AN APPRAISAL OF THE CONTROVERSY BETWEEN THE FEDERAL INLAND REVENUE SERVICE AND RIVER STATE GOVERNMENT IN RESPECT OF VALUE ADDED TAX COLLECTION

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Abstract

Value added tax is the tax levied on goods and services by virtue of the additional value added from its original form to its final stage until it gets to the consumer. The taxing powers of the National Assembly are circumscribed by the powers created in that regard by the Constitution, the Constitution does not however expressly exhaust all the various kinds of taxes imposable by a State Government on persons or activities within its territory. Thus, the power to impose any tax that is not expressly enumerated in the Constitution is a residual power, which vests exclusively in the Governments of the various States of the federation. This paper contains primary and secondary sourced materials, such as laws, statutes and other resource materials. This paper revealed that though the matter is *sub judice* as it is presently been considered by the court, however, the Taxes and Levies (Approved List for Collection) Decree now an Act 1998 and the Value Added Tax Act, 2004 as amended in 2020 seems to have addressed this controversy. The Taxes and Levies (Approved List for Collection) Act 1998 specifically provides for items that the Federal Government can collect taxes and it includes the value added tax. The National Assembly seems to have the implied power under items 62 (trade and commerce clause) as sales tax is within the ambit of trade and commerce, also item 68 (incidental and supplementary power clause) of the exclusive list to collect VAT. Though VAT is on the residual list by virtue of the fact that it is neither expressly stated on the exclusive nor concurrent list, the VAT Act and the Taxes and Levies List for Collection Act are existing laws which subsist and the relevant provisions on the collection of VAT has not been set aside by any court of law.

KEYWORDS: Tax, Constitution, Government, Goods, Services, Collection.

1.1 INTRODUCTION

The Federal High Court sitting in Port Harcourt on Monday August 9, 2021, delivered a judgement[1] filed by the Attorney General of Rivers State against the Federal Inland Revenue Service (FIRS) and Attorney General of the Federation, challenging the power of the Federal Government of Nigeria to impose and collect taxes outside the scope of items listed in 58 and 59 of Part 1 of the Second schedule of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

> The court presided over by His Lordship, Hon. Justice Stephen Dalyop Pam, resolved in favour of the plaintiff and against the defendants that only the Rivers State Government and not the Federal Government of Nigeria is constitutionally entitled to impose Value Added Tax (VAT), enforceable or collectable in the territory of Rivers State.

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[1] Suit no: PHC/PH/CS/149/2020 (Unreported)

Consequent upon this judgment, the Governor of Rivers State, His Excellency, Nyesom Ezenwo Wike, on Thursday August 19, 2021, signed the Rivers State Value Added Tax Bill into Law, now know the Rivers State Value Added Tax Law No.4 of 2021 which provides for the imposition and administration of Value-Added Tax (VAT) in Rivers State. In his judgment, Justice Stephen Pam stated that there was no constitutional basis for the FIRS to demand for and collect VAT and other such taxes in Rivers State or any other State of the Federation, being that the constitutional powers and competence of the Federal Government was limited to taxation of incomes, profits and capital gains, which does not include VAT and others of such taxes.

Promptly reacting, on August 23, FIRS went public warning taxpayers that refusal to pay VAT to the Federal Government's agency will lead to penalties. The FIRS urged taxpayers, especially those in Rivers State to continue to pay their VAT to it to avoid paying penalties for failure to do so. It also told the public that it has appealed the judgment as well as a stay of execution so that the Rivers State Government would not go ahead with the tax collection. The FIRS thereafter brought an application back to the Federal High Court sitting in Port Harcourt, the court however dismissed the suit by the FIRS seeking to stop the Rivers State Government from commencing the collection. River States is therefore moving forward with the tax collection. It's been a drama of some sorts.

1.2 Meaning of Value Added Tax

Value Added Tax has a young history Nigeria. VAT was first devised by a German economist during the 18th Century. In the United Kingdom, it was adopted in 1973[2], while in Nigeria; the decision to adopt VAT was taken in January 1992 and implemented in January, 1993.[3] It must be noted that prior to the VAT regime, they were some expenditure frame work or taxes like the general Sales tax, excise duty payable on some goods. All of these have now been subsumed under the VAT by virtue of the VAT Decree No.102 of 1993 now VAT Act, 2004.[4]

The question now is what is Value Added Tax (VAT)? VAT fundamentally is a merger of two concepts to wit: "value added" and "tax". The phrase value added has been described as the increase in the value of goods or services in the process of their production to delivery, it has also been described as the amount of value a firm contributes to a good or services by applying the factors of production namely- land, labour, capital and entrepreneurial ability and these value added may take the form of altering the product from its original form and improving same or removing the product to an area of higher need i.e transportation or by passage of time i.e storage. VAT is the tax levied on by virtue of the additional value added to the goods or services from its original form to its final stage until it gets to the consumer.[5]

[2] D W Williams, *Taxation: Guide to Theory and Practice*, Macmillam Publishers, 1992,185.
[3] C S Ola, Income *Tax Law and Practice,* New Edition (London: Macmillan Publishers, 1985), 583.
[4] S Abiola, Current Law and Practice of Value Added Tax in Nigeria, British *Journal of Arts and Social Sciences*, Vol. 5, No.2, 2012.
[5] ibid.

VAT is generally a consumption tax applicable to goods and services VAT is borne by the final consumer but collected at each stage of the production and distribution chain. It is known as Goods and Services Tax (GST) in some countries. VAT can only be levied and paid for if there is a consumption of either VATabl*e* goods or services. Being a consumption and transferable tax, incidence of VAT should be borne by the final consumer. VAT must be paid at every stage wherein value is added. It is instructive to note that VAT is not the same as withholding tax. Withholding tax is a tax deducted at source from payments made to a taxable person for the supply of goods and services. When Wike of Rivers State was defending the collection of VAT by the State, he said something interesting,

'In this (Rivers) State, we awarded contracts to companies and within the last month we paid over N30 billion to the contractors and 7.5% will now be deducted from that and to be given to FIRS. Now, look at 7.5% of N30billion of contracts we awarded to companies in Rivers State, you will be talking about almost N3 billion only from that source. Now, at the end of the month, (the) Rivers State Government has never received more than N2 billion from VAT. So, I have contributed more through the award of contract and you are giving me less. What's the justification for it?' That's an interesting observation because it touches at the heart of the agitation for States to collect taxes. According to the VAT Act, 2004 (as amended in 2020), FIRS by section 7 is charged with the administration, management, and collection of VAT in Nigeria. The current rate is 7.5% under the Finance Act, 2020 having been increased from 5% when it was signed into law in January 2020. Once the VAT is collected, the agreed sharing ratio is applied. The Federal gets 15%, States get 50% and Local Governments get the balance of 35%. Before all these, the FIRS keeps 4% as the cost of collection.

Three of the 37 States (FCT included) in Nigeria provide 81% of the VAT collected by the FIRS. Lagos has the highest VAT collection, amounting to 55% of Nigeria's VAT. FCT has second place with 20%, while 6% is from Rivers. If you remove Kano's 5%, 33 States provide only 14% of the total VAT in Nigeria; Lagos provides 4 times what 33 States provide combined. That seems an unfair deal considering several States in the country, through Sharia, do not permit the sale of certain goods and services. It was therefore expected when Lagos swiftly pounced on the news and insisted that following the judgment in Rivers State, FIRS should stop issuing demand notices for payment of VAT in the State.

In his assessment of the judgment Oyedele, the Fiscal Policy Partner and Africa Tax Leader at Price water Coopers (PwC) stated that 'if the judgement is enforced or upheld on appeal, it will apply to other States and not just Rivers State. This means each State would administer VAT within their territory. By implication, FIRS will administer VAT within the FCT and non-import foreign VAT while the Nigeria Customs Service will continue to collect import VAT on international trade'.[6]

[6] T Oyedele, Analysts: Lagos Major Beneficiary of Rivers Court Ruling on VAT, Responsible for 70% of Collection Across Nigeria, available at https://www.thisdaylive.com/index.php/2021/08/11/analysts-lagos-major-beneficiary-of-rivers-court-ruling-on-vat-responsible-for-70-of-collection-across-nigeria/accessed on 8th September, 2021.

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1.3 Implications of the Federal High Court Judgement

Highlighting the implication of the ruling on VAT collection and administration in Nigeria post judgement, Oyedele noted that 'the biggest losers will be the States except Lagos. A few States like Kano, Rivers, Oyo, Kaduna, Delta and Katsina may experience minimal impact, while at least 30 States which account for less than 20 percent of VAT collection will suffer significant revenue decline. The federal government may in fact be better off given that FCT generates the second highest VAT (after Lagos) in addition to import and non-import foreign VAT'. Oyedele argues that the 'Federal Government is likely to retain more than the 15 percent it currently shares, while States and Local Governments will have less to share especially if we consider VAT on FG contracts included in Local VAT which will also be due to the Federal Government'. In addition, the Federal Government's take home from VAT will increase as it will now keep everything the Nigeria Customs Service collects which used to be shared as VAT proceeds.

According to Oyedele, 'in 2020 for instance, total VAT collection was about N1.53 trillion with import VAT being N348 billion (or 22.7 percent) while foreign non-import VAT was N420 billion (or 27.4 percent) and local VAT amounted to N763 billion (or 49.8 percent)'. With the increased clamour for fiscal federalism, some States started to introduce consumption taxes, which were invariably challenged. The VAT Act therefore came into focus and this culminated with the Supreme Court decision in ***Attorney General of Lagos State v Eko Hotels and Another,***[7] where the Supreme Court held that the VAT Act, being an enactment of the National Assembly, had covered the field on the issue of Sales Tax and must prevail over the Sales Tax Law of Lagos State. Accordingly, this upheld the validity of the VAT Act and its supremacy over Sales / Consumption taxes introduced by the States. The Supreme Court judgement noted that VAT covered the field (of consumption tax) and therefore a State cannot impose a consumption tax in addition to VAT. This means any State intending to impose VAT will have to repeal its existing consumption tax'.[8]

It is my considered opinion that the judgement may also have implications for taxes collectible by Local Governments which are currently administered by States as well as the amendment via Finance Act 2020 which introduced Electronic Money Transfer levy in place of stamp duties, among others. There is also the disturbing possibility of "businesses including SMEs who may have to deal with multiple tax authorities for VAT purposes and consequently a decline in Nigeria's ease of paying taxes and doing business ranking. It may become necessary to amend the Constitution to address the current challenges while retaining the positives under the current system. For instance, States will have to rely on the Federal Government to enforce the Significant Economic Presence requirement for global tech companies. The FIRS[9] had through a motion on notice applied for a stay of execution of the earlier judgement. The court in its ruling refusing the application stated that granting the application would negate the principle of equity and the Rivers State Government through the State Assembly has duly enacted the Rivers State Value Added Tax Law No. 4, 2021 which makes it legitimate for the State to collect VAT.

[7] 2018 (36)TLRN 1
[8] ibid.
[9] Suit no. FHC/PH/CS/149/2020 (Unreported)

What is certain for now is that the FIRS have resolved to challenge the judgement in the Appeal Court as the board and management have ordered the Service's Head of Legal to appeal the ruling. It is expected that the appeal process would get to the Supreme Court for a conclusive determination of the issues in contention. This will help to bring certainty and closure to the various challenges on the taxing powers of the States and the Federal Government in respect of sale/ consumption or value added tax. Until that time, taxpayers would need to make compliance decisions based on their preferred compliance approach (aggressive or conservative) and the advice of their tax consultants.

However, a new twist in the case unfolded again. The Court of Appeal in Abuja, on Friday the 10th of September, 2021 ordered the Rivers and Lagos State Governments to stay action on their bids to collect Value Added Tax (VAT) pending the resolution of the legal dispute on the matter. A three-man panel of the appellate court ordered that the enforcement of the judgment of the Federal High Court, Port Harcourt, latched on to by the State Governments be put on hold. Haruna Tsanami, the judge who delivered the lead ruling of the panel, also suspended the operation of the law passed by the Rivers State House of Assembly and assented to by Governor Nyesom Wike, for the collection of VAT by the State Government.

The court held that since parties had submitted themselves to the jurisdiction of the court for adjudication on the issue, they must not do anything that will destroy the subject matter of the appeal. Specifically, Mr Tsanami granted "status quo ante bellum" in favour of the Federal Inland Revenue Service (FIRS) and against the respondents. The suit was then fixed for September 16, 2021, for hearing of an application by the Lagos State Government to join the suit. Lagos State needed to apply to be joined in the case because it was not part of the case at the trial court. FIRS in an appeal marked CA/PH/282/2021, is praying the court to set aside the judgment of the Federal High Court, in Port Harcourt, the Rivers State capital, which granted power to the State Government to collect VAT. The tax collection agency also asked the appellate court to stay the execution of Rivers' judgment.[10] It must be stressed that the Constitution clearly defines and allocates legislative powers between the National Assembly (for the Federal Government and the Federal Capital Territory, Abuja) and the respective Houses of Assembly (for each States of the federation).[11] In doing this, the Constitution provides for two distinct legislative lists with different subjects exclusively or concurrently assigned to either or both of the National Assembly and House of Assembly. The National Assembly has the exclusive legislative power to make laws with respect to matters provided in the exclusive list.[12] The National Assembly also exercises legislative powers over matters contained in the concurrent list, only to the extent provided for in the concurrent list.[13] In addition to the powers contained in the exclusive list and the concurrent list, the National Assembly is equally empowered to exercise legislative powers over matters that are expressly reserved for it by any provision(s) of the Constitution.[14]

[10] A Ejekwonyilo, VAT Collection Tussle: Appeal Court orders Rivers, Lagos to halt enforcement available at https://www.premiumtimesng.com/news/headlines/484203-vat-collection-tussle-appeal-court-orders-rivers-lagos-to-halt-enforcement.html accessed on 16th September, 2021.
[11] Fasakin Foods (Nig.) Limited v Shosanya (2006) 4 KLR (Pt 216) 1447.
[12] CFRN, 1999, S.4(3)
[13] ibid., S. 4(4)9a)
[14] ibid., S. 4(4)(b)

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On the other hand, the House of Assembly is empowered to legislate on matters contained in the concurrent list, to the extent stipulated therein.[15] In addition to this, a House of Assembly has the power to legislate on any other matters with respect to which it is empowered to make laws in accordance with any specific provision of the Constitution.[16] But more importantly, the House of Assembly has power to make laws with respect to any matter not listed in the exclusive list and/or the concurrent list,[17] or any matter in respect of which the Constitution has not vested legislative power in the National Assembly or the House of Assembly. It is this power of the House of Assembly to make laws in respect of any matter not listed in the exclusive list and/or the concurrent list, or in respect of which the Constitution has not vested legislative power in the National Assembly or House of Assembly, that is regarded as the residual powers of the States to make laws; and this power is exclusive to the States. Accordingly; the National Assembly cannot legislate on those residual matters. The Supreme Court of Nigeria in *Attorney General of Abia State v Attorney General of the Federation*[18] emphasized the existence of residual matters under the Constitution, in the following words:

The Constitution of the Federal Republic of Nigeria 1999, like most Constitutions, does not provide for a residual list. And that is what makes the list residual. The expression emanates largely from the judiciary, that is, it is largely a coinage of the Judiciary to enable it exercise its interpretative jurisdiction as it relates to the Constitution. Residual merely means that which remains. In legislative or parliamentary language, residual matters are those that are neither in the exclusive nor concurrent legislative list; that is what remains or is not covered by the exclusive and concurrent legislative lists.

Thus, in order to determine whether the National Assembly or the House of Assembly has the power to legislate on any matter, the matter herein being related to the imposition of VAT and sales tax, recourse must first be had to the exclusive list, the concurrent list and specific provisions in the Constitution. An examination of the Constitution shows that the powers of the National Assembly to legislate over tax matters are confined to matters specified in the exclusive list.[19] These powers are contained in items 16 (customs and excise duties), 25 (export duties), 58 (stamp duties), and 59 (taxation of incomes, profits and capital gains). It should be noted also that taxing powers are equally set out in the concurrent list. But having said this, I must quickly add that the powers set out in the concurrent list are not in addition to the taxing powers of the National Assembly as set out in the exclusive list. The listing of taxing powers of the National Assembly in the concurrent list[20] is intended merely to provide guides or direction on how the substantive taxing powers of the National Assembly as contained in items 58 and 59 of the exclusive list may be exercised with regard to the collection of the taxes created in the exclusive list. They do not confer any power on the National Assembly to impose any tax different from what is already conferred on that legislative body by items 16, 25, 58 and 59 of the exclusive list. Further, a close examination of the

[15] ibid., S.4(7)(b)
[16] ibid., S.4(7)(c)
[17] ibid., S.4(7)(a) and(b)
[18] (2006) 16NWLR (Pt. 1005)265, 380.
[19] This is because the taxing powers provision in the concurrent list merely prescribes how the taxing powers contained in the exclusive list would be exercised.
[20] Items 7 and 8 of the concurrent list

concurrent list shows that none of items 7, 8 and 9 thereof allocates any power to impose tax to either of the legislative bodies. Rather, in item 7 the Constitution gives power to the National Assembly to make laws to empower the States to collect the taxes set out therein[21]; and in item 9 the Constitution gives power to the House of Assembly of a State to make laws enabling Local Government Councils within the relevant State to collect any tax which the House of Assembly has power to impose. Indeed, the concurrent list has not provided for a co-existence of taxing powers between the National Assembly and the House of Assembly.

In support of this point, Nwabueze, while examining similar provisions in the 1979 Constitution contends that:

> Perhaps the most remarkable feature of the concurrent legislative list is that there is
> no co-existence of power at all in respect of four of the five ... matters included therein – allocation of revenue (item A), antiquities and monuments (item B), archives (item C) and collection of taxes (item D). The delimitation in the schedule restricts the Federal and State Governments to specific aspects of the matters, thus making those aspects exclusive to the one or the other. The result is that, while these matters are dealt with under the concurrent legislative list, their inclusion therein in no way implies that the power of the Federal and State Governments toact over any aspect of them co-exist together.[22]

Considering that the powers of the National Assembly to impose taxes (or to make laws for the imposition of taxes) is limited to items 16, 25, 58 and 59 of the exclusive list, it is then arguable that all the taxing powers of the National Assembly are presently contained in the exclusive list since the concurrent list confers no additional power to impose tax on the National Assembly. It would therefore seem that the powers of the National Assembly to impose tax, under the previously reviewed provisions of the Constitution pertain only to the following subjects: customs and excise duties; export duties; stamp duties; and taxation of incomes, profits and capital gains. Outside these powers, there is no specific or express provision in the Constitution authorizing the National Assembly to enact any statute to impose a tax. At most, the legislative powers of the National Assembly to impose taxes may be stretched under item 68 of the exclusive list. This particular item empowers the National Assembly to legislate on 'any matter incidental or supplementary to any matter mentioned elsewhere in the list'. The power under this item is however circumscribed to exercising powers within any of the items in the exclusive list.

The power to legislate on incidental and supplementary matters cannot go outside the specific items within the list.[23] The Supreme Court in *The Honourable Minister for Justice and Attorney General of the Federation v The Hon. Attorney-General of Lagos State*[24] rejected the position of the Federal Government that the power to regulate and register hotels within the territory of a State was incidental to the power to legislate over tourist traffic, a matter specified under item 60(d) of the

[21] Items 8 enables the National Assembly to make laws to avoid double taxation by various States in respect of powers that may be delegated to them to collect taxes listed in item 7.
[22] B Nwabueze, *Federalism in Nigeria under the Presidential Constitution* (Sweet &Maxwell) 1983, 6.
[23] L N Okeke, 'The VAT Decree and the Nigerian Constitution' (2000) 27 TPIR 7.
[24] (2013) 12 TLRN (2013)16 NWLR (Pt. 1380) 249.

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exclusive list. Expectedly, the court in this case held that matters pertaining to the regulation, registration, classification and grading of hotels are exclusive to the States, and that the National Assembly has no power under the Constitution to make any law relating to the regulation or registration of hotels within the territory of any State of the federation. Accordingly, the National Assembly cannot impose taxes outside those listed in the exclusive list; and so the powers of the National Assembly in the concurrent list, which relate to taxation, are limited to the powers to make laws for the 'collection' of the taxes which the National Assembly has express powers to impose as set out in the exclusive list.

The taxing powers of the National Assembly are expressly enumerated and exhausted in the Constitution; and these powers do not include the power to impose sales tax or any consumption tax on sales or transactions that occur within the territory of a State of the federation. Whilst the taxing powers of the National Assembly are circumscribed by the powers created in that regard by the Constitution, the Constitution does not however expressly exhaust all the various kinds of taxes imposable by a State Government on persons or activities within its territory. Thus, the power to impose any tax that is not expressly enumerated in the Constitution is a residual power, which vests exclusively in the Governments of the various States of the federation.[25] Sales tax on the other hand is imposed on the person making expenditure from either his income or capital receipt and at the point of the expenditure.[26] Sales tax is therefore imposed at the point of sale of goods or services. I assert that ordinarily, the power to impose sales tax or value added tax is not one of the powers enumerated in the exclusive list. Also, there is no specific provision in the Constitution where the National Assembly is empowered to impose sales tax or value added tax. Therefore the power to impose sales tax within the boundaries of a State ordinary belongs exclusively to Governments of the various States in the federation because sales tax falls under matters that are considered residual being matters in respect of which no specific legislative power is provided for in the Constitution.

In *Attorney General of Ogun State v Aberuagba*[27] the Supreme Court of Nigeria had occasion to determine the constitutionality of the imposition of sales tax by a State in Nigeria. In that case the respondent, as plaintiff, sought a declaration, inter alia, that the Ogun State sales tax law, which was enacted in 1982, was inconsistent with the provisions of the 1979 Constitution. Given the constitutional nature of the issue, the High Court referred the following questions to the Court of Appeal for determination:

(a) whether the tax imposed under the sales tax law was an excise duty within the meaning of that item 15 of the exclusive list;
(b) whether the enactment of the sales tax law was an exercise of power with respect to trade and commerce in item 61 of the exclusive list;
(c) whether the sales tax law was valid and constitutional in so far as it imposed a tax on purchasers of taxable goods, and
(d) if the answer to the immediately foregoing question was in the affirmative, whether sections 4, 5, and 8 of the sales tax law were valid and constitutional. The Court of

[25] *Attorney General of Ogun State v Aberuagba (1985) 1 NWLR (Pt.3) 395, 405*
[26] *Aberuagba*, n. 15
[27] *Aberuagba*, n.15

> Appeal answered the first three questions in the affirmative, and the fourth in the negative.

On further appeal, the Supreme Court held, inter alia, that a State Government was constitutionally empowered to impose sales tax provided the said sales tax was imposed only on intra-state transactions. A State could not therefore impose sales tax on inter-state or international transactions, being matters exclusively reserved for the Federal Government under item 61 of the exclusive list (i.e. 'trade and commerce clause'). Consequently, the Supreme Court struck down the Ogun State sales tax law to the extent that it imposed sales tax on inter-state and international transactions, i.e. goods brought from other States and/or any other country into Ogun State. The Supreme Court also set aside the Ogun State sales tax law on the further ground that it resulted in the increase of price of goods affected beyond the price set thereby under the Price Control Act in force at the time. However, the Price Control Act now in force (as amended),[28] applies to very few goods, which fall outside the scope of the sales tax law of the States that we have reviewed.

Thus, to the extent that the power to legislate on international and inter-state commerce is vested exclusively in the National Assembly, any sales tax law made by the House of Assembly must be limited in reach to intra-state commerce and cannot validly extend to transactions that are in the nature of international or inter-state commerce.[29] The Supreme Court of Nigeria appears to have adopted this line of reasoning in *Aberuagba* when it struck down an Ogun State sales tax law to the extent that the law imposed tax on inter-state and/or international trade and commerce and or violated a Federal statute on a matter in respect of which the Federal Government had exclusive competence.

The question again is, whether VAT ACT 'Covered the Field' tilled by sales tax legislation? *Attorney General of Lagos State v Eko Hotels*[30] was decided in part on the basis of the applicability of the doctrine of covering the field to the question whether the sales tax law of Lagos would validly apply in the light of the application of the VAT Act. In that suit the 1st respondent, as plaintiff, filed an originating summons before the Federal High Court sitting in Lagos to determine which of the parties, i.e. the Federal Government, represented by the Federal Board of Inland Revenue (FBIR), on the one hand, and the Government of Lagos State on the other hand, was entitled to monies it collected from its consumers. It also prayed the court to order that it could only be a taxable person or remitting agent to either the Federal Government or Government of Lagos State – but not the two Governments at the same time. At trial, the 1st respondent argued that there was a conflict between the provisions of the VAT Act and the Taxes and Levies Act, on the one hand, and the Lagos State sales tax law on the other. Both the Federal and State legislation required the 1st respondent to collect a tax at the rate of 5% of the price of the goods it sold and the services it rendered to its customers; and to further remit same, individually, to them. The 1st respondent argued that it was difficult to comply with the two pieces of legislation because that would amount to double taxation. In its judgement the Federal High Court held, inter alia, that the VAT Act had covered the field in which the Lagos State sales tax law was enacted to operate; hence the 1st

[28] Cap P28 LFN 2004.
[29] *Aberuagba*, n. 15.
[30] (2005)All FWLR (Pt.398) 235.

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respondent could only remit the amounts collected as tax from its customers to the FBIR. Dissatisfied with the decision of the Federal High Court, the appellant appealed to the Court of Appeal.

In its decision, the Court of Appeal upheld the decision of the High Court, affirming the position that the VAT Act had covered the field in which the sales tax law sought to operate: the sales tax law was therefore invalid. In particular, while commenting on the doctrine of covering the field and its application in *Attorney General Ogun State v Attorney General of the Federation*,[31] Fatayi Williams, CJN, stated that:

> Where identical legislations [sic] on the same subject matter are validly passed by virtue of their constitutional powers by the National and a State House of Assembly, it would be more appropriate to invalidate the identical law passed by the State House of Assembly on the ground that the law passed by the National Assembly has covered the whole field of that particular subject matter.[32]

On the question whether the power to impose VAT or sales tax is contained in the exclusive list, my answer is that neither is therein listed. As earlier argued, the concurrent list does not allocate the power to impose any tax on either the National Assembly or the House of Assembly: it merely allocates the power to make laws for the collection and administration of taxes by the Federal and State legislatures.[33] In the absence of a provision in the concurrent list relating to the power to impose VAT, no basis exists in the Constitution for the invocation of or reliance on the doctrine of covering the field in the determination of the key issue in *Eko Hotels*. There is also no provision for the imposition of sales tax in the concurrent list.

Having demonstrated that the power to impose or collect VAT or sales tax is not listed in the concurrent list, the contingent or dependent question of whether the VAT Act has covered the field in which a State sales tax law applicable only within the States seeks to operate becomes irrelevant. It is further argued that *Eko Hotels* should be deemed to have been overruled by the Supreme Court in *Honourable Minister for Justice and Attorney General of the Federation v The Hon. Attorney-General of Lagos State*[34] in which the Supreme Court held that the doctrine of covering the field would apply only with regard to legislative conflict over matters listed in the concurrent list.

The position of the Supreme Court is in contradistinction with the decision of the Court of Appeal in *Eko Hotels*, where the lower court invoked the doctrine of covering the field to resolve legislative contest over a subject matter that is not listed in the concurrent list. Implied overruling occurs when an appellate or superior court in rank without mentioning that it is overturning its previous decision or a decision of a lower court, determines in a different decision or matter that the principle of law earlier established in its previous decision or the decision of a lower court is no longer correct. Once the decision of a court is impliedly overruled, it automatically ceases to be an authority on that point, which should bind a lower court. It would also follow that decision in

[31] (1982) 13 NSSC 1, 11.
[32] Ibid.
[33] Items 7-10 of the concurrent list.
[34] Attorney General of the Federation, n.27.

cases like *Mama Cass & 2 ors. v Federal Board of Inland Revenue*[35] were also wrongly decided and would be deemed to have been overruled by *Honourable Minister for Justice and Attorney General of the Federation v The Hon. Attorney-General of Lagos State*,[36] to the extent that they were founded on the doctrine of covering the field.

However, assuming that provision is made for the imposition or collection of VAT in the concurrent list, it will be argued further that VAT is different from sales tax; and so the VAT Act and the sales tax laws of the relevant States do not operate in the same field. Although this matter was not determined directly by the court of appeal in Eko Hotels, the litigation was indeed inspired by thinking that VAT and sales tax are identical and constitute the same kind of tax, so that the two taxes cannot be imposed on the same person.

The argument that VAT and sales tax are one and the same tax may be linked to the fact that they are both consumption taxes. But aside this tenuous connection, the differences between them are there. First, VAT is imposed at different stages of the value chain and/or production and distribution chain of goods and services wherever additional value is added along the process or chain. Ideally, VAT could be imposed for more than once in the life span of a VAT able good or service. The rationale behind the imposition of VAT is simply because value has been added at the point of transaction; and this means that it is not only when goods and services are sold to the ultimate consumer that VAT is imposed. Hence, it is imposed at every stage of the production/distribution chain where value has been added. There is also the provision for the recovery of input VAT from output VAT,[37] including the refund of any input VAT by the revenue authority where the input VAT exceeds the output VAT collected by the relevant person.[38] VAT is therefore intended to encourage production and value addition, for it is only when a taxable person engages in value addition that he will be ultimately relieved from the burden of VAT. Sales tax is however not recoverable by the taxable person.

On the basis that the VAT Act purports to operate as an existing law, the question that arises is whether the VAT Act can pass the S. 315 test either as an Act of the National Assembly or a Law of the House of Assembly based on the subject matter it covers. But the Constitution does not expressly enable the National Assembly to impose VAT. It is imperative to opine that the National Assembly seems to have the implied power under items 62 (trade and commerce clause) as sales tax is within the ambit of trade and commerce, also item 68 (incidental and supplementary power clause) of the exclusive list to collect VAT.

It is my considered opinion that though the matter is *sub judice* as it is presently been considered by the court, the Taxes and Levies (Approved List for Collection) Decree now an Act 1998.[39] And the Value Added Tax Act, 2004 as amended in 2020 seems to have further addressed this controversy. The Taxes and Levies (Approved List for Collection) Act 1998 specifically provides

[35] (2010) 2TLRN 99.
[36] *Attorney General of the Federation*, n.27.
[37] See VAT Act, S. 14(2)
[38] VAT Act, S. 16(1)(a) and(b)
[39] Taxes and Levies (Approved List for Collection) Act 1998 NO.2 1998.

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for items that the Federal Government can collect taxes and it includes the value added tax. The items are reproduced hereunder:

PART 1-TAXES TO BE COLLECTED BY THE FEDERAL GOVERNMENT

1. Companies' income tax.
2. Withholding tax on companies, residents of the Federal Capital Territory, Abuja and non-resident individuals.
3. Petroleum profit tax.
4. Value added tax.
5. Education tax-now TETFUND
6. Capital gains tax on the residents of the Federal Capital Territory, Abuja, and bodies' corporate and non-resident individuals.
7. Stamp duties on bodies corporate and residents of Federal Capital Territory, Abuja.
8. Personal income tax in respect of -
   (a) members of the armed forces of the Federation;
   (b) members of the Nigeria Police Force;
   (c) Residents of the Federal Capital Territory, Abuja; and
   (d) Staff of the ministry of foreign affairs and non-resident individuals.

Item 4 above states that the Federal Government can collect VAT and the agency of Government at the Federal level that collects VAT is the FIRS. In the same vein, section 7 of the Value Added Tax Act 2020 which is also an Act of the National Assembly provides:

7 (1) the tax shall be administered and managed by the Federal inland Revenue Service

(1) The service may do such things as it may deem necessary and expedient for the assessment and collection of the tax and shall account for all amounts so collected in accordance with the provisions of this Act.

1.4 CONCLUSION

It is our contention that though the VAT is on the residual list by virtue of the fact that it is neither on the exclusive nor concurrent list, the VAT Act and the Taxes and Levies List for Collection Act are existing laws which subsist and the relevant provisions on the collection of VAT has not been set aside by any court of law. Therefore, I hold the position pending the full determination of the matter by the apex court that though value added tax is not specifically mentioned as one of the items on the exclusive legislative list, it has been taken care of by the aforementioned legislation and the legislation are still valid and subsisting, therefore it is the Federal Government through the Federal inland Revenue Service should collect value added tax.