most of the taxing subjects to itself. The last author noted that Nigeria's central taxing structure along with Venezuela is the most extreme (Ibid).¹¹ He deplored the fact that Nigeria's State governments depended on the central transfer for more than 80% of their revenues.

Okor¹² has noted that Nigeria's federalism is not original, as it had stemmed from our unitary practices. This may account for why the federal government is still seen as a superior level of government, whereas federalism expects a decentralized approach and reiterating KC Wheare, a co-ordinate, and independent government.

Constitutional provision regarding taxing powers

Constitutionally demarcated legislative powers determine the taxing powers and competencies of all governments. The Nigerian constitution has not failed in this regard, as it has expressly and impliedly demarcated these powers. Under the provisions of Section 4 of the Nigerian constitution which refers to the Second Schedule to the constitution, the constitution is clear about what legislative powers are assigned to the Federal and State governments. It is worthy here to consider the implication of Section 4(2) of the constitution which provides that;

The National Assembly shall have the power 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 this Constitution.

The last item on the exclusive list, item 68, provides that the federal government shall also have legislative competence on "any matter incidental or supplementary to any matter mentioned elsewhere in this list". This provision should not in any way expand the scope of the legislative powers therein. While it is conceded that legislative powers may be implied to expand the elastic legal provision, it must be done with cautious restraint as

this is capable of robbing other levels of government of their powers. Since tax laws are *sui generis*, it becomes imperative to be certain that the legislative powers birthing them are properly appropriated. Adam Smith has stated that a good taxing system should be equitable, certain, convenient, and administratively convenient (Smith (1776)).¹³ The constitution has towed this path by ensuring that it does not give consumption taxing powers to both levels of government though it can validly do so. It is only fair that in looking to ensure the fairness of taxation, the effect on the various levels of government is well considered too. What is the point of having a government if it will be sterile?

It has been argued that while the constitution may not have expressly granted legislative taxing competence in some items on the list, the powers to impose a related tax are incidental to the powers to make such laws. This assertion may be correct to the extent of what is termed related. Moreover, the constitution must always be interpreted as a whole and not disjointed. In this particular instance, as it relates to taxes, it is submitted that the items listed are foreclosed and not open-ended.

This assertion is premised on the age-long principle of law that in the interpretation of statutes, what is not expressly mentioned is expressly excluded, '*expressio unius est exclusion alterius*'. The power to expand elastic clauses of the constitution is not meant to create new powers but to harness the extant powers already granted by the law. Expanding the legislative competence by adding consumption taxes to income tax is beyond its scope and it will amount to a reassignment of legislative powers. If the power to tax is derived by such inferences and not by express statements, then there will be no taxing powers left for other levels of government in the long run as taxing powers would be implied from all legislative competencies of the federal government to the detriment of subnational governments.

The exclusive list has always been subjected to debate. Particularly Item 62 (a) of the 1999 Constitution which gives legislative powers to the federal government on;

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.

A similar provision in the 1979 Constitution was well considered in the case of Attorney General, Ogun State v Alhaja Ayinke Aberuagba, (LPELR-SC (1985))¹⁴ wherein the court rejected the argument that since the 1960 and 1963 constitution specifically shared the power to impose Sales tax between the Federation and the Regional governments and same was not listed in the legislative lists for the federal government to derive any competence in the 1979 constitution, it had become a residual matter.

¹⁰ Anderson F. M, 'Money and Fiscal powers, in Federalism: An introduction' (2021) <http://www.forumfed.org/wp-content/uploads/2016/02/Primer_English-Ch5.pdf> accessed 26 August, 2021

¹¹ Ibid, pg 34

¹² Supra, footnote 5

¹³ Adam Smith, An Inquiry into the nature and causes of the wealth of nations. (W. Shanon and T. Cadell Publishers, London, 1776) Bk V. Chpt. II

¹⁴ 1985 LPELR-SC. 20/1984

Many other scholars also agreed with this submission (Akanle 1986).¹⁵ The court however held the view that;

It is axiomatic that in the absence of any constitutional provision, express or implied to the contrary the respective taxing power of the Federation and of a State includes Sales Taxing power. Accordingly, the Federation is entitled to levy sale tax on any saleable matters within its competence.

According to this judgment, both levels of government are at liberty to impose a Sales tax law, but where the Federal Government has done so, the State will be unable to impose the same. The court went on to apply the doctrine of 'covering the field' against the State Sales Tax Law. This technical defeat to States' legislative competence on Sales tax is in contrast to our constitutional depiction as a federated union. The judgment though unsatisfactory is understandable in a legal system that was itself in the shadow of a quasi-federal system reeking of a unitary governance approach.

It is noted that in the 1963 republican constitution, under the exclusive list, item 38 was *Taxes on amounts payable on the sale or purchase of commodities except...* This shows a clear and express intention to impose this tax exclusively for the federal government. In the 1997 constitution, this item was neither in the exclusive or concurrent list and this shows an apparent intention to cede it to the residual list. The abandonment of the legislative competence can only mean the item had become a residue. If the legislature intended to keep or retain this, it would have done that expressly as it had earlier done.

The schedule to the 1999 constitution has assigned taxing powers such as custom and excise duties, export duties, stamp duties, incomes, profits, and capital gains to the federal government without a doubt via the exclusive list. The same schedule via the concurrent list has given taxing power on capital gains, incomes, or profits of persons to both the federal and the state levels of government. It has however failed to vest any taxing powers on the local governments. This is not an oversight, as the concurrent list in item 9 gives the State governments the responsibility of assigning part of their taxing powers to the local governments. But a government denied of reasonable taxing powers would not devolve any such taxing powers.

There is a constructive implication that there is legislative competence conferred on the federal government because of other constitutional provisions, as in item 39 on mines and minerals, including oil fields, oil mining, geological surveys, and natural gas. This is supported by section 44(3) of the constitution, which vests all minerals and mineral oils and gas in the government of the federation.¹⁶

¹⁵ Oluwole Akanle, Financing the States: The Constitutionality of Sales Tax Law cited by Dr Magaret T. Okorodudu in Constitutional demarcation of Federal and State Taxing Powers – Suggested reforms (1986) 1 UILR

Sequel to this is the Petroleum Industry Act¹⁷ which provides for taxation of the upstream oil industry while consolidating other industry laws in the sector.

The 1999 constitution, armed with sufficient background knowledge that tax is levied on income, profits, and consumption traditionally, excluded consumption tax in the list of federal legislative competencies. Consumption is either on necessities or luxuries and the taxing authority tends to leave out basic necessities when taxing consumption. Item 59 reserves legislative powers on 'Taxation of incomes, profits, and capital gains, except as otherwise prescribed by this Constitution to the federal government. It later shared aspects of these powers with State governments.

Realistically, it is administratively difficult for a government in Abuja to effectively collect consumption taxes at the coastal city of Ikot Abasi or the border town of Baga. Especially in a country where tax avoidance and evasion are a norm. No one can say that VAT has failed as a tax, but surely it could have been more effective if locally administered. Can the makers of the constitution intend that the Federal Government who controls and taxes all mineral resources would also send its taxmen to shop, offices, roadside cafeterias, and kiosks in the hinterlands to demand enforcement of taxes? It is pertinent to state that this argument was canvassed by counsel in Aberuagba suit.

According to the court;

Chief Adaramaja, learned counsel for the Appellant, submitted that the Court of Appeal was wrong in its interpretation of the provisions of item 61 in holding that all aspects of trade and commerce are exclusive to the Federation and a State has no power whatsoever over trade and commerce, he said the Constitution does not intend the Federal Government to concern itself with petty matters, such as control of street trading, regulation and collection of market fees, licensing of beer parlours, control of advertising etc... he further contended, item 61 should be construed as to limit the exclusive powers of the Federation therein to the matters specifically listed in paragraphs (a) to (f) inclusive. The words "in particular" are words of limitation and not of particularisation. Since the Constitution makes no specific provision for Sales Taxing Power, it was intended to be a residuary matter which is within the competence of a State.

One cannot but agree with the learned counsel that item 61 is not an elastic clause, but a limiting clause and ought to be interpreted as such. Where there are

¹⁶ Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in and under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

¹⁷ This Act repealed the Petroleum Profit Tax Act, the main oil tax legislation and the Deep Offshore and Inland Basin Production Sharing Contracts Act

supplementary powers in any legislation, they exist only in respect of the said provisions and cannot expand the scope of other provisions. Similarly, the Attorney General of Rivers State submitted rightly that if the 'trade and commerce' clause in item 61 was intended to cover all aspects of trade and commerce without limitation, there would have been no reason for the drafters to have specifically listed customs, excise, banking, business registration, and others as the legislative competence of the federal government.

The justification for collecting VAT on behalf of States government is still dissentious considering that these State governments have robust and decentralized mechanisms and channels to collect other taxes imposed on their behalf and those they imposed by themselves.¹⁸ VAT is believed to be imposed for the benefits of all the levels of government but collected by the federal government for onward sharing to States.¹⁹ The allocation of a chunk of 50% to the State government appears to be a silencer. But the question is, should it be imposed and collected by the federal government at all? If States can collect other taxes themselves, then they will do well to collect their VAT too. Thus, beyond the legislative competence is also the allocation of 15% of the collected VAT to the federal government.

The Pre-VAT National Sales Tax Act

After the judicial setback of the Ogun State Sales Tax Law of 1982, the Federal Government of Nigeria enacted the Sales Tax Act of 1986 which imposed a tax on certain goods and for collection by the States before it was replaced by the VAT Act. The Sales Tax Act provided that:²⁰

Any tax collected under section 8 of this Act shall be paid to the appropriate State authority on or before the 30th day of the month next following that in which the tax is due

Appropriate State authority in the interpretation section was said to mean the Internal Revenue Department of the State where the distributor or agent of a manufacturer or an importer of taxable goods or a supplier, in the case of taxable services, carries on business. This put it beyond any distorted interpretation that the tax was reserved for State governments.

This was the law under the 1979 constitution. The trade and commerce clause was subsequently imported into the 1999 constitution verbatim and it is on this premise that it is argued that the constitution does not expect the federal government to collect consumption taxes. The

1979 constitution did not list consumption taxes or sales tax in the exclusive list to warrant the enactment of the Act in the first place. What needs to be done is to fill the lacuna created regarding interstate commerce. This is because if different states were to impose different tax rates for consumption taxes, there is the likelihood of a population shift or tax jurisdiction shopping for the populace. It will therefore be proper to have the federal government impose the consumption tax rate for collection by the state and kept by the states (Akanle 1988).²¹ This will be similar to the doctrine of non-taxability of interstate commerce in the United States. According to Professor Akanle, the power to impose a tax is not subjected to a constitutional grant as the existence of a government comes with it, though the constitution may expressly withdraw the powers.²²

VAT in practice and related lawsuits

Today, the principal consumption tax law in Nigeria is VAT. Though resembling a retail sales tax law, it differs in its mode of collection. The VAT was introduced and aimed at reforming the National Sales Tax law and bring some alignment and expansion. The three levels of government share the proceeds of VAT. The local government has no taxing powers constitutionally. Though the Taxes and Levies (Approved list for collection) Act has designated certain taxes and levies for the local government, they have been denied more reliable sources of taxes. The enactment of the law itself is akin to putting something on nothing which in the words of Lord Denning²³ is bound to fall.

Though consumption or sales tax comes in different forms and types, the Retail Sales Tax (RST) has been the most common type. It can be levied by the national government or the subnational government, but only if assigned by the constitution. VAT in Nigeria is administered as a cascading tax that can be monitored throughout the supply chain where value is added.

The imposition of a Sales tax is expected to encourage savings since consumers will only choose to buy what they need. Retail sales tax should however be properly contextualized and not imposed without first ascertaining its feasibility. A retail sales tax should only be taxable on one occasion and would not normally be chargeable in the event of the consumer transferring his ownership interests to another person in the future. This is because the retailer selling the goods had earlier collected the tax on behalf of the taxing authority. There are also triggers like nexus, permanent establishment, non-taxable items, or sales volume threshold that may affect the duty to pay. This may be radically different from a Sales tax which is

¹⁸ See section 2 of the Personal Income Tax Act and Section 2 of the Stamp duties Act

¹⁹ See section 40 of the VAT Act which allocates 15% to the Federal Government, 50% to the State Governments and 35% to the Local Governments.

²⁰ Section 9 of the Sales Tax Act

²¹ Oluwole Akanle, 'The power to tax and federalism in Nigeria', (Centre for Business and Investment Studies, Lagos. 1988)

²² Ibid

²³ UAC v MacFoy 1962 AC 153

levied at all levels of sale because as a sale, it becomes taxable. However, it would be better off to be like a Value Added Tax which is a cascading tax and taxed at every stage of the value chain with input and output tax factored in.

What aspect of the taxing power should be ceded to subnational governments in a federal structure? Should State governments and Local governments have the powers to tax income or consumption? Is there a need for a harmonization of federal and state consumption tax? Should States abandon the VAT and adopt their own retail sales tax? Many questions readily come to mind in a discourse like this.

It is important to note that a Sales tax / Retail sales tax/VAT can be imposed by any level of government, federal, state, or local government upon a constitutional provision. This paper submits that consumption taxed by whatever nomenclature they may be enacted should not be levied by the federal government since States are the primary provider of public goods to the retailers. The submission is buoyed by the provisions of the constitution. State governments are empowered by item 7 of the concurrent list in the second schedule to impose taxes such as capital gains, incomes, or profits other than companies and documents or transaction by way of stamp duties while local governments do not have any constitutional taxing powers under the list. The constitution provides that the various Houses of Assembly can make provisions for the collection of any tax, fee, or rate or the administration of the law providing for such collection by a local government council. Ironically, when it comes to fiscal matters, State governments themselves are known to be bullish towards the local governments just like the federal government is to them. The practice has become endemic to the Nigerian system that local governments themselves are appendages to State government and they have to beg to get direct access to their monthly allocations.

Income taxes unlike consumption taxes are constant and almost certain because income comprises not just wages and salaries, but includes commission, fees, fringe benefits, perks, gifts, and stock options known as benefit-in-kind that would usually come with employment or any work-related engagements. Consumption taxes on the other hand are tied to consumption patterns and would therefore be subject to the purchasing power available at any point in time. Consumption taxes in Lagos state includes the federal governments' Value Added Tax and the Hotel Occupancy and Restaurant Consumption Tax imposed by the State. This makes residents of Lagos state subject to a Federal and a State or Sub-national tax. Because retail sales tax is additional spending on consumption, it can also be a burden on the poor, as such, it will be better suited for luxury goods.

The validity of the VAT Act is presently being questioned by Rivers State in a suit filed in 2020. This follows the path of a 2014 Supreme Court decision on the same

question²⁴ in which the court adroitly declined the invite. In the latter suit the A.G, Lagos had taken the A.G, Federation before the court for a determination of certain questions, as follows:

Whether upon the coming into effect of the 1999 Constitution, the VAT Act is an existing law within the meaning of Section 315 of the said constitution, being a Federal Legislation which is deemed to be an act of the National Assembly.

If the answer is in the affirmative, whether the combination of the provisions of Sections 2, 4, 6, and 7 of the said VAT Act which empowers a Federal organ to impose and collect taxes on supply of all goods and services other than those listed in the first schedule to the said Act amounts to an imposition of tax on supply of all goods and service within the Lagos State of Nigeria and within other States of the Federation?

If the answer to question 2 is in the affirmative, whether Sections 2, 3, 4, 5, 6, and 7 of the said VAT Act are within the contemplation and competence of the powers conferred on the National Assembly under Section 4 of the 1999 Constitution?

The premise of these questions is that the federal collection of tax on the supply of goods and services tremendously made it difficult for Lagos state to impose and collect taxes from these sources and also that the VAT Act is unconstitutional and illegal. The court, in this case, did not go into the merits of this case but upheld the preliminary objection of the Respondent to deny its jurisdiction on the suit, thus suffering a legal technicality. While it was a good occasion to test the law and determine the question before it properly, the court was bound to determine the issue of jurisdiction first before anything else so as not to waste the time of all involved. Six years after that decision, the Attorney General for Rivers State took the hint of the court, considered the history of the VAT and Sales tax suits in Nigeria till date, and approached the Federal High Court, to determine;

Whether upon the correct interpretation of the provision of items 58 and 59, Part I of the Second Schedule of the Constitution, the correct appreciation of the scheme of the Constitution, and the residual powers of the State of the Federation to make laws as well as Section 4 (7) of the 1999 Constitution, the Federal Government is entitled to make laws for the purpose of taxation other than for stamp duties, taxation of incomes, profits and capital gains, and if not, whether the 1st Defendant is entitled to enforce and administer laws consistent with or in excess of the powers of the Federal Government of Nigeria to make laws?

²⁴ A.G Lagos v A.G Federation and Ors, LOR 11/4/2014 SC

Whether upon a proper construction and interpretation of the provisions of items 58 and 59 of the Second schedule Part I (Exclusive Legislative List) of the 1999 constitution and item 7 (a) and (b) of Part II (Concurrent Legislative List) of the constitution, the Legislative competence of the Federal Government through the National Assembly to impose duties and taxes, and to delegate the power of collection of taxes, include the power to levy or impose any form of Sales Tax such as VAT or any form of levy?

Whether upon a correct interpretation of item 58 and 59 of part I and Items 7 and 8 of Part II of the Second Schedule, the power of the Federal government to delegate the power of collection of taxes can be exercised for the purpose of delegating the duty to any other person other than the government of a State of other authority of a State?

Whether upon a proper construction of the provisions of Items 58 and 59 of the Second Schedule Part I (Exclusive Legislative List) of the 1999 Constitution items 7 (a) and (b) of Part II (Concurrent Legislative List), and [sic] Section 7 (1) and (2) of the constitution, fourth schedule of the said constitution, the Taxes and Levies Act is not unconstitutional and void...?

The recurrence of the taxing provision of the exclusive, concurrent list and the fourth schedule herein shows that the allocation of taxing powers is the fulcrum of the issues raised for determination. Plaintiff herein argued that if certain classes of taxes have been reserved for the federal government already, its foray into basic taxes as consumption taxes robs it of its taxable base.

If the powers of the federal government are limited, then we can argue that certain acts of the federal government may be ultra vires or at least unconstitutional. As earlier argued, since the 1963 constitution expressly listed Sales tax on the exclusive list and the 1979 constitution omitted it, it only means it has become a residual matter for the State government to deal with.²⁵ Defendant argued that a community reading of sections 4 (1) – (4) (a) and (b), 315 (1) (a), 318 (1) and items 62, 67, and 68 of the second schedule, Part I of the 1999 Constitution and Sections 1, 2 (a) of Part 3 (Supplemental and Interpretation) of the Constitution reveals that the National Assembly has expansive powers to enact legislation to cover all the referenced taxes. This cannot be right by any means. There are rules of interpretation that certainly negate this assertion and the court rightly held so. The court expressly stated that where the words of a statute are clear and easy to comprehend, there is no need for esoteric construction or

resort to external aid for its interpretation. The apex court has also stated this.²⁶

The need for a right interpretation of constitutional provision as it relates to legislative competencies of the different levels of government was again brought to the fore in our court in what led to the recognition of Lagos Hotel Occupancy and Restaurant Consumption Law 2009 and the Hotel Licensing Law 2003 some year ago in the case of *Hon Minister for Justice and Attorney General of Federation v Hon Attorney General of Lagos State*.²⁷ The regulation of the hospitality industry was the focus of that matter and in a unanimous decision, the court dismissed the claims of Plaintiff without much ado and upheld the validity of the state laws. In this case, Plaintiff had argued that the two laws of Lagos State mentioned above conflict with the constitution.

The Plaintiff, in that case, sought a declaration that under the provisions of items 60(d) Part 1 of the Second Schedule of the Constitution of the Federal Republic of Nigeria 1999 and the subsequent provisions Section 4(2) (d) of the Nigerian Tourism Development Corporation Act Cap N137 Laws of the Federation of Nigeria 2004, it is only the National Assembly that can legislate, and it is only the Nigerian Tourism Development Corporation, as established that can control matters relating or about the licensing, regulation, registration, classification and grading of hotels, motels guest inns, travel agencies tour operating outfits, resort, cafeterias, restaurant, fast food outlets and other related tourists establishment within the geographical boundaries of Lagos State and any other place in Nigeria.

For clarity, the provision of item 60 (d) of the second schedule to the constitution reads.

*“The establishment and regulation of authorities for the Federation or any part thereof
(d) To regulate tourist traffic*

Thus the meaning of regulation or authority to regulate tourist traffic was the issue. According to Professor Akanle,²⁸ the power of government to regulate an industry or activity is often mistaken as the power to tax them. This suit is another attempt to import into the constitution what was never intended. The defendant in this case successfully argued that the constitutional power of the Federal Government is expressly limited to the regulation of tourism traffic in Nigeria and that this is to be done by issuance of visas and rights to remain and does not include or extend to registration, classification, and grading of hospitality enterprises.

One may tend to think that the federal government will be denuded of sufficient taxing powers if the VAT is taken

²⁵A comparison of the 1963 and 1979 constitutions will show an apparent intention of the drafters to reassign specific powers as a result of the transition from the regional government that it was to the federal government it is today. Some of the affected legislative competences include arms and ammunitions, census, fingerprints, identification and criminal records, prisons, quarantine and registration of business names among others

²⁶ Dr. Olubukola Saraki v Federal Republic of Nigeria (2016) 3 NWLR Pt 1500, pg 590

²⁷ LOR 19/7/2013 SC

²⁸ Supra footnote 21 pg 4

away from it. But in reality, it has sufficient taxing powers when you consider the long list of taxes it truly has. If properly harnessed, these taxes can be humongous.²⁹ In regulating the other items on the exclusive list, the federal government can also record sufficient income.

CONCLUSION

By the provision of Decree 34, Nigeria transitioned from a federal republic to a unitary state in 1966. As compared to a federal government, a unitary government is one with a central government lacking any autonomous component. Though this was reversed later, the regular stint of military presence which usually had a central command and unitary as impacted our governance leading to denuded State governments.

While there is nothing wrong with a unitary government itself, it appears our administration and governance models are relics of past interregnums. The present structure of governance makes it impossible for states which are expected to be autonomous to be a truly federal component. It is expected that States would be able to control their resources,³⁰ that states and local government being closer to be people would be autonomous and yield some power to the government at the centre.

A unitary government is a concentration of powers and this is exactly what the Nigerian government is despite the tag of federalism which is an apparent misnomer. One can even argue that the Price Control Decree had its influence in Aberuagba's case and ever since then the taxing landscape has been unevenly tilted. It is imperative to note also that the constitutional doctrine of 'covering the field' as applied in Aberuagba is misplaced.³¹ Imposing tax may be unconstitutional, but never subjected to the 'covering the field' principle. Tax law is sui generis and the powers to impose tax by a federal and state government concurrently will be valid as long as the constitution states so. Thus, since the court found that both the Federal and the State governments, in that case, had the powers to impose Sales tax, it cannot subject the State law to the principle of 'covering the field'. According to Professor Lane:³²

"... one is concerned with federal taxation for federal purposes, the other with states' taxation for States purposes. In the abstract power X will not compete with power Y ... not only can there be no conflict between the

two powers but also there is not likely to be a conflict within the constitution..."

One distasteful solution is a concurrent imposition/collection of Sales tax by both federal and state governments. Of course, this cannot be done without reallocating taxing powers via constitutional amendment. It will certainly be unconstitutional in the present power assignment under the 1999 constitution, wherein the Federal government has already usurped the State's legislative competence regarding consumption tax. It is already established that the VAT or Sales Tax is paid by the consumer; as such it is the consumer who bears the brunt of the law. A dual-Sales tax system exists in some federal states, however, the legislative competence to impose the same needs to be first firmly established. In the case of Canada for example, there is a harmonized sales tax by which the federal government and provincial government share the combined tax levied or the Goods and Services Tax.

This paper is in alignment with the Federal High Court judgment that with an understanding of the principles of a federal government and more particularly the provisions of the 1999 constitution, the federal government cannot stifle or prevent the state governments from imposing a consumption tax. Reasons have been adduced for this earlier and it is only logical. More so, since the National Sales Tax Act of 1986 imposed Sales Tax for the States benefit, the VAT Act should have toed this path also.

Other advocates of the federal structure have argued that regardless of the enumerated powers in the constitution, the federal government has unlisted powers in the constitution. That the 'peace, order and good governance of the federation' clause in section 4 (2) of the constitution will allow the federal government to make any law. But they did fail to recognize the purpose of an autonomous decentralized government. If the good governance of the federation is all-encompassing, then what is the purport of section 4 (7) on the powers to make laws for 'peace, order and good governance of the State' expressly reserved for State Houses of Assembly.

A tax expert (Oyedele 2021)³³ sounded a warning recently, that while he agrees that the State should be the right collector of the VAT, States trying to enforce these State VAT laws at the moment Lagos and Rivers state cannot effectively collect the taxes at the moment. He also noted and one must agree that there are hardly any of these States where you do not find touts on the road enforcing either taxes, tolls, or rates. What will become of the informal sector in a VAT dispensation where almost everyone is subjected to taxation unlike the 25m turnover exemption under the federal VAT mechanism, he queried?

²⁹ Customs and excise, export duties, mines, minerals and oil, stamp duty, taxation of incomes, profit and capital gains of companies and residents of the Federal capital territory. The tax base listed above is wide if properly taxed but rather than ensuring proper taxing the federal government is trying to add more heads of taxes to its powers.

³⁰ Resource control alongside revenue sharing formula has been on the topmost agenda for several years without success

³¹ Supra footnote 21, pg 57

³² Supra footnote 21, pg. 57-58

³³ Taiwo Oyedele, 'How to fix Nigerian broken VAT system' (Lagos, 11 September 2021) <https://pwc-nigeria.typepad.com/tax_matters_nigeria/> accessed 12th September 2021

While this fear is real, it must be noted that the Federal VAT Act itself has been operational for almost 30 years and amended about a dozen times with the latest done via the 2019 Finance Act. This has allowed the law to transition into whatever it is today. Certainly, the law has evolved over those years, and given the challenges of a digital economy today the proposed States VAT law may be entering into a new problem. However, it is certain that it will get better with time. It is noted that the input tax credit mechanism which worked very well with the federal VAT is absent in the proposed State VAT laws and this means consumers will pay more than they will pay under the federal VAT system.

The current attempt to impose VAT by Lagos and Rivers State will certainly come with some legal and policy hurdles and this should be expected. It is a fact that other federal constitutions have also gone through their fair share of legal battles decades ago. Oyedele also predicted a dwindling inflow for Lagos and Rivers if their VAT laws eventually stands. According to the tax pundit, Lagos and Rivers benefit from the 'headquarters effect' to post large VAT returns because of the central filing system introduced about a decade ago under which company headquarters and not branches file returns.³⁴ Regardless of these likely shortcomings, the place of the constitution is still very much sacrosanct and consumption taxes as residual matters should be rightly taxed by States. In as much as the revenue of the government to be used in developing a locality will be sourced from the people in that locality, it is only equitable that VAT collected from Lagos be used exclusively for Lagos and as suggested by Oyedele,³⁵ VAT collected on imports, international services and inter-state transaction should go into the VAT pool and shared based on derivation. This may tend to revive the resource control debate, but based on the constitution, such resources are national assets and are not in the class of a consumption tax.

The practicality of States' ability to enforce a Sales tax without a threshold of sale volume or merchant type is a huge challenge. Bello JSC in Aberuagba decades ago held the view and it is still apposite today even for proposed State-VAT;

....It is a notorious fact that except in few departmental stores, shops and drug-stores where accounts of sales are kept, the bulk of retail trade is carried on by a swarm of amorphous traders in the market places and their homes, on our homes, on our streets and highways, under our bridges and trees. They do not keep records or account of their business dealings and they cannot be reached by any Government. It will be a bonanza to those retail traders to appoint them as agents for the collection of any sale tax...not a kobo would reach the Government.

³⁴ ibid

³⁵ ibid

It is a serious challenge for the State Internal Revenue Services to deal with these amorphous business units and itinerant workers in our society. But challenges cannot be wished away, they must be confronted, and since the law is organic and can be fine-tuned to achieve its target, the VAT laws of the states should be given a chance to survive. States governments who want to tax their people should not be hindered from doing so because the federal government is doing so without a legal basis.

There are ongoing legislative approaches to expressly give legislative competence to the Federal government or the State governments. These attempts if they come by way of enactment of any law would still be *ultra vires* if it negates constitutional provisions. It is advised that extant constitutional provisions should rather be enforced to avoid another wave of lawsuits.

A look at the Spanish constitution will reveal that it did not expressly specify the type of government it intended to run. But after almost two hundred years, devolution was deemed necessary, it was initiated, though politically painful, it was successful. Authority devolved to its autonomous communities and the new tier of government became popular (Almendral 2002)³⁶ with new taxing powers ceded to them by the State. The country is highly decentralized with significant spending power devolved to the autonomous communities. But a fiscal equalization mechanism is in place to guarantee uniform access to essential services of the Spanish state. The country is not a federation but a decentralized unitary government and still deemed decentralization necessary. The essence of this comparison is to show why change should be undertaken when it is necessary. The handlers of Nigeria's fiscal issues need to take a new turn at the moment.

Taxes are not friendly, as such taxpayers only perform this duty while respecting the law. The current brickbat is not healthy for taxpayers who painstakingly pay the tax. The threat of the State governments to enforce their State VAT would further heat the situation needlessly and should be suspended. The courts should be allowed to do their duty of affirming who should impose or collect the tax.

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³⁶ Violeta Ruiz Almendral, Fiscal Federalism in Spain: The Assignment of Taxation Powers to the Autonomous Communities 2002 European Taxation Journal, 467

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