VAT affirmed as the principal tax on goods and services in hotels, restaurants and event centers

KPMG in Nigeria

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The Court of Appeal (COA or "the Court") sitting in Lagos recently decided in *Federal Inland Revenue Service (FIRS or "the Appellant") and Attorney General of Lagos State (AGL or "First Respondent") & The Registered Trustees of Hotel Owners and Managers Association of Lagos (RTHMAL or "Second Respondent")* that VAT is the principal tax on consumption of goods and services in Nigeria. The COA further held that the VAT Act, being an existing Federal law, has covered the field on consumption tax and, therefore, supersedes any similar State Law including the Lagos State Hotel Occupancy and Restaurant Consumption (HORC) Law.

Facts of the case

On 3 October 2019, the Federal High Court (FHC) sitting in Lagos decided in *RTHMAL and AGL & the FIRS* that Lagos State was the only constitutional and lawful body empowered to assess, impose and collect tax from customers for goods and services consumed in hotels, restaurants and event centres in the State. The FHC also ruled that the provisions of Sections 1, 2, 4, 5 and 12 of the VAT Act, which sought to impose tax on customers for goods and services consumed in hotels, restaurants and event centres in Lagos State, were inconsistent with the provisions of Sections 4(2), (4)(a) & (b) and Section 4(7) (a) & (b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) ("the Constitution) and, therefore, unconstitutional and invalid.

Consequently, the FHC made an order of perpetual injunction restraining the FIRS, its staff, servants and agents from implementing or enforcing the provisions of VAT Act on customers of hotels, restaurants and event centres in Lagos State.

Dissatisfied with the FHC's judgement, the FIRS filed an appeal with the COA.

FIRS' argument

The FIRS argued that:

1. the AGL's countersuit in the FHC addressed the constitutionality or validity of the VAT act, which is a federal enactment. Therefore, the Attorney General of the Federation (AGF) was the appropriate party to be sued instead of the FIRS, who is merely an agent of the Federal Government (FG). The failure of the AGL to include the AGF in the parties to the counterclaim rendered the claim incompetent and invalidated the judgment of the FHC.
2. the AGL and itself were parties to the judgement of the Supreme Court (SC) in *AGL v. Eko Hotels Limited, (2017),* where the SC held that the VAT Act had *"covered the field"* on consumption taxes which includes HORC Law of Lagos State. Therefore, the similarities in the cases required all parties to stand by the decision of the SC and avoid disputing the same issue.
3. the constitutionality of the Taxes and Levies (Approved List for Collection) Act (Amendment) Order 2015 "(the Order), which amended the Taxes and Levies (Approved List for Collection) Act (TLA), was not considered in the FHC's ruling. Specifically, Section 1(2) of the TLA, which empowers the Minister of Finance to amend the Schedule to the Act, was unconstitutional and contrary to the rule of separation of powers in the Constitution.

AGL's argument

The AGL raised the following objections to the FIRS' arguments, and submitted that the:

1. FIRS was deemed by law to have accepted its counterclaim when it failed to file a counter-affidavit to its suit.

2. SC in *AGL v. Eko Hotels Limited (2017)* did not decide on the constitutionality of the VAT Act in its judgment. The law under consideration was the Sales Tax Law of Lagos State and not the HORC Law, which the SC upheld as valid and operational in *AGF v. AGL (2013) (LPELR-20974).*

3. doctrine of *"covering the field"* refers only to items on the concurrent list jointly held by the FG and State Government. Since consumption tax within the State on the sale of goods and services contemplated in the HORC Law does not fall under the concurrent list, the VAT Act has not validly covered the field.W

Issues for determination

The COA adopted the following keys issues for determination in the case:

1. whether the counterclaim was properly constituted despite (a) the fact that the Second Respondent, who was the Plaintiff in the court below, was not primarily affected by the reliefs claimed in the counterclaim and (b) the non-joinder of the primarily affected party to the counterclaim (i.e., the AGF).

2. whether having regard to the binding decision of the SC in the *Eko Hotel case* on the validity of the VAT Act as an existing Act of the National Assembly, the AGL can still challenge the constitutionality of the VAT Act in the court below.

3. whether the learned trial judge was right in his interpretation and application of the judgment of the SC in the *Eko Hotel case,* namely, that covering of the field of consumption taxes by VAT Act was irrelevant to its decision.

4. whether the learned trial Judge rightly upheld the validity of the powers donated to the Minister of Finance under section 1(2) of the TLA, to amend provisions of Schedule to the said Act, even though the Minister is not a member of the National Assembly, which is the body solely responsible for amending an Act of National Assembly.

5. whether the learned trial judge was right in his decision (agreeing with the First Respondents' counsel) that the issue of constitutionality of Section 1(2) of the TLA was improperly raised by the court on its own motion and, therefore, the issue should not have been decided.

COA decision

After considering the arguments of both parties, the COA held that:

(i). the appropriate party to respond to a suit against the FG on the validity of the VAT Act is the AGF, who is the Chief Law Officer of the Federation and Chief Custodian of the Nigerian Constitution, and not the FIRS who merely acts as an agent on behalf of the FG. Therefore, to the extent that the AGL did not include the AGF as a party to the suit, the suit was not properly constituted and hence incompetent. In arriving at its decision, the COA relied on the principle of law that *"an agent who acts on behalf of a known and disclosed principal, incurs no liability".* On this basis, the Court struck out the AGL's suit.

(ii). While Lagos State's HORC Law and Hotel Occupancy and Restaurant Consumption (Fiscalisation) Regulations are valid consumption taxes enacted within the legislative competence of the House of Assembly of Lagos State, taxation of goods and services under these laws are also provided for by the VAT Act. Therefore, the VAT Act being an existing federal law and having covered the field on consumption tax, its provisions should prevail over similar States laws, including the HORC Law and Hotel Occupancy and Restaurant Consumption (Fiscalisation) Regulations.

(iii). Once the lower court raised the issue of the validity of the TLA by itself, it became an issue for determination in the case provided that it gives the relevant parties an opportunity to present their arguments on the issue. Therefore, the FHC erred when it declined to resolve the issue it raised on its own accord.

However, the COA, having resolved that the counterclaim was incompetent, declined to comment on the validity of the TLA noting that neither the FHC nor itself had the jurisdiction to entertain the issue. The COA, therefore, resolved the issue in favour of the FIRS and struck out AGL's counterclaim of 30 May 2018.

Based on the above, the COA set aside the decision of the FHC and upheld the powers of the FIRS to impose VAT on goods and services consumed in hotels, restaurants, event centers, and similar establishments in Nigeria.

Commentary

Since the issuance of the Schedule to the Order by the Minister of Finance in 2015, State tax authorities have laid claim to the imposition of consumption tax on goods and services in the hospitality sector. This has resulted in an increase in the prices of goods and services supplied by hotels, restaurants, and event centres in the affected States due to the combined imposition of both 7.5% VAT and 5% consumption tax thereon. Therefore, the COA's decision is a welcome development for the affected businesses as it effectively resolves the conflicting positions held by different judicial divisions of the FHC. It is hoped that all the States with consumption tax laws will respect the decision of the court and desist from further imposition of consumption tax alongside VAT in the hospitality sector. This is especially as the impact of COVID-19 pandemic on the sector is yet to abate and its 0.52% contribution to GDP in Q2 of 2022 fell short of its performance in the comparative period in 2021 by -53.73%.

The COA's judgement was as expected considering that the Order, which formed the basis of the FHC's

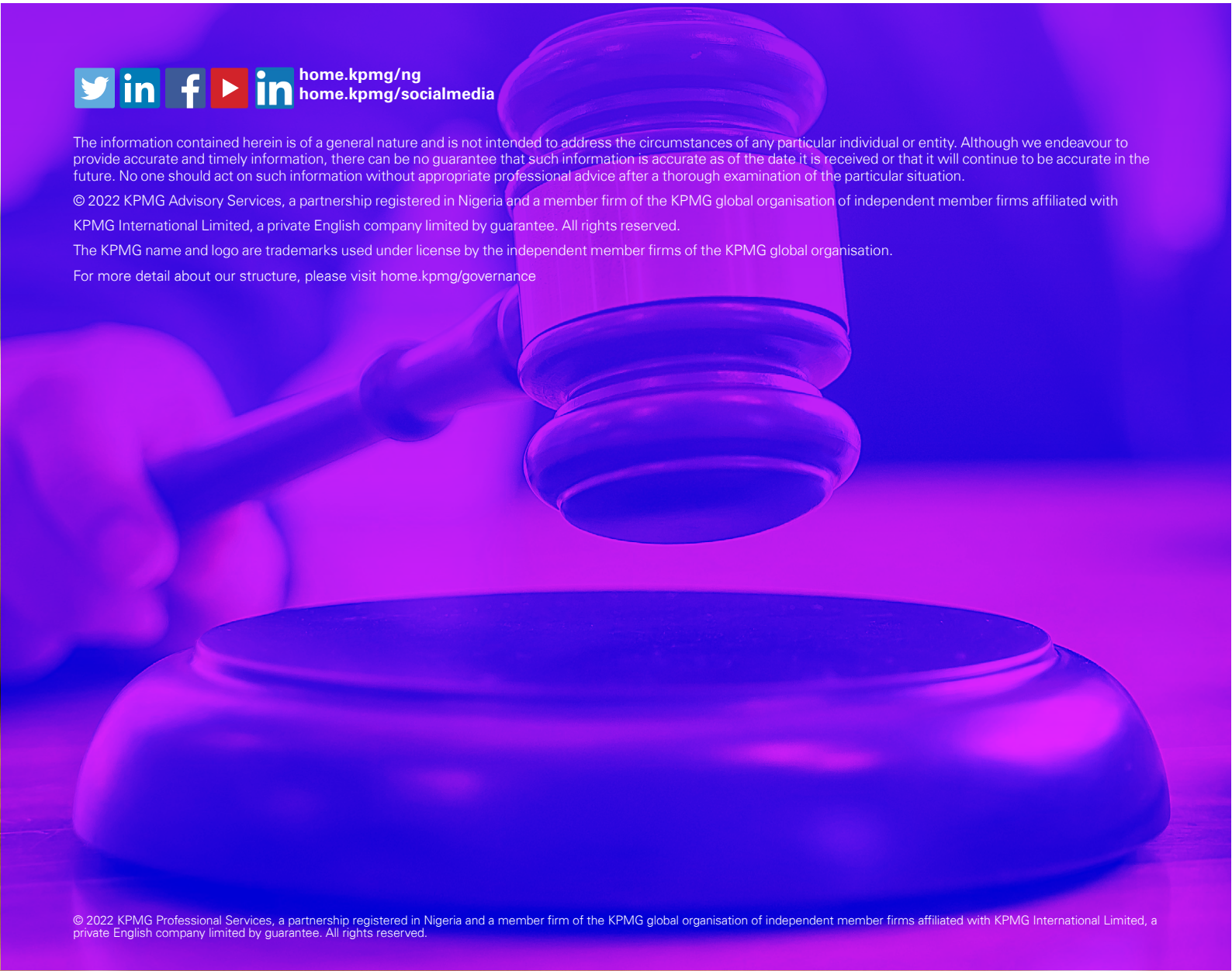
judgement, was declared unconstitutional, null and void by another judicial division of the FHC on 8 May 2020 in *RTHMAL vs AGF & Minister of Finance.* (Please refer to our *Newsletter, Issue No. 9.7 of September 2020* for our commentary on the judgment). The judgement of FHC Port Harcourt Division on 9 August 2021 in *Attorney General for Rivers State v. FIRS* was to the same effect on the ground that the Minister of Finance does not have the jurisdiction to amend or modify the provisions of an Act of the National Assembly.

Similarly, there have been other court decisions invalidating "Hotel, Restaurant or Event Centre Consumption Tax" Laws enacted by various States of the Federation pursuant to the Order. For instance, on 22 May 2020, the COA sitting in Calabar decided in *Uyo Local Government Council v. Akwa Ibom State Government & Anor* that the Order was unconstitutional, hence any tax or levy imposed further to it is null and void.

While the COA confirmed the legitimacy of State consumption tax laws, the Court was also quick to clarify that they are inapplicable as the VAT Act has *"covered the field"* in respect of consumption tax in Nigeria. The COA referenced the following comments of the SC in *AGL vs Eko Hotels Limited & Anor* to support its position:

"a State Law which is not necessarily inconsistent with either the Constitution or an Act of the National Assembly but merely covers the legislative field of the National Assembly is not harmful as it is merely a surplusage. In line with the decision of Eso, JSC, in A.G. Ogun State (supra), such a law of a State House of Assembly is in abeyance and inoperative and could be revived and becomes operative if for any reason the Federal legislation is repealed."

Understandably, the COA did not make a pronouncement on the constitutionality of the VAT Act as it was not an issue for determination before it. Therefore, the lingering controversy between the FG and States of the Federation on the subject remains yet unresolved.



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