

FHC nullifies VAT Act, other taxes & levies beyond the scope of the Constitution

August 2021

The Federal High Court (FHC or “the Court”) Port Harcourt Division, recently delivered judgement in the case between the *Attorney General for Rivers State (AGRS or “the Plaintiff”)* and *Federal Inland Revenue Service (FIRS or “1st Defendant”) & Attorney General of the Federation (AGF or “2nd Defendant”)* collectively referred to as *(the Defendants)*, stating that the Federal Government of Nigeria (FGN) lacks the power to impose and collect taxes that are not listed under Items 58 and 59 of Part I of the Second Schedule of the Constitution of the Federal Republic of Nigeria 1999 (as amended) (“the Constitution”). Consequently, taxes such as Value Added Tax (VAT), Withholding Tax (WHT), Tertiary Education Tax (TET), the National Information Technology Development Agency (NITDA) Levy, etc., which are not specifically listed under the said Items are outside of the jurisdiction of the FGN.

The Court also noted that the provisions of Item 7(a) and (b) of Part II of the Second Schedule of the Constitution do not extend the legislative competence of the National Assembly beyond capital gains, incomes or profits of persons other than companies, and documents or transactions by way of stamp duties. Therefore, the National Assembly lacks the power to enact any law to impose any form of sales tax, including VAT, and any other tax outside of those specifically mentioned in Item 7(a) and (b) of Part II of the Second Schedule of the Constitution.

Finally, the Court noted that the Taxes and Levies (Approved List of Collection) Act (TLA) is unconstitutional, hence, any tax or levy provided for in the Act is also unconstitutional, null and void, except such tax or levy is provided for in the Constitution or any other law made validly by a competent legislature.

Facts of the case

We have summarised the arguments of the parties to the case below:

AGRS’ Position

The Plaintiff argued that Items 58 and 59 of the Second Schedule, Part I of the Constitution, limits the powers of the FGN to enact, impose and collect taxes outside stamp duties and taxes on income, profit, and capital gain. Consequently, the imposition of taxes such as VAT, WHT, TET and NITDA Levy by the FGN are ultra vires its constitutional powers, and therefore null and void.

Further, the AGRS argued that the FGN, in exercising its powers to impose any tax or duty on capital gains, incomes or profits of persons other than companies, and on documents or transactions by way of stamp duties, is not permitted to delegate the power to collect any other tax or duty to any other person except the Government of a State or any other State authority. Therefore, the powers of the FGN and/ or its agencies, such as the FIRS, are limited to the administration of only the taxes specifically listed in Items 58 and 59 of the Second Schedule, Part I of the Constitution.

The AGRS also argued that the TLA is unconstitutional, null and void to the extent that it provides for taxes and levies beyond the scope of Items 58 and 59 of the of the Second Schedule, Part I (Exclusive legislative List) and Items

7 (a) and (b) of Part II (Concurrent legislative List) of the Constitution.

Consequently, the Plaintiff sought the following reliefs from the Court:

1. A declaration that only the Rivers State Government (RSG) or other authority of the State Government is empowered to collect Capital Gains Tax (CGT), income or profits tax of persons other than companies within the territory of Rivers State, and stamp duties on documents or transactions within the State.
2. A declaration that any legislation of the FGN, through the National Assembly or other means that purports to delegate powers to collect taxes and duties chargeable within Rivers State, on individuals or persons other than the RSG is unconstitutional, null and void.
3. A declaration that there is no constitutional basis for the imposition of and collection of VAT, WHT, TET, and NITDA in Rivers State or any other State; being that the constitutional powers and competence of the FGN is limited to taxation of incomes, profits and capital gains specifically mentioned in Items 58 and 59 of the Exclusive Legislative List of the Constitution.
4. A declaration that the constitutional powers of the FGN to impose taxes and duties is limited to the taxes listed in Items 58 and 59 of Part 1 of the Second Schedule of

the Constitution.

5. A declaration that the TLA, in so far as it purports to legislate on the collection of taxes other than as provided for under Items 58 and 59 of the Exclusive Legislative List of the Constitution, is unconstitutional, null and void.
6. A declaration that only the RSG is constitutionally empowered to impose taxes enforceable or collectable in the territory of Rivers State of the nature of consumption or sales tax, VAT, TET and other taxes or levies other than those specifically reserved for the FGN by items 58 and 59 of Part 1 of the Second Schedule of the Constitution and as delimited by the provisions of Items 7 & 8 of Part II Concurrent Legislative List of the Second Schedule of the Constitution.
7. A declaration that where the VAT Act purports to demand the collection of VAT by the FIRS or any other agency of the FGN, it is unconstitutional, illegal, null and void.
8. A declaration that the power of the FGN to delegate taxes can only be exercised to delegate collection of taxes to the Government of a State or other State authority and no other person.
9. A declaration that all statutory provisions made in exercise of the legislative powers of the FGN, which are inconsistent with the powers to impose tax and duties prescribed by Items 58 and 59 of Part I of the Second Schedule of and Items 7 & 8 of Part II of the Second Schedule of the Constitution are unconstitutional, null and void to the extent of their inconsistency.
10. A declaration that the Defendants are not constitutionally entitled to impose levies, charges or rates on the residents of Rivers State on indeed any State of the Federation.
11. An order of perpetual injunction restraining the Defendants from demanding the residents of Rivers state to pay unconstitutional taxes in the name of enforcing legislation of the FGN.

FIRS' Position

The FIRS argued that by a combined reading of Sections 4(1) to (4)(a) & (b), 315 (1)(a), 318 (1), and Items 62, 67, and 68 of the Second Schedule, Part I of the Constitution, and Sections 1, 2(a) of Part 3 (Supplemental and Interpretation) of the Constitution, the National Assembly has expansive powers to enact legislations to cover VAT, WHT, TET, NITDA, and other taxes provided by the TLA.

The FIRS also argued that where a conflict or contradiction exists between a schedule and a section of an enactment, the section prevails. Consequently, the provisions of Items 58 and 59 of the Second Schedule of the Constitution cannot override the provisions of the aforementioned sections of the Constitution. Further, WHT, NITDA and TET are taxes on the incomes of the taxable persons, therefore fall within the purview of Item 59 of the Second Schedule.

The FIRS also submitted that the Federal Government is constitutionally empowered to delegate persons other than State Governments and their agents, as agents of tax collection.

Further, the FIRS stated that VAT is centrally administered by

the FGN through the FIRS in collaboration with the Nigerian Customs Service and the various states revenue services; with about 50% of the accrued VAT allocated to the States of the Federation, 35% to Local Governments, and only 15% retained by the Federal Government. Rivers State is a major beneficiary of the net VAT proceeds distributions and should not be allowed by the Court to approbate and reprobate at the same time.

Finally, the FIRS maintained that the TLA, although promulgated by the military government, is an existing law by virtue of Section 315 (4) (b) of the 1999 Constitution, and therefore is valid and effective.

AGF's Position

The AGF argued that VAT, WHT, TET, and NITDA Levy are within the legislative competence of the National Assembly because the FGN's powers as regards taxation is not limited to Items 58 and 59 of the 2nd Schedule to the Constitution. Items 67 and 68 of the Second Schedule empowers the National Assembly to impose any tax connected to all the items in the Exclusive Legislative List, including VAT, WHT, TET, and NITDA Levy. Further, the AGF maintained that these taxes were rightly imposed by the National Assembly and validly administered by the FIRS. Consequently, the FGN had not imposed any tax, levy, or duty which is beyond its constitutional powers.

Additionally, the AGF posited that based on Item 8 of the Second Schedule, the National Assembly has the power to delegate the administration of the referenced taxes to the State Government or any other agency of its choice. Consequently, the FIRS is validly empowered to administer the collection of the taxes on behalf of the FGN.

The 2nd Defendant further argued that except for taxes and levies provided for in Item 9, Part II, Second Schedule of the Constitution, the Plaintiff or its House of Assembly cannot validly challenge the powers of the National Assembly which is exercised in consonance with Items 7 and 8, Part II, Second Schedule of the Constitution.

Finally, the AGF submitted that the FHC is duty-bound by doctrine of judicial precedence to uphold the constitutionality of the TLA in line with the decision of superior courts.

Issues for Determination

Based on the prayers and arguments submitted by the parties, the Court adopted the three main issues for determination as follows:

- *Whether the Federal Republic of Nigeria and the Federal Government of Nigeria are entitled to make laws for the purpose of taxation other than for taxation of incomes, profits and capital gains, and if not, whether the 1st Defendant is entitled to enforce and administer laws inconsistent with, or in excess of the authority of the Federal Republic of Nigeria or the Federal Government of Nigeria to make laws?.*
- *Whether the legislative competence of the National Assembly to impose tax or duties on capital gains, incomes or profits of persons and on documents or transactions by way of stamp duties extends to and includes the power to levy or impose any form of Sales Tax including Value Added Tax or any other form of Levy and if so, whether the power of the Federal Republic of Nigeria 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 or other authority of a State?

- Whether the Taxes and Levies (Approved List for Collection) Decree No. 21 of 1998, now Act, in so far as it purports to legislate in respect of the responsibility for collection of taxes and levies, assessment and collection of taxes other than as provided for under items 58 and 59 of the Exclusive Legislative List, (Second Schedule Part 1) and items 7 and 8 of the Concurrent Legislative List (Second Schedule, Part II), is not unconstitutional, null and void?

FHC's decision

After considering the argument of the parties, the FHC decided on the issues as follows:

- The Constitution does not empower the FGN to impose and collect taxes outside the scope of Items 58 and 59 of Part I of the Second Schedule. The provisions of Items 58 and 59 of Part I of the Second Schedule are clear and unambiguous. Further, where a statute mentions a specific thing among other alternative, those not mentioned are deemed excluded. Items 58 and 59 of Part I of the Second Schedule specifically designated the taxes that the FGN is empowered to impose and collect and does not include VAT, WHT, TET and NITDA.
- The provisions of Item 7 (a) & (b) of Part II, Second Schedule do not extend the legislative competence of the National Assembly to the imposition of any form of tax outside capital gains, incomes or profits of persons other than companies; and documents or transaction by way of stamp duties. Therefore, the National Assembly is not empowered to enact any law to impose any form of sales tax, including VAT, and any other tax outside those specifically mentioned in Items 7(a) & (b) of Part II, Second Schedule. Further, Items 7(a) & (b) of Part II, Second Schedule is unequivocal in limiting the entities to whom the National Assembly can delegate the power to collect such tax or administer the tax law to State Government or a State Government authority. The FHC therefore held that *any delegation to any other person or entity apart from State Government or a State Government authority shall be null and void.*
- The Court referred to the decision of the Court of Appeal (COA) in *Uyo Local Government Council V. Akwa Ibom State Government & Anor. (2020) LPELR-49691 (CA)* where the COA nullified the TLA for being inconsistent with the provisions of the Constitution. Consequently, the FHC relied on judicial precedent to hold that the TLA is unconstitutional, and any tax or levy provided for by it is automatically unconstitutional, null and void, except such tax is provided for by the Constitution or any other law validly made by a competent legislature.
- Based on the foregoing, the Court resolved all three issues in favour of the Plaintiff and granted all the reliefs sought by the Plaintiff.

Commentaries

The issue of the powers of the FGN to enact legislation which imposes taxes other than those provided for under Items 58 and 59 of the Executive Legislative List in Part I of Second Schedule has been topical for a number of years. It is therefore not surprising that the matter has now been referred to the law courts for adjudication. However, the ruling of the FHC, though clear may not immediately bring the certainty that taxpayers require as a key tenet of taxation.

The FIRS has since announced that it has filed a notice of appeal at the Appellate Court and a stay of execution and injunction at the FHC. It therefore insists that until both applications are determined by the Courts, the status quo should remain, and taxpayers should continue to charge and remit VAT to it.

The RSG however, has taken a different view with the passage of its Value Added Tax Law on 19 August 2021. It appears that their position is that until the decision of the FHC is overturned by a court of competent jurisdiction, they retain the authority to levy and collect VAT on transactions in the State. The RSG, through the Rivers State Board of Internal Revenue have also begun to issue notices to taxpayers' resident in the State, reminding them of their obligation to account for VAT on transactions conducted in the State to them.

It is therefore important that the pending appeal and all other judicial process are quickly dispensed of to provide much needed clarity to taxpayers.

According to the National Bureau of Statistics' VAT report for 2020 fiscal year, VAT contributed ₦1.53 trillion to the Federation account which was shared amongst the 36 States and FGN. VAT is typically levied on supply of goods and services which are driven by business activities; therefore it is trite that some States may contribute more to the VAT collections than others depending on their level of economic activities. The effect of decentralising the VAT system may therefore negatively impact some States more than others. There are also potential administrative issues around the logistical challenge for companies with operations across the various States who would then be required to file different VAT returns for each of these States. This is without consideration for how the input and output VAT offset mechanism – a key tenet of any successful VAT system - would work where the input tax is incurred and paid in a different State from where the output tax is charged and collected.

It is therefore obvious that several conversations would still be required after the completion of the judicial process irrespective of its outcome. At the end of the day, it is important that the taxpayer is taken into consideration in all of this conversations in order to ensure that the Nigerian tax system continues to play a positive role in Government's plan to improve the ease of doing business in the country.

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