

EXAMINING THE CONFLICT BETWEEN THE FEDERAL AND STATE GOVERNMENTS OF NIGERIA IN THE ADMINISTRATION OF THE VALUE ADDED TAX ACT

By

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ABSTRACT

In the Attorney-General of Rivers State against the Federal Inland Revenue Service and the Attorney-General of the Federation, on who can impose, administer, and collect Value-added tax in Rivers State, the Federal High Court of Nigeria, sitting in Port-Harcourt, in its judgment delivered on 20th August, 2021 held that the Rivers State has the legitimate power to collect Value-added tax within the State. This was accepted with mixed feelings by the populace as some people commended the Court for championing the lingering debate on fiscal Federalism while others condemned the Court for trying to indirectly amend the provisions of the 1999 Constitution. The decision of the Court is an indication of the constant conflict of taxing powers that exists between the Federal Government of Nigeria and the various State Governments. This decision has also led to the questioning of the validity or legitimacy of the Value-Added Tax Act which confers powers on the Federal government to impose Value-added tax and collect same through its agent(s). This article explores the controversy surrounding the conflict of taxing powers between both tiers of government, its origin, instances of judicial intervention, and the final conclusions that can be drawn from it, as well as made recommendations to curb this lingering crisis, with emphasis on the need for a Constitutional amendment.

Keywords: Conflict, Administration, Value-Added Tax, Taxing Power, Federal Government.

1.0 INTRODUCTION

The term “Tax”, like many legal concepts, is incapable of an all-encompassing definition as numerous scholars have given different definitions of this concept with each definition bearing its unique characteristics. For instance, tax can be defined as a monetary charge imposed by the government on persons, entities, transactions, or property to yield public revenue.¹ It is a

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demand made by the government of a country for a compulsory payment of money by the citizens of that country.² It is a compulsory levy imposed on a subject or upon his property by the Government having authority over him or the property.³ It is a compulsory and definite amount fixed by Law and levied annually on adult citizens of a particular country.⁴ As opposed to fines, charges, fees, and penalties, tax is a statutory collection that is not directed at providing a specific benefit, and its collection is backed by Law.⁵ Taxation is one of the ways and means by which institutions of government, at either the Federal or State level, generate revenue to execute projects for the benefit of the people.⁶ It is used as a means of checking socio-economic vices. For instance, governments can impose higher tax rates to check the consumption of harmful goods and can reduce tax rates to encourage certain socio-economic activities. Tax is a compulsory contribution that is backed by legislation.⁷ Before tax can be imposed with regard to any subject matter, it must go through the process of Law-making by either the Federal or State legislature before it becomes a tax.⁸ Thus, in this vein, taxation derives its ability and legitimacy from legislation. The Law is responsible for not only imposing tax but also the power to tax, also known as taxing power.

2.0 THE CONCEPT OF TAXING POWER

Taxing Power can be defined as “the power granted to a governmental body to levy a tax.” It can be defined as the legitimate power of a tier of government to legislate on, impose, and collect taxes in accordance with the Law.⁹ It also refers to the power of a tier of government to impose tax by Law and prescribe conditions for the collection and administration of tax either by its agent or by

¹Bryan A. Garner, Black’s Law dictionary, 9th edition, pg. 1594

²Ola C.S., Nigerian Income Tax Law and Practice (Macmillan Publication, 1985).

³Akanle O, ‘The Government, The Constitution and the People’ in Akanle O. (ed.) Tax Law and Tax Administration in Nigeria (Lagos, Nigerian Institute of Advanced Legal Studies, 1991)

⁴Olokooba S.M., ‘Nigerian Taxation Law, Practice and Procedure Simplified’ (Singapore, Springer Nature Singapore Pte Ltd. 2019)

⁵*Ibid*

⁶*Ibid*

⁷unlike charges, fees, and tolls which may be mandatory for people to pay but is not backed by any legislation

⁸Section 59, 1999 CFRN

⁹Aladekomo A.S., Division of Taxing Powers in the Federation of Nigeria, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3639090>, 22, accessed 21st September 2023.

another tier of government.¹⁰ It is the absolute authority of a sovereign government to compulsorily impose tax on persons, income, and activities within its own territory. The ability to impose tax is only possible through legislation, that is, the Law is the only instrument through which taxes can be legitimately imposed on persons, income, and activities.

A government's ability to exercise its taxing powers is mostly determined by the system of government it operates. Nigeria operates a Federal system of government¹¹ where power is shared among the Federal, State, and Local governments. Other factors may also play a role in determining how a government exercises her taxing powers however one of the most important factor that determines how a government exercises its taxing powers is the system of government in operation. Thus, the taxing powers of the Federal Republic of Nigeria are shared or divided among the three tiers of government; the Federal government, the State governments, and the Local governments, which implies that the three tiers of government have power to impose and collect tax in their areas of jurisdiction¹²

2.0 CLASSIFICATION OF TAXES IN NIGERIA.

Generally speaking, taxes in Nigeria are classified into Federal and State taxes. This is because these taxes are established by different Laws and may have jurisdictional limitations in its application and scope. Federal taxes are administered by the Federal Government while State Taxes are administered by the State Government. The power to impose and administer these taxes is determined by Law.

¹⁰ Sanni A.O., Division of Taxing Powers under the 1999 Constitution, University of Lagos, <<https://ir.unilag.edu.ng/bitstream/handle/123456789/8347/DIVISION%20OF%20TAXING%20POWERS%20UNDER%20THE%201999%20CONSTITUTION.pdf?sequence=1&isAllo wed=y>>, accessed 21st September 2023.

¹¹ Section 2 (2) 1999 CFRN provides that “Nigeria shall be a Federation consisting of States and a Federal Capital Territory.”

¹² Section 318 1999 CFRN defines ‘government’ to include “the Government of the Federation of Nigeria, or of any State, or of any Local government council...”

2.1 THE DIFFERENCES BETWEEN FEDERAL TAXES AND STATE TAXES IN NIGERIA.

Under the Exclusive Legislative list, the Federal government, through the National Assembly, exercises its taxing powers by enacting tax legislations that provide for the imposition of tax on taxable items under the said list as not all items under the Exclusive list can generate tax. Some of the taxable items include customs¹³ and excise,¹⁴ export duties,¹⁵ income of companies,¹⁶ income of Federal workers, private sector income earners in the Federal capital territory, members of the Police and Armed forces, officers of the Nigerian Foreign Service, and persons resident outside Nigeria but derive income or profit from Nigeria,¹⁷ profits from mineral resources,¹⁸ stamp duties for documents and transactions with Federal character,¹⁹ capital gains on assets disposed of by companies,²⁰ international and inter-State trade and commerce,²¹ entertainment within the Federal Capital Territory only,²² tertiary education,²³ information technology development,²⁴ and real properties in the Federal Capital Territory.²⁵ The taxes imposed on the above items can be categorised as Federal taxes. They are imposed by the Federal government via legislation and are administered through the Federal Inland Revenue Service.

¹³ Items 16 and 62 (a), Part I, Second Schedule, CFRN 1999; Customs & Excise Management Act Cap C45 LFN 2004

¹⁴ Item 16, Part I, Second Schedule, CFRN 1999; Customs & Excise Management Act

¹⁵ Items 25 and 62 (b) & (c), Part I, Second Schedule, CFRN 1999; Customs & Excise Management Act

¹⁶ Items 32 and 59, Part I, Second Schedule, CFRN 1999; Companies' Income Tax Act Cap C21 LFN 2004

¹⁷ Item 59, Part I, Second Schedule, CFRN 1999; Personal Income Tax Act Cap P8 LFN 2004 (amended in 2011)

¹⁸ Item 39, Part I, Second Schedule, CFRN 1999; Hydro Carbon Tax

¹⁹ Item 58, Part I, Second Schedule, CFRN 1999; Stamp Duties Act Cap S8 LFN 2004

²⁰ Item 59, Part I, Second Schedule; Item D, para. 7 & 8, Part II, Second Schedule, CFRN 1999; Capital Gains Tax Act Cap C1 LFN 2004

²¹ Item 62, Part I, Second Schedule, CFRN 1999; Value Added Tax Act Cap 6 LFN 2004

²² Items 60 (b), (c), and (d) & 68, Part I, Second Schedule, CFRN 1999; Nigerian Tourism Development Corporation Act Cap N16 LFN 2004

²³ Items 60 (e) and 68, Part I, Second Schedule; Item L, para. 27, Part II, Second Schedule, CFRN 1999; Section 18 (1), CFRN 1999; Tertiary Education Trust Fund (Establishment, etc.) Act No. 16 of 2011

²⁴ Item 68, Part I, Second Schedule; Item L, para. 27, Part II, Second Schedule, CFRN 1999; section 18 (2), CFRN 1999; National Information Technology Development Agency Act Cap N156 LFN 2004

²⁵ Item 68, Part I, Second Schedule, CFRN 1999; section 44 (3), CFRN 1999; para. 2 (c) Part III Second Schedule, CFRN 1999; Land Use Act No. 13 of 2007

Under the Concurrent Legislative list, State governments, through their Houses of Assembly, exercise their taxing powers by enacting tax legislations that provide for the imposition of tax on taxable items on the said list. In this list, both the Federal government and State governments share legislative competence as the latter exercises its taxing powers subject to the doctrine of covering the field and the inconsistency rule enshrined in section 4 (5) of the 1999 Constitution.²⁶ Nevertheless, State governments can exercise their taxing powers on matters such as the income of State workers and private sector workers earning remuneration or operating business within the State,²⁷ documents and transactions involving individuals,²⁸ assets disposed off by individuals,²⁹ and real property within the State.³⁰ In addition, State governments, in exercising their taxing powers, can impose tax on matters that are not covered in the Exclusive and Concurrent Legislative lists.³¹ For instance, State governments can impose entertainment tax within their relevant territories.³² These taxes can be categorised as State taxes.

The exercise of taxing powers by the Federal and State governments is regulated by Constitutional doctrines like the ‘doctrine of covering the field’ and the inconsistency rule.³³ The doctrine of covering the field is a Constitutional principle that exists in a Federal system of government where there is a conflict as to which legislative house possesses the Constitutional and legislative competence to enact legislation in a State.³⁴ Nigeria being a

²⁶ In such cases, where the Federal legislature has covered the field on a certain tax matter, it can make the State governments beneficiaries of such tax.

²⁷ Item D, paragraphs 7 (a), 8, and 9, Part II, Second Schedule, CFRN 1999

²⁸ Item D, paragraphs 7 (b), 8, and 9, Part II, Second Schedule, CFRN 1999; Stamp Duties Law of Lagos State, Cap S10, Laws of Lagos State 2003

²⁹ Item D, paragraphs 7 (a), 8, and 9, Part II, Second Schedule, CFRN 1999

³⁰ Item K, paragraph 26, Part II, Second Schedule, CFRN 1999; Land Use Charge Law of Lagos State, Cap L79, Laws of Lagos State 2015

³¹ See Section 4 (7) (c) CFRN 1999; In *AG Lagos State v AG Federation & Ors* [2003] 6 SC (pt. 1) 24 at 61, the Supreme Court stated that “The National Assembly cannot...in the exercise of its powers to enact some specific Laws, take the liberty to confer authority on the Federal government or any of its agencies to engage in, or be concerned with, town planning matters, or to grant permits, licenses or approvals which ordinarily ought to be the responsibility of a State government or its agencies.”

³² In 2009, the Lagos State House of Assembly enacted the Hotel Occupancy and Restaurant Consumption Tax Law Cap H8, Laws of Lagos State 2015

³³ See section 4 (5), 1999 CFRN

³⁴ Zainab Inusa, ‘Covering the Field under Constitutional Law’, (March 2022), *Law Students’ Hub*, <[41](https://loyalnigerianlawyer.com/covering-the-field-under-Constitutional-Law/#:~:text=The%20principle%20of%20doctrine%20of,on%20Laws%20in%20that%20Stat e.>, accessed 21st September 2023.</p></div><div data-bbox=)

federation, shares its legislative powers between the Federal and State governments through the establishment of the National Assembly and State Houses of Assembly. This doctrine is applied where a State House of Assembly, in exercising its legislative power, enacts a Law on a matter that the National Assembly has enacted an Act on, thus, the Act enacted by the National Assembly supersedes the State Law, thus covering the field, thereby rendering the State Law void to the extent of its inconsistency.³⁵ The application of this principle is, however, limited to the Concurrent legislative list, where both the Federal and State governments share legislative competence.

3.0 EXAMINING THE TAXING POWERS OF THE FEDERAL GOVERNMENT OF NIGERIA AND THE STATE GOVERNMENTS.

The taxing powers of the Federal and State governments are legislative in nature as they are derived from the provisions of Section 4 of the 1999 Constitution of the Federal Republic of Nigeria (hereinafter referred to as **CFRN**). Under this section, both the Federal and State governments are granted legislative powers that are vested in their respective legislative institutions: the National Assembly³⁶ and the State House of Assembly.³⁷ Both legislative institutions have the legislative powers of the federation vested in them to be used to make Laws for the peace, order, and good governance of the country but with respect to different matters. The Federal government exercises its taxing powers, through the National Assembly, with respect to matters included in the Exclusive,³⁸ and Concurrent Legislative list³⁹ while State Governments exercise their taxing powers, through the State Houses of Assembly, with respect to matters in the Concurrent Legislative list,⁴⁰ provided that the Federal government has not legislated on any matter in the said list,⁴¹ and the Residual list.⁴² The tax agency for the Federal

³⁵ *Ibid*

³⁶ Section 4 (1), 1999 CFRN provides that “The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly...which shall consist of a Senate and a House of Representatives.”

³⁷ Section 4 (6), 1999 CFRN provides that “The legislative powers of a State of the federation shall be vested in the House of Assembly of the State.”

³⁸ Section 4 (3), 1999 CFRN; Part I, Schedule II, 1999 CFRN

³⁹ Section 4 (4)(a), 1999 CFRN; Part II, Schedule II, 1999 CFRN

⁴⁰ Section 4 (7)(b), 1999 CFRN; Part II, Schedule II, 1999 CFRN

⁴¹ In such an instance, the Federal legislation shall prevail while the State legislation shall, to the extent of its inconsistency with the Federal legislation, be null and void. This is known as the doctrine of Covering the Field. This doctrine also works in tandem with the inconsistency rule provided in Section 4 (5) 1999 CFRN only in relation to issues concerning the supremacy

Government of Nigeria is the Federal Inland Revenue Service, which is a creation of an Act of the National Assembly, and it is vested with powers to administer and collect taxes on her behalf, while the States Inland Revenue Services administers and collects taxes on behalf of the States Government, as they are equally an agency of the States Government established by Law.

3.1 THE CONFLICT OF TAXING POWERS BETWEEN THE FEDERAL AND STATE GOVERNMENTS OF NIGERIA

The purpose of establishing the Exclusive and Concurrent legislative lists is to properly delineate the areas upon which each tier of government can exercise jurisdiction, thus dividing the powers of each tier of government, taxing powers included. Despite the attempts made to delineate the taxing powers of each tier of government, conflicts still arise, especially with respect to the extent of the exercise of such taxing powers.⁴³ This conflict occurs predominantly between the Federal and State governments as each tier seeks to jealously guard their sources of revenue, especially in the administration of taxes imposed on consumption or sales. This conflict between the Federal and State governments can be traced back to the provisions of the 1960 and 1963 Constitutions where both Constitutions specifically provided for a sharing of power to legislate on sales tax between the Federal governments and the then regions (now States). Under the 1979 Constitution, sales and consumption were omitted from both the Exclusive and Concurrent legislative list. This same omission was still repeated in the 1999 Constitution, thus creating the assumption that sale and consumption is a residual matter reserved for only States to administer, and this led to the States enacting Sales Tax Laws in their respective territories.

3.2 INSTANCES OF JUDICIAL INTERVENTION IN THE CONFLICTS OF TAXING POWER IN NIGERIA

When these conflicts occur, the Courts intervene to interpret the Law with regard to who has the right to impose tax between the Federal and State governments. In doing its job, the Courts analyse the provisions of the Law with regards to the conflict. For instance, in the case of consumption tax and

of a Federal or State legislation on the same matter. See *AG Abia State v AG Federation* [2002] 6 NWLR (Pt. 763) 264 at 435; *O.S.I.E.C. v A.C.* [2010] 19 NWLR 271 at 350 -351 per MUHAMMAD JSC

⁴² Section 4 (7)(c), 1999 CFRN

⁴³ Afolabi Elebiju & Ayo Fadeyi, 'Tussles: A review of Attorney General of Lagos State v. Eko Hotels & Anor (2018) 36 TLRN 1, (May 2019) *LeLaw Thought Leadership Insights*, <<https://leLawlegal.com/index.php/page/blogs/26>>, accessed 21st September 2023.

Value-added tax, the Courts have declared the former to be unconstitutional, inconsistent with the latter, null and void since it proposes to collect the same tax for which the latter had provided. However, States have argued that the Consumption tax cannot be declared inconsistent with the former since it falls within its legislative competence, to the exclusion of any other.

The first notable instance of the conflict of taxing powers between the Federal and State governments was in *AG Ogun State v Aberuagba*⁴⁴ where the Supreme Court held that the Sales Tax Law of Ogun State was invalid as it encroached on the Exclusive legislative powers of the Federal Government. The Court declared the provisions of the Sales Tax Law of Ogun State as unconstitutional and invalid because it imposed tax on taxable products brought into the State which is a matter of inter-state trade and commerce, an item that falls within the exclusive legislative competence of the Federal Government. However, in *Nigerian Soft Drinks v Attorney General Of Lagos*,⁴⁵ the Court of Appeal upheld the Sales Tax Law of Lagos State as it did not seek to tax items covered in the Exclusive Legislative list. The Court further made a distinction between the Sales Tax Law of Ogun State and that of Lagos State highlighting that the Sales Tax Law of Ogun State purported to regulate products brought into the State, an incidence of inter-State trade that falls within the provisions of item 61(a) of the Exclusive list, while that of Lagos State is levied upon the consumers and purchasers within a State. Thus, section 2 of the Lagos State Sales Tax Law was declared valid and Constitutional.

In *Mama Cass Restaurant Ltd. & Ors. v Federal Board Inland Revenue*,⁴⁶ the Court refused to follow the decision in the *Nigerian Soft Drinks Case*⁴⁷ and relied on the decision in *Aberuagba's Case*.⁴⁸ In doing so, it held that the Sales Tax Law of Lagos State was unconstitutional and that the Value Added Tax Act had covered the field upon which the Sales Tax Law of Lagos was seeking to provide.

In 2009, the Lagos State House of Assembly enacted the Hotel Occupancy and Restaurant Consumption Tax Law of Lagos State with the view to impose tax on persons paying for the use, possession of, or exercising the right to use or take possession of any hotel, hotel facility or event centre, or purchases

⁴⁴ [1985] 1 NWLR (pt.3) pg. 395

⁴⁵ Vol.3 All NTC 133 at 148; [1987] 2 NWLR (pt. 57) pg. 444

⁴⁶ [2010] 2 TLRN 99, at 125

⁴⁷ *Supra*

⁴⁸ *Supra*

consumable goods and services in any restaurant whether or not located in any hotel in Lagos State. In *Princel Court Ltd v AG Lagos & Ors*,⁴⁹ the Court held that having regards to the provisions of the Value Added Tax Act, similar obligations are placed on taxpayers with the consumption tax but in *Mas Everest Hotels & Ors v AG Lagos State & Anor*,⁵⁰ the Court held that the Hotel Occupancy and Restaurant Consumption Law falls within the legislative competence of Lagos State as the tax was charged on the services rendered by the claimants but not on their income. As such, the tax was not *ultra vires* the powers of the Lagos State House of Assembly.

In *AG Federation v AG Lagos State*,⁵¹ the plaintiff challenged the validity and Constitutionality of the Laws enacted by the defendant: the Hotel Licensing Law 1983,⁵² the Hotel Occupancy and Restaurant Consumption Law, and the Hotel Licensing (Amendment) Law of Lagos State on the basis that the defendant had no power to enact the said Laws and that the Laws were unconstitutional because they dealt with the administration of hotels, motels, inns, restaurants, and other related establishments which, according to the Plaintiff, were matters incidental to tourism under item 60(d) of the Exclusive legislative list. In dismissing the suit, the Supreme Court held that the Federal government lacks the Constitutional *vires* to make Laws outside its legislative competence which are by implication residue matters for the State Assembly. Galadima JSC held that:

“The National Assembly cannot, in the exercise of its powers to enact some specific Laws, take the liberty to confer...authority on the Federal government or any of its agencies to engage in matters which ordinarily ought to be the responsibility of a State government or its agencies. Such pretext cannot be allowed to enure to the Federal government or its agencies so as to enable them to encroach upon the exclusive Constitutional authority conferred on a State under its residual legislative power...”⁵³

In *AG Lagos State v Eko Hotels & Anor*,⁵⁴ the Lagos State Government introduced Sales tax via the enactment of the Sales Tax Law and Sales Tax (Amendment) Order 2000 with the intent to increase its internally generated

⁴⁹ [2010] 3 TLRN 30

⁵⁰ Vol. 7 All NTC 93

⁵¹ [2013] 16 NWLR (pt. 1380) 249 SC

⁵² Cap H6 Laws of Lagos State of Nigeria 2003

⁵³ [2013] 16 NWLR (pt. 1380) 249 SC at 303 per GALADIMA JSC

⁵⁴ [2018] 36 TLRN 1

revenue. However, the provisions of the Sales Tax Law were similar to that of the Value Added Tax Act as both legislations required vendors like the Defendant, Eko Hotels, to collect and remit 5% of its sales as Sales Tax and VAT respectively. The Court held that sections 2 of the Value Added Tax Act and the Sales Tax Law contained similar provisions and since the goods and services covered by both legislations are the same, the Value Added Tax Act has effectively covered the field, as such, its provisions shall prevail over that of the Sales Tax Law. The Court also noted that allowing the Value Added Tax Act and the Sales Tax Law to co-exist would amount to double taxation since both legislations covered the same goods and services and targeted the same consumers.⁵⁵ Although, the Court was not tasked with determining the validity of the Value Added Tax Act or the Sales Tax Law as the main issue for determination before it was whether the former had covered the field such that the latter remains insignificant to which it responded in the affirmative.⁵⁶

In the same case, the validity of State Laws on matters of consumption tax on individuals, and goods and services consumed in hotels, restaurants, and other event centres was challenged.⁵⁷ Although consumption tax on individuals on goods and services consumed in hotels, restaurants, and event centres was absent in both the Exclusive and Concurrent legislative lists, the Court rejected that view and held that the Value Added Tax Act had covered the field on matters of consumption tax.⁵⁸ The Supreme Court Stated:

“...an Act of the National Assembly, for the purposes of covering the field, can only be said to be a predominant paramount legislation if it was validly enacted or could be deemed to have been validly enacted with respect to any matter the National Assembly is empowered by the Constitution to make Laws. An act of the National Assembly enacted in respect of any residual matter not being a matter either in the exclusive or concurrent legislative list, cannot be arrogated to a predominant paramount legislation so as to override any Law validly enacted by the House of Assembly of a State in respect of any residual matter. The determinant factor in covering the field is the validity of the predominant paramount legislation viz-a-viz the subordinate legislation.”

⁵⁵ Afolabi n (2)

⁵⁶ Eko Hotels Case [*Supra*] at 51 – 53, per Okoro JSC.

⁵⁷ K.J. Bielu n.10

⁵⁸ *Ibid*

In *Reg. Trustees of Hotel Owners and Managers Association of Lagos v AG Lagos*,⁵⁹ the Plaintiff instituted an action at the Federal High Court, seeking a declaration that the Hotel Occupancy and Restaurant Consumption Law of Lagos State, also known as the Consumption Tax Law of Lagos State, is inoperable and of no effect since the Value Added Tax Act has fully covered the field on the subject of consumption tax.⁶⁰ The Court, however, ruled in favour of the Lagos State Government upholding its legislative competence to charge and collect Consumption tax⁶¹ on the basis that under the provisions of the 1999 Constitution, consumption tax on goods, and services consumed in hotels, restaurants, and events centres is a residual matter which is within legislative competence of State Governments.⁶²

In *Emmanuel Chukwuka Ukala v FIRS*,⁶³ the Plaintiff prayed to the Court to determine the extent of the powers of the Federal government to enact Laws for the purpose of taxation other than taxation of income, profits, and capital gains⁶⁴ contending that the exercise of the Constitutional powers of the Federal government to impose tax is limited to the items provided in item 59 of the Exclusive list and does not include the power to impose Value Added Tax, thus requesting the Court to declare that there was no Constitutional basis for the imposition, demand, and collection of Value Added Tax by the Defendant since its legislative competence with respect to taxation is limited to the matters identified in item 59.⁶⁵ The Court, in response to the Plaintiff's contention, held that the 1999 Constitution expressly prohibits the National Assembly from enacting a Law on any other head of revenue except for incomes, profit, and capital gains, stamp duties on documents and transactions, and that if the National Assembly makes Laws for any other item of taxation outside the items expressly reserved for it by the Constitution, such Law shall

⁵⁹ [2019] 47 TLRN 1

⁶⁰ 'Federal High Court Upholds State Government's Powers to Collect Consumption Tax', *Andersen Tax* (Nigeria 17 October 2019), <<https://ng.andersen.com/Federal-high-Court-upholds-State-Governments-powers-to-collect-consumption-tax/>>, accessed 21 April 2023.

⁶¹ *Ibid*

⁶² *Ibid*

⁶³ [2021] 56 TLRN 1

⁶⁴ Michael Ango & Emmanuel Omoju, An Analysis of Federal High Court Decision Invalidating the VAT Act – Implications for VAT Administration and Compliance, *Mondaq* (Nigeria, 9 June 2021), <<https://www.mondaq.com/nigeria/sales-taxes-vat-gst/1077894/analysis-of-Federal-high-Court-decision--invalidating-the-vat-act--implications-for-vat-administration-and-compliance>>, accessed 21 April 2023.

⁶⁵ *Ibid*

become a nullity.⁶⁶ The reason for the Court's decision is hinged on the facts that the express mention of taxation of incomes, profit, capital gains, and duties on documents and transactions excludes the National Assembly from imposing other forms of taxes such as consumption tax; Value Added Tax or Sales tax.⁶⁷

In *Attorney-General Rivers State v FIRS & Anor*,⁶⁸ the Plaintiff argued that by virtue of items 58⁶⁹ and 59⁷⁰ of the Exclusive legislative list,⁷¹ the Federal government, acting through itself or any of its agencies, lacks the legislative competence to impose and collect taxes outside stamp duties, taxation of incomes, and profits and capital gains, thus the imposition of taxes like Value added tax, Withholding tax, Technology tax, and Education tax by the Federal government is *ultra vires* of its powers therefore null and void.⁷² It further argued that the powers of the Federal government's agencies, like the 1st defendant, are limited to the administration of these taxes only and that the imposition of Value Added Tax by the 1st defendant on consumers of goods and services in States of the Federation is null and void and of no effect.⁷³

However, the 1st defendant contended that the National Assembly has extensive powers to enact legislation to cover Value Added tax and the other taxes highlighted by the Plaintiff arguing that the provisions of items 58 and 59 of the Exclusive legislative list could not override the provisions of other sections of the Constitution.⁷⁴ The 2nd Defendant also contended that the National Assembly has the legislative competence to enact Laws on taxation by virtue of items 58, 59, 67, and 69 of the Exclusive legislative list, arguing that since the Federal government legislated on items that are contained in the Value Added Tax Act, there would be no need for States to legislate on the same matter under a State Law.⁷⁵ The Court held that the Federal government is only empowered to impose and collect taxes with respect to the items

⁶⁶ *Ibid*

⁶⁷ *Ibid*

⁶⁸ Suit No. FHC.CS.149/2020

⁶⁹ Stamp duties

⁷⁰ Taxation of income, profit, and capital gains

⁷¹ Part I, Second Schedule, 1999 CFRN

⁷² The VAT Quagmire: An analysis of the decision of the Port-Harcourt Division of the Federal High Court of Nigeria, *Dentons* (April 2022), <<https://www.dentons.com/en/insights/articles/2022/april/1/the-vat-quagmire>>, accessed 20 April 2022.

⁷³ *Ibid*

⁷⁴ *Ibid*

⁷⁵ *Ibid*

outlined in items 58 and 59 of the Exclusive legislative list while the power to legislate and enforce Value Added Tax and other taxes that are not listed in the said items lie exclusively within the ambit of the State government. It also held that the provisions of items 7 (a) & (b) of the Concurrent legislative list⁷⁶ do not extend the National Assembly's legislative competence to the imposition of any form of tax outside the matters listed in items 58 and 59 of the Exclusive legislative list. In addition, the Court adopted the Court of Appeal's decision in *Uyo Local Government Council v Akwa Ibom State Government & Anor*,⁷⁷ where the Taxes and Levies (Approved List for Collection) Act was nullified by the Court on the ground of being inconsistent with the provisions of the Constitution. In adopting this decision, the Court declared the Taxes and Levies Act to be unconstitutional stating that any tax or levy provided for in the Act is automatically unconstitutional and void.⁷⁸ This case, having gone through the Court of Appeal, now awaits hearing from the Apex Court.

3.3 THE POSITION OF THE VALUE ADDED TAX ACT AND THE 1999 CONSTITUTION

The Value Added Tax Act seems inconsistent with the provisions of the 1999 Constitution. In the *Eko Hotels case*,⁷⁹ the Supreme Court reasoned that the Value Added Tax Act qualifies as an existing Law under Section 315 of the 1999 Constitution, and had therefore covered the field with regard to the sales tax Law.⁸⁰ Section 315 (1)(a) provides as follows:

“(1) Subject to the provisions of this Constitution, an existing Law shall have effect with such modifications as may be necessary to bring into conformity with the provisions of this Constitution and shall be deemed to be:

(a) An Act of the National Assembly to the extent that it is a Law made with respect to any matter on which the National Assembly is empowered by this Constitution to make Laws.”

⁷⁶ Part II, Second Schedule, 1999 CFRN.

⁷⁷ [2020] LPELR-49691 (CA)

⁷⁸ Dentons n.28

⁷⁹ *Supra*

⁸⁰ Gabriel Nwodo, 'The Constitutional Basis for The Imposition of Consumption Taxes By Federal And State Governments In Nigeria: A Critical Analysis Of the Supreme Court's Decision in AG Lagos v. Eko Hotels Ltd & Anor', *Mondaq* (Nigeria, 11 September 2018), <<https://www.mondaq.com/nigeria/Constitutional--administrative-Law/734820/the-Constitutional-basis-for-the-imposition-of-consumption-taxes-by-Federal-and-State-Governments-in-nigeria-a-critical-analysis-of-the-supreme-Courts-decision-in-ag-lagos-v-eko-hotels-ltd--anor>>, accessed on 21 April 2023

Although the Value Added Tax Act is recognised as an existing Law pursuant to section 315(4) of the Constitution, it does not follow that every existing Law must enjoy automatic application.⁸¹ Section 315(1) lays emphasis on the fact that existing Laws shall only be applicable provided that they are appropriately adjusted to ensure compliance with the provisions of the Constitution, but the Value Added Tax Act does not conform with the current provisions of the Constitution.⁸² While the Value Added Tax Act may have been validly made by the Supreme Military Council in 1993, under our current Federal Constitutional framework, the National Assembly lacks the legislative competence to impose a consumption tax on a country-wide level, primarily because taxation on consumption is absent in both the Exclusive and Concurrent legislative list, thus, raising the assumption that taxation of consumption is a residual matter on which State governments are empowered to legislate in their respective regions.⁸³

Again, there is a lack of clarity on the basis for the imposition of the Value-added tax by the Federal Government of Nigeria. This position was laid bare in the *Attorney General of Rivers State case*,⁸⁴ the Federal government, while relying on the provisions of Sections 4(1) – (4) (a) & (b), 315 (1) (a), 318 (1), items 62, 67, and 68 of the Exclusive legislative list, and sections 1, and 2 (a) of Part 3, Supplemental and Interpretation of the 1999 Constitution, argued that it was empowered to enact tax legislations beyond the limits of items 58 and 59 of the Exclusive legislative list. In simple terms, the Federal government argued that by virtue of its legislative powers conferred on the National Assembly, it was empowered to enact tax legislation on any matter that is incidental or supplementary to the matters of stamp duties, and taxation on income, profits and capital gains, thus claiming that because it enacted legislations on the imposition of stamp duties, income tax, profits tax, and capital gains tax, it was also empowered to enact legislation to impose value-added tax. However, the Court was not of this opinion.

When it comes to the interpretation of statutes, the general rule is that words should be given their ordinary and literal meaning. Where the words of a statute are clear and easy to comprehend, there is no need for esoteric

⁸¹ *Ibid*

⁸² *Ibid*

⁸³ *Ibid*

⁸⁴ *Supra*

construction or resort to external aid for its interpretation.⁸⁵ In *Saraki v. Federal Republic of Nigeria*,⁸⁶ the Supreme Court held that:

“When interpreting Constitutional and statutory provisions, clear and unambiguous words used must be given their plain and ordinary meaning except where such interpretation would lead to manifest absurdity or inconsistency with the rest of the statute, or where the context requires some special or particular meaning should be given to the words.”

With regards to the interpretation of tax legislation, the Court in *AG Rivers State case* noted that tax legislation is interpreted strictly and that there is no presumption and no room for intendment. In *FBIR v Integrated Data Services Ltd*,⁸⁷ the Court of Appeal held that:

“A Law which imposes pecuniary burden is under the rules of interpretation subject to the rule of strict construction. All charges upon the subject must be imposed by clear and unambiguous language because in some degrees they operate as penalties. Therefore, the subject is not to be taxed unless the language of the statute clearly imposes the obligation.”

The Court also applied the *expressio unius est exclusio alterius* rule which simply means that an exclusion of a certain item may be inferred or implied where a statute expressly mentions specific items. In *Udoh & Ors. v. Orthopaedic Hospitals Management Board & Ors.*,⁸⁸ the Supreme Court held that: ***“it is a well-settled principle of construction of statutes that where a section names specific things among many other possible alternatives, the intention is that those not named are not intended to be included.”***

The 1999 Constitution expressly grants the Federal government legislative competence to enact legislation on the taxation of income, profits, capital gains, and stamp duties. Aside from these heads of tax, there is no express mention of taxation on consumption in both the Exclusive and Concurrent lists. Therefore, based on the *expressio unius est exclusio alterius* rule, it is clear that the drafters of the Constitution intended to exclude consumption from the heads of taxation available to the Federal government to legislate on,

⁸⁵ *Attorney-General Rivers State v FIRS & Anor* (unreported Suit No. FHC.CS.149/2020) per Stephen Daylop Pam J.

⁸⁶ [2016] 3 NWLR (pt. 1500) 589, 590

⁸⁷ [2009] 8 NWLR (pt. 1144) 637, 638

⁸⁸ [1993] 7 NLWR (pt. 304) 147, 148

hence, the Federal government has no legitimate basis for imposing value-added tax.

The Value Added Tax Act is a residual Law, so its enforcement must be limited to the Federal Capital Territory, Abuja. The express absence of taxation on consumption on both the Exclusive and Concurrent legislative lists suggests that taxation on consumption is a residual matter reserved exclusively for States to legislate and administer. The National Assembly, aside from being the Federal legislative body, also serves as the State legislative body for the Federal Capital Territory, Abuja.⁸⁹ The implication of this is that the National Assembly has the legislative competence to legislate on residual matters only in application to the Federal Capital Territory, Abuja, and as such should not legislate on residual matters within the jurisdiction of other States that make up the Federation of Nigeria, as doing that will amount to undue interference, as it will erode the autonomy of the States.

4.0 CONCLUSION

The recent decision of the Court in Attorney General of Rivers State against the Federal Inland Revenue Service,⁹⁰ has further brought to light the conflicts that exist between the Federal and State Government, when it comes to tax administration in Nigeria, as the decision of the court confirmed that the Federal government lacks the legislative competence to impose and collect Value-added tax because of its absence in the Exclusive legislative list, thus, making it the responsibility of State governments to administer. Thus, in the light of this, the following conclusions can be drawn:

- i. Value-Added Tax, which is a form of consumption tax, is not a Federal tax as it is absent from both the Exclusive, and Concurrent legislative lists. Generally, taxes can be classified into three forms: tax base, tax burden, and tax subject.⁹¹ With respect to tax base, taxes in Nigeria can be classified into three major bases: Capital base, Income base, and Consumption base.⁹² Capital base refers to the imposition of tax on the sale of capital goods, Income base refers to the imposition of tax on the

⁸⁹ Section 299 (a) 1999 CFRN provides that “all the legislative powers...vested in the House of Assembly...shall respectively vest in the National Assembly...”

⁹⁰ Attorney-General Rivers State v FIRS & Anor (unreported Suit No. FHC.CS.149/2020 Federal High Court Port Harcourt Judicial Division, 9 August 2021)

⁹¹ Oyedokun Godwin Emmanuel, ‘Overview of Taxation and Nigerian Tax System’ in Muhammad Akaro Mainoma et al (eds.) Tax Management and Compliance in Nigeria (Lagos, OGE Business School, 2020)

⁹² *Ibid*

- income of persons, and Consumption base refers to the imposition of tax on the consumption of goods and services.⁹³
- ii. The Federal government has legislative competence with respect to matters under the Exclusive and Concurrent legislative lists. With respect to tax, the Federal government can exercise its taxing powers on taxable matters under the Exclusive and Concurrent Legislative lists. From this exercise, the taxes created from the Exclusive and Concurrent legislative lists are regarded as Federal taxes because they are imposed by the Federal government. Under the Exclusive list, the Federal government is empowered to legislate on the taxation of income, profit, capital gains, and stamp duties. However, there is no express mention of taxation on consumption in the same list.
 - iii. Likewise, under the Concurrent list, the Federal government is empowered to legislate on the taxation of income, profits, capital gains, and stamp duties and it can instruct State governments to administer the Laws it has imposed on the said matters.⁹⁴ There is no mention of taxation on consumption in the Concurrent list. The absence of taxation on consumption in both the Exclusive and Legislative list suggests that the Federal government does not have the legislative competence to administer, impose, or collect taxation on consumption, thus, it is a residual matter which falls under the purview of State governments.
 - iv. Having established this, if one is to assume that the Valued Added Tax Act is a valid Law and it has conformed with the provisions of section 315 of the 1999 Constitution, then it should be applied and implemented as a State Law only in the Federal Capital Territory, Abuja by virtue of section 299 of the 1999 Constitution which empowers the National Assembly to exercise the legislative powers of a State House of Assembly over the FCT.

5.0 RECOMMENDATION

The major solution to this lingering conflict of taxing powers between the Federal and State governments is that the 1999 Constitution must be amended. The illegitimacy of the Value-Added Tax Act stems from the fact that it is a form of consumption tax that was not expressly envisaged on the Exclusive and Concurrent Legislative List and its continued absence on both lists will only create more confusion in terms of revenue generation, and tax

⁹³ *Ibid*

⁹⁴ Item 7, Part II, Second Schedule, 1999 CFRN

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in the Administration of the Value Added Tax Act* <https://doi.org/10.53982/apblj.2019.0301.03-j>

administration, and will impose an unnecessary burden on the taxpayers. Thus, there is a need for the Constitution to be amended. In the event of an amendment, the Federal and State legislatures must consider the purpose and effect of such amendment. They must decide, in the best interest of the nation and for the ease of administration, whether to leave the administration of value-added tax as well as other taxes to the exclusive legislative competence of State governments, thus encouraging fiscal Federalism and independence, or whether to overburden the Federal government with the imposition and administration of consumption tax along with the other 69 items, which in reality, the Federal government may not effectively oversee efficiently.