

**Value Added Tax War: A Legal Appraisal of Consumption Tax Collection and Retention in Nigeria<sup>1</sup>**

**Abstract**

*The Supreme Court of Nigeria on the 12<sup>th</sup> day of April, 1986 in Attorney-General, Ogun State v Alhaja Ayinke Aberuagba & 7ors<sup>2</sup> declared that the words “in particular” used in item 61 of the Exclusive Legislative list of the Constitution of the Federal Republic of Nigeria, 1979 to be words of limitation and not of emphasis. This was on an interpretation of whether sales tax is an incidental matter within the exclusive power of the federal government of the Nigeria. In the Court’s hallowed judgment, it held that the Federal Government has power to make law on the items specified in the sub-items (a) to (f) in respect of international trade and commerce and inter-state trade and commerce, but the States are left with the residuary matter of trade and commerce within a State. The controversy, however, continued with the rift between the State’s sales tax and/or Hotel occupancy and Restaurant consumption and Value Added Tax introduced by the Federal government. The controversy has now snowballed into a struggle between two legislations named Value Added Tax made by both the Federal and State governments. This unending VAT war under Nigeria’s federal Constitution over who is reposed with the responsibility to impose and collect Value Added Tax is the crux of this paper. Doctrinal method of data collection was adopted using analytical approach to review the various statutes, decisions of courts, opinions of experts, journals and internet materials on the subject matter. The paper revealed that the Constitution did not confer on the Federation exclusive power over trade and commerce. The Federal, State and Local governments were accorded their respective shares of powers to control trade and commerce and incidental powers to impose and collect Value Added Tax in Nigeria. It is however, recommended that constitutional amendment is imperative to specify the boundaries of operations of each government in order to avert double taxation in the implementation of the various enactments. Again, the Joint Tax Board should be alive to its responsibilities to avoid unnecessary and intolerable discriminations among the State laws when left open to all.*

**Keywords: Tax, Value Added Tax, Consumption Tax, Exclusive Item, Residuary Item, Constitution**

**1. Introduction**

The attempt to particularize and specify the taxing powers in the Nigerian economy have bred more controversies than developing the economy of the Federation. The 1960<sup>3</sup> and 1963<sup>4</sup> constitutions specifically shared the power to make sales tax law between the federation and the Regions in Nigeria. The item 38 in the then exclusive legislative lists of the two constitutions conferred on the federal government powers on imposition and administration of taxes on amounts paid or payable on the sale or purchase of commodities except produce, hides and skins, motor spirit, diesel oil sold or purchased for use in road vehicles and diesel oil sold or purchased for other than industrial purchases.

The sharing of power to make law on taxes on amounts paid or payable on the sale or purchase of commodities by the federal and state governments was omitted in the current Exclusive and

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<sup>2</sup> (1985) 3 All NTC 17 at 37.

<sup>3</sup> The Nigeria (Constitution) Order in Council, 1960, The Schedule, the legislative lists, part, the Exclusive legislative list, item 38.

<sup>4</sup> The Constitution of the Federation, 1963, The Schedule, the Legislative lists, part 1, the Exclusive legislative list, item 38.

Concurrent legislative lists. Rather, the present constitution<sup>5</sup> conferred on the federal government power on trade and commerce and in particular;

- (a) Trade and commerce between Nigeria and other countries including imports of commodities into and export of commodities from Nigeria and trade and commerce between the States.<sup>6</sup>
- (b) Establishment of a purchasing authority with power to acquire for export or sale in world markets such agricultural produces as may be designated by the National Assembly.<sup>7</sup>
- (c) Inspection of produce to be exported from Nigeria and the enforcement of grades and standards of quality in respect of produce so inspected.<sup>8</sup>
- (d) Establishment of a body to prescribe and enforce standards of good and commodities offered for sales,<sup>9</sup>
- (e) Control of the prices of goods and commodities designated by the National Assembly as essential goods or commodities and;<sup>10</sup>
- (f) Registration of business names.<sup>11</sup>

Upon reading the above provisions, there is a temptation to presume that sales tax on trade and commerce within or intra-states is left as a residuary matter to the state. On the contrary, it also appears that since trade and commerce is a taxing power under item 62 of the exclusive list exclusively reserved for the federation, by its very nature, sales tax is an incident of trade and commerce. Moreover, under item, 68<sup>12</sup> of the exclusive list, it is within the exclusive power of the federation to make law on any matter incidental or supplementary to any matter mentioned elsewhere in the exclusive list.

Following the various interpretations of the provisions of the constitution with respect to whose responsibility it is to impose and administer Value Added Tax in Nigeria, the controversy has continued. The current controversy is over the presence of two legislations on the same matter, one made by Federal and the other, states. There are Value Added Tax Act,<sup>13</sup> Hotel occupancy and Restaurant Consumption Tax Laws<sup>14</sup> and Value Added Tax (VAT) Law,<sup>15</sup> in place to regulate consumption tax in Nigeria. This has also snowballed into a legal battle between the federation of Nigeria and component States.

## 2. Conceptual Clarifications

### 2.1 Tax.

Tax is a compulsory financial charge or some other type of levy imposed on a tax payer (an individual or legal entity) by a governmental organization in order to fund government spending and various public expenditures (regional, local or national). Tax is a pecuniary

<sup>5</sup> Constitution of the Federal Republic of Nigeria, 1999, Second Schedule, legislative powers, part, the Exclusive legislative list, item 62.

<sup>6</sup> Ibid, item 62 (a).

<sup>7</sup> Ibid, item 62(b).

<sup>8</sup> Ibid, item 62 (c).

<sup>9</sup> Ibid, item 62(d).

<sup>10</sup> Ibid, item 62(e).

<sup>11</sup> Ibid, item 62(f).

<sup>12</sup> Ibid, item 68 provides for any matter incidental or supplementary to any matter mentioned elsewhere in the list.

<sup>13</sup> Decree 102 amended to 1993. No 2007.

<sup>14</sup> No 53 Hotel Licensing Law cap. 46 Laws of Lagos State of Nigeria, 2003, Hotel Licensing (Amendment) Law No 23 volume 43 Lagos State of Nigeria official of 20<sup>th</sup> July 2010 and Hotel occupancy and Restaurant Consumption Law, No 30 Vol. 43 Lagos State 2009.

<sup>15</sup> Law No. 4 of 2021, Rivers State.

burden laid upon individuals or persons or property to support the government which is exacted by a legislative authority.<sup>16</sup> It is a compulsory monetary charge imposed by the government on persons, entities, transactions or property to yield public revenue.<sup>17</sup> It is a demand made by Government of a country for a compulsory payment of money by the citizens of the country.<sup>18</sup> In *Matthews v Chicory Marketing Board (v) of Victoria Australia*,<sup>19</sup> a tax is held to be compulsory exaction of money by public authority for public purposes. In *United States v Butler*<sup>20</sup> the court held tax in a general sense and understanding of the term to be an exaction of money for the support of the government.

Whenever issues come up requiring a determination of whether a person either natural or artificial is liable to pay taxes, the court is duty bound to explore the relevant tax legislations and apply them accordingly.<sup>21</sup> It is certain and well settled in our jurisprudence that taxation issues are not all comers' affairs or an arbitrary issue. No tax can be imposed on the subject without the word in an act of parliament clearly showing an intention to lay a burden on the subjects.<sup>22</sup> Agbonika stated that for there to be command for the payment of tax, the following features or characteristics must be visible;<sup>23</sup>

- i. It must be compulsory levy.
- ii. There must be a legislation backing the demand for the payment.
- iii. The levy must be certain and show a basis for calculating the payment.
- iv. Payment must be for the common good of all and not for any individual use.
- v. Payment must be for a public authority with tax jurisdiction known as the Relevant Tax Authority.
- vi. There must be penalties for non-compliance with the law
- vii. Payment could be in money's worth such as goods or free labour.

## 2.2 Value Added Tax

Value added tax, known in some countries as a good and services tax, is a type of tax that is assessed incrementally. It is a multi-stage tax. VAT is borne by the final consumer. All goods and services (produced within or imports into the country) are taxable except those specifically exempted.

Value Added Tax was introduced in Nigeria to replace Sales tax.<sup>24</sup> It started with the enactment of Sales Produce tax.<sup>25</sup> The Sales Tax Decree imposed a sales tax on such goods and services which included sales and service of registered hotels, motels, catering establishments, restaurants and other personal services.

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<sup>16</sup> IA Ayua, *Nigerian Tax Law* (Ibadan: Spectrum Law Publishing, 1996) 9.

<sup>17</sup> BA Garner *Black's Law Dictionary*, 10<sup>th</sup> edn (USA, Thomson Reuters St. Paul MN, 2014) 1688.

<sup>18</sup> CS Ola, *Nigeria Income Tax Law and Practice* (Ibadan: Macmillan Publishing, 1983) 13.

<sup>19</sup> (1938) 60 CLR 263 at 276.

<sup>20</sup> 2776 US 1 (1936) 61.

<sup>21</sup> *Best children Int'l Schools vs FIRS* (2019) 40 TLRN33.

<sup>22</sup> *Authority v Regional Tax Board* (1970) ALL NLR 177, *Scottish Widows PLC & ors v Commissioner for her Majesty Revenue and Customs (Scotland) & ors* (2011) LPELR – 17822 (UK), *VODACOM Business Nig Ltd v FIRS* (2018) 35 TLRN 01 at 18.

<sup>23</sup> JAM Agbonika & JAA Agbonika, 'Understanding of ABNC of Taxation, the Nigerian Perspective' in JAM Agbonika et al (ed) *Tropical Issues on Nigerian Tax Laws and Related Areas*, Vol2 (Ibadan: Ababa Press Ltd (2018) P.2.

<sup>24</sup> FRS gov.ng/value-added-tax.

<sup>25</sup> Taxation Ordinance No 12 of 1953 but was amended by the Sales Tax Decree No 7 of 1986.

The value added tax came in with an enactment of Value Added Tax Decree<sup>26</sup> and later Value Added Tax Act.<sup>27</sup> The tax is chargeable and payable on the supply of goods and services<sup>28</sup> except the goods and services exempt.<sup>29</sup> VAT is administered and managed by the Federal Inland Revenue Services (FIRS).<sup>30</sup>

The Act imposed tax at the rate of 7.5 percent of the value of the good and services.<sup>31</sup> The Act<sup>32</sup> specified the allocation formula for the proceeds between the federal and state governments. The formula is stated thus:

Federal Government	-	-	-	-	-	15%
State Government and FCT Abuja	-	-	-	-	-	50% and
Local government	-	-	-	-	-	35%

However, there is a proviso that a derivation principle of not less than 20% shall be reflected in the distribution of the allocation amongst states and local governments.<sup>33</sup> The imposition and collection of value added tax is bedeviled with controversy over who either the Federal or State Government has jurisdiction to legislate. In *Ogun State v Agberuagba*,<sup>34</sup> the Supreme Court declared the Ogun State Sales Tax law, particularly; section 3(1) invalid to the extent that it imposes tax on taxable goods brought into the state which is a matter of inter-state commerce. In *Nigeria Soft Drinks v AG Lagos State*,<sup>35</sup> and *Attorney-General of Lagos State v Eko Hotels & Anor*,<sup>36</sup> the court held that collecting both sales tax and VAT in the same state will amount to double taxation and that the VAT Act has covered the field.

But in *Registered Trustees of Hotel Owners and Managers Association of Lagos v Attorney General of Lagos State & Anor*<sup>37</sup> the court restated that where a matter is not stated in either the exclusive or concurrent legislative list such matter is considered as a residual matter and therefore within the exclusive legislation competence of a State government.

### 2.3 Tourism Tax.

Tourism tax is another aspect of consumption tax that is disputed between states and the federal Government. Various states introduced tourism taxes irrespective of the existence of VAT Act. Cross River State introduced the Cross River State Tourism Development Law, 2007. The tax was made to tax all tourism enterprises.<sup>38</sup>

In *Hon. Ministry for Justice & AG of Federation v AG Lagos State*,<sup>39</sup> the Federal government as plaintiff against Lagos State as defendant challenged the validity of enactment of the

<sup>26</sup> Decree No 7, 1986.

<sup>27</sup> Act No 102 of 1993 and later Cap VI laws of the Federation of Nigeria, 2004 but with the latest amendment, Act No 53 f 2007.

<sup>28</sup> VAT, Act, 2007, s.2 but see also Finance Act, 2019, s.33 (2) (1).

<sup>29</sup> Ibid, s.3.

<sup>30</sup> Ibid, s.7.

<sup>31</sup> Finance Act, 2019, s.34 which amended section 4 VAT with the substitution of 5 percent with the rate 7.5 percent.

<sup>32</sup> VAT Act, 207, ss.40.

<sup>33</sup> Ibid, 2.26.

<sup>34</sup> (1985) 3 All NTC 17 at 37.

<sup>35</sup> (1987) 3 All NTC 133 at 147.

<sup>36</sup> (2018) 36 TLRN 1 at 37.

<sup>37</sup> (2019) 47 TLRN 1 at 16.

<sup>38</sup> Cross River State Tourism development % Levy Law, 2009, s.2 (1).

<sup>39</sup> 8 All NTC 425.

following Laws;<sup>40</sup> the Hotel Licensing Law, the Hotel Occupancy and Restaurant consumption Law<sup>41</sup> and the Hotel Licensing (Amendment) Law, all of Lagos state.<sup>42</sup>

The above laws were meant to regulate and license, register, classify and grade Hotel, Motel, Guest Ins, travel agencies, tour operating outfits, resorts, cafeterias, restaurants, fast food outlets and other related tourist establishments situate and located within the geographical boundaries of the State.

The Court rejected the contention of the Minister of Justice and held that the doctrine of covering the field is only applicable to the concurrent legislative powers when validly exercised on the same subject matter. It is important to note that the court made a notable pronouncement that the federal government lacks the constitutional *vires* to make law outside its legislative competence which are by implication, residual matters for the State Assembly. The Supreme Court made it explicit that what is in the exclusive legislative list is regulation of tourist traffic<sup>43</sup> not regulation of tourism establishments.

## **2.4 Residuary Power**

This is a reserved powers or residuary power which are neither prohibited nor explicitly given by law to any organ of government. It is a general power of competence given because it is impracticable to detail in legislation every act allowed to be carried out by the state.

In *AG Ogun State v Agberugba*,<sup>44</sup> the court having regard to all relevant provisions of the Constitution said, the constitution did not confer on the federation, exclusive power over trade and commerce in item 61. The court construed the words, “in particular” in item 61 as words of limitation and not of emphasis. The Federal Government has powers with respect to international and interstate trade and commerce whilst intra-state trade and commerce are what was left for the State as a residuary matter to the States.

In *Hon. Minister for Justice & AG of federation v AG of Lagos State*,<sup>45</sup> the court held that having regard to the fact that regulation, registration, classification and grading of hotels, motels and others are not items in the exclusive and concurrent legislative lists, they are clearly, residual matters for the state.

The Supreme Court summed up the imbroglio in *AG Ogun State v Aberugba*<sup>46</sup> that a careful perusal and proper construction of section 4 of the constitution would reveal that the residual legislative powers of government were vested in the States. By residual legislative powers within the context of the section is meant what was left after the matters which the constitution expressly empowered the Federation and the State to legislate upon has been subtracted from the totality of the inherent and unlimited powers of a sovereign legislature.

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<sup>40</sup> Cap. H6, Laws of Lagos State of Nigeria 2003.

<sup>41</sup> No 30, Vol 42, Lagos State of Nigeria official Gazette 2009.

<sup>42</sup> No. 23 Vol 43, Lagos State of Nigeria official Gazette 2010.

<sup>43</sup> Constitution of the Federal Republic of Nigeria, 1999 as amended (CFRN) Second schedule, legislative list, part 1, Exclusive list, item 60 (d).

<sup>44</sup> *Supra* at 38.

<sup>45</sup> *Supra* 21-22.

<sup>46</sup> (CFRN), 1999, Chapter 11, Fundamental Objectives and Directive Principles of State Policy, s.16.

### 3. Taxing Powers of the Federation with Respect to Trade and Commerce

#### 3.1 Federal Government

The Constitution<sup>47</sup> accorded the federal government power to control the national economy in such a manner as to ensure maximum welfare, freedom and happiness of every citizen. The federal government is directed to within the context of the ideals and objectives for which provisions are made in the Constitution<sup>48</sup>, thus

- i. Harness the resources of the nation and promote national policy and an efficient, a dynamic and self-reliant economy for every citizen on the basis of social justice and equality of status and opportunity;<sup>49</sup>
- ii. To control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status of opportunity;<sup>50</sup>
- iii. Without prejudice to its right to operate or participate in areas of the economy, other than the major sectors of the economy, manage and operate the major sectors of the economy;<sup>51</sup> Note,<sup>52</sup> that the reference to the major sectors of the economy shall be construed as reference to such economic activities as may from time to time, be declared by a resolution of each house of the National Assembly by the government of the federation and until a resolution to the contrary is made by the National Assembly, economic activities being operated exclusively by the government of the federation on the date immediately preceding the day when the section comes into force, whether directly or through the agencies of a statutory or other corporation on company, shall be deemed to be major sectors of the economy.

Further, it defined the economic activities to include activities directly concerned with the production, distribution and exchange of wealth or of goods and services. Again, it clarifies to participate to include the rendering of services and supply of goods.<sup>53</sup> On the jurisdiction of the federal government, the constitution specified the participation of the federal government in trade and commerce in the exclusive legislative list,<sup>54</sup> to be limited to the trade and commerce between Nigeria and other countries including import of commodities into and export of commodities from Nigeria and trade and commerce between the States.

#### 3.2. State Government

While the constitution requires the Federation to control the national economy, it also empowers the State to participate in the development of the economy within the State. The States participation in the development of the economy is specified in the Concurrent legislative list,<sup>55</sup> thus:

Subject to the provisions of this Constitution, a House of Assembly may make laws for that State with respect to industrial, commercial or agricultural development of the State.

<sup>47</sup> CFRN, 1999 as amended, chapter 11. Fundamental objectives and Directives principles of state policy, s.16.

<sup>48</sup> Ibid, s.16 (1).

<sup>49</sup> Ibid, s.16 (1) (a).

<sup>50</sup> Ibid, s.16 (1) (b).

<sup>51</sup> Ibid, s.16 (4) (c).

<sup>52</sup> Ibid, s.16 (4) (a).

<sup>53</sup> Ibid, S. 16(4) (b) (c).

<sup>54</sup> Ibid, second schedule, legislative powers, part 1, Exclusive Legislative list, item 62 (a).

<sup>55</sup> Note that part II and concurrent legislative list is further titled; extent of Federal and State legislative powers particularly see, item H18 of the concurrent legislative list.

Note that in furtherance to the above provision, the constitution provides that nothing in the foregoing paragraphs of this item shall be construed as precluding a House of Assembly from making laws with respect to any of the matters referred to in the foregoing paragraphs.<sup>56</sup> To further show the extent of powers accorded the States in matters of trade and commerce, the Constitution<sup>57</sup> stated that it shall be the duty of a local government council within the state to participate in economic planning and development of the area referred to in subsection (2) of the section and to this end an economic planning board shall be established by a law enacted by the House of Assembly of the State.

From the above, it is clear that the control of the economy is not within the exclusive power of the Federation. Each government has a share in the control. While the Constitution requires the Federation to control the national economy, it also empowers the State to participate in the development of the economy within the State.

### **3.3 Local Government**

A local government in Nigeria, by the Constitution<sup>58</sup> participates in the development of the economy within its area of jurisdiction. The constitution provides that the system of local government by democratically elected local government councils is under this Constitution guaranteed, and accordingly, the government of every State shall subject to section 8 of this Constitution, ensure their existence under a law which provides for the establishment, structure, composition, finance and functions of such councils.

It provides that the functions to be conferred shall include those set out in the fourth schedule to the Constitution.<sup>59</sup> The functions set out therein include control and regulation of out-door advertising and hoarding; control and regulation of shops, kiosks, restaurants and other places for sale of food to the public, laundries and the development of agriculture and natural resources. These functions are invariably matters relating to trade and commerce. Again, the constitution having specifically empowered a state to confer trade and commerce power on its local governments, it must be inferred that the constitution reserves some trade and commerce power to a state. The reasoning is that it would be ridiculous for the constitution to oblige a State to give what it does not possess.

### **4. Imposition and Administration of Value Added Tax, the Nigerian Experience.**

The Constitution<sup>60</sup> provides that Nigeria shall be a federation constituting of States and a Federal Capital Territory. This defining feature of federation was in recognition of the separateness and independence, of each government that makes up the federation. The sharing of the powers of the Nigerian federation is among the tiers of government. The Constitution<sup>61</sup> provides for the sharing of legislative powers.

Further up, the Constitution<sup>62</sup> provides that the National Assembly shall to the exclusion of the States legislate on the taxation of incomes, profits and capital gains.<sup>63</sup> The limitation of the

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<sup>56</sup> CFRN, 1999, *ibid*, item H 19.

<sup>57</sup> *Ibid*, S.7 (3).

<sup>58</sup> *Ibid*, S. 7 (1).

<sup>59</sup> *Ibid*, S. 7 (5).

<sup>60</sup> Constitution of the Federal Republic of Nigeria (CFRN), 1999, S.2 (2).

<sup>61</sup> CFRN, 1999, S.4 (1) to (7).

<sup>62</sup> CFRN, 1999, s.4 (2).

<sup>63</sup> *Ibid*, Second Schedule, part 1, Exclusive legislative list, item 59, however, this is subject to any other provision in the Constitution.

National Assembly in the exercise of this power under item 59 is the provisions in item 62 of the Exclusive Legislative List. Under item 62, it is provided that the National Assembly shall to the exclusion of the State, legislate on Trade and Commerce. However, the exercise of this power is further limited to the trade and commerce between Nigeria and other countries including import of commodities into and export of commodities from Nigeria and trade and commerce between the States.<sup>64</sup>

Under the Concurrent legislative list,<sup>65</sup> the National Assembly was granted the powers in the exercise of this power to impose any taxes or duty on capital gains; incomes or profits of persons other than companies and documents or transaction by way of stamp duties; that National Assembly may subject to such conditions as it may be prescribed, provide that the collection of any such tax or duty or the administration of the law imposing it shall be carried out by the government of a State or other authority of a State.

Interestingly, there is no constitutional provision expressly providing for the imposition of consumption tax. The Constitution merely provided for the taxation of trade and commerce. Black's law dictionary<sup>66</sup> defined trade as the business of buying and selling or battering goods or services. Commerce is the exchange of goods and services especially on a large scale involving transportation between cities, states and nations.<sup>67</sup> A careful reading of the provisions of the constitution above will reveal that the intention or the wordings of the constitution is that the National Assembly shall to the exclusion of the States exercise power to impose tax on trade and commerce between states in Nigeria and between Nigeria and other countries, that is, inter-state trade and international trade and commerce. The States are left to legislate upon the items left after the items expressly mentioned had been subtracted.<sup>68</sup> Interestingly, the power of the National Assembly did not extent to trade and commerce within or intra-state of the State.

#### 4.2 Value Added Tax Act

Value Added Tax otherwise called VAT is also described or used interchangeably as consumption tax on goods and services. VAT was intended to replace the Sales tax<sup>69</sup> in 1993. The VAT came in with an enactment as the Value Added Tax Decree<sup>70</sup> and later Value Added Tax Act.<sup>71</sup> The Sales Tax Decree imposed a sales tax on such goods which included sales and services in registered hotels, motel, catering establishments, restaurants and other personal services. The Value Added Tax (Amendment) Act<sup>72</sup> was passed by the National Assembly. The current VAT Act was further amended by the Finance Act.<sup>73</sup> The Act<sup>74</sup> substituted a new section 2 of the VAT Act thus;

(2)(1) The tax shall be charged and payable on all supplies of goods and services in Nigeria other than those listed in the first schedule to the Act.

<sup>64</sup> Ibid, item 62 (a).

<sup>65</sup> Ibid, concurrent legislative list, item D paragraph 7(a) & (b).

<sup>66</sup> BA Garner, *Black's Law Dictionary*, 11<sup>th</sup> ed, (USA, Thomson Reuter, St Paul MN, West Publishing Co, 2020)1021.

<sup>67</sup> Ibid, p.9.

<sup>68</sup> *AG Ogun State v Aberuagba & ors*, (1985) 3 All NTC 17 at 21.

<sup>69</sup> Prior VAT, there were some expenditure taxes like sales tax, exercise duty payable on goods.

<sup>70</sup> Decree No 7, 1986.

<sup>71</sup> Cap. V1 LFN, 2004.

<sup>72</sup> No 53, 2007.

<sup>73</sup> Finance Act, 2020, No 4 Vol 108, Government Notice, No1, Federal Republic of Nigeria official Gazette.

<sup>74</sup> Ibid, s.40.



- (2) For the purposes of this Act, goods and services consumed or otherwise utilized in Nigeria are supplied in Nigeria.
- (3) Notwithstanding the provisions of subsection (1); a taxable supply shall be deemed to take place in Nigeria if-
- a. in respect of goods:-**
- i. the goods are physically present in Nigeria at the time of supply, imported into Nigeria, assembled in Nigeria or installed in Nigeria or
  - ii. the beneficial owner of the rights in or over the goods is a taxable person in Nigeria and the goods or rights is situated, registered or exercisable in Nigeria;
- .b in respect of a service-**
- i. the services is rendered in Nigeria by a person physically present in Nigeria at the time of providing the service.
  - ii. The service is provided to and consumed by a person in Nigeria, regardless of whether the service is rendered within or outside Nigeria or whether or not the legal or contractual obligation to render such service rests on a person within or outside Nigeria or
  - iii. The service is connected with existing immovable property (including the services of agents, experts, engineers, architects, valuers etc) where the property is located in Nigeria, and
- c. in respect of an incorporeal**
- i. the exploitation of the rights is made by a person in Nigeria,.
  - ii. the rights is registered in Nigeria, assigned to or acquired by a person in Nigeria, regardless of whether the payment for its exploitation is made within or outside Nigeria or
  - iii. the incorporeal is connected with a tangible or immovable asset located in Nigeria.

It is a further provision of the Act,<sup>75</sup> that the tax shall be computed at the rate of 7.5% which took effect from 1<sup>st</sup> February 2020, on the value of all goods and services; except that goods and services listed under part III of the first schedule to the Act which shall be taxed at zero rates.

## **5. Fiscal Federalism in Other Democracies**

The United States of America has separate federal, state and local governments with taxes imposed at each of these levels. Taxes are levied on income, payroll, property, sales, capital gains and others. Sales taxes are imposed by most states and some localities on the price at retail sale of many goods and some services. Sales tax rates vary widely among jurisdictions, from 0% to 16%.

United States does not have a national consumption tax, many countries in the world have impose some form of a national consumption tax.<sup>76</sup> The sales tax in US is a form of state tax not a federal tax. The United State is the only OECD country that employs a retail sales tax rather than principal consumption tax. The retail tax is a tax imposed at the state and local government level.

Retail sales taxes and VAT belong to the same category (Taxes on general consumption) in the OECD classification of taxes. Compared to the other OECD countries, the United States is the

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<sup>75</sup> Finance Act, 2020, s.42.

<sup>76</sup> J Kagan, 'What is a Consumption Tax', <http://www.investopedia-com>. accessed 21 February, 2022.

lowest proportion of revenue from general consumption in its total revenue (8.2%).<sup>77</sup> In Australia, a good and service tax (GST) is a Value Added Tax levied by the federal government at 10% on the supply of most goods and service by entities registered for the tax. The States and the Commonwealth entered into arrangement after the introduction of goods and services tax.

The Australian goods and services tax revenue is collected by the federal government and then paid to the states under a distribution formula determined by the Commonwealth grants Commission. Harrison<sup>78</sup> said it is interesting to note that the Australian situation is quite different to overseas experience where governments have increased their reliance upon consumption taxes as a source of revenue. There are 128 countries which operate a consumption tax known as the Value Added Tax (VAT). Over the last two decades, nearly all these countries have adopted this more modern form of consumption tax. Australia and the United States are the only OECD countries not to have VAT.

Australia does have a wholesale sales tax on goods imposed at the federal level while the United States has a broad retail based sales tax imposed at the state level. In interpretation of the inter-state commerce clause of the Constitution of the United States, the Supreme Court has consistently held the taxing of goods coming from other states as such to be unconstitutional because such tax is a regulation of inter-state commerce.<sup>79</sup> In *Brown v Houston*,<sup>80</sup> the court held that no state has power to make any law or regulation which will affect the free and unrestricted intercourse and trade between the states, on which will impose any discriminating burden or tax upon the citizen or products of other states coming or brought with its jurisdiction.

However, the court upheld the validity of the state tax law in that case because the particular product of inter-state commerce that had been brought into the state had intermingled with the local products and the tax was imposed on both the inter-state product and the local products. It was not a discriminating tax.

Again, the court in Australia took similar stance in the interpretation of section 92 of their Constitution which guaranteed freedom of inter-state trade and commerce. In *Fox V Robbins*,<sup>81</sup> the court declared unconstitutional a State licensing law which impose higher fee for the sale of wine brought into the State than the fee for the sale of local wine.

Note, unlike Nigeria constitution, the Constitution of the United States did not specifically prohibit a state from making laws which would interfere with the freedom of inter-state commerce. The guarantee was secured by judicial interpretation. Nigerian Constitution is specific. In clear terms section 4 (3) prohibited the States from making laws with respect to any matter in the Exclusive List, which includes inter-state trade and commerce.

<sup>77</sup> OECD (2020) Revenue statistics 2020, OCED publishing pars <https://doi.org/10.1787/8625f8e5-en> or D-Bradbury, centre from Tax Policy and Administration, Head, Tax Policy and Statistics Division at David. Bradbury@oecd.org.

<sup>78</sup> J Harrison, Commerce and Industrial Relations Group, 22 September 1997, <http://www.aph.gov.au>. accessed 21 February, 2022.

<sup>79</sup> *Nippert v City of Richmond* 327 US. 416: *Carter v Clarle* 67 SCE.815.

<sup>80</sup> 114 US. 611 at 630.

<sup>81</sup> (1909) 8 CLR 115.

## **6. The VAT War-whether Economic or Political**

The outbursts that followed the decision of the Federal High Court sitting at Port Harcourt in *AG River State v FIRS* indicates political animosities rather than strengthening and stabilizing the Nigerian economy. Adedoku<sup>82</sup> thus said, outburst accompanying these current court processes that indicate deep-seated animosities and suggest less than altruistic motives. This opinion was echoed as a result of the outburst of the Rivers State Governor, Nyesom Wike, that what accrued to his state is small compared to what accrues to Kano State in terms of what each contributes to the pool.

It has to be observed that the struggle is not all about the emancipation of the people economically, that necessitates the battle for who has the requisite jurisdiction to impose and administer VAT and tourism sector. The struggle is not unconnected to the huge amount of money that the sector yields to the government. The imbalance in the sharing, that is, the huge amount collected by the federal government from the area and there is nothing to show for it in the various states that contributed majorly for it.<sup>83</sup> It is important to restate the event and incident that followed the passage of the North-East development Commission Bill at the National Assembly on 13<sup>th</sup> day of October, 2016. The Bill proposed for the setting out 3 percent of what accrues to the federal government for 10 years.

In reaction and contributing to the debate, the three senators from Lagos State protested that what is good for the goose is also good for the gander. It was stated that the Lagos State contributes 68 percent of VAT and request that the other members to support their bill on strategic funding of Lagos State. The bill sought for the request for approval of not less than 1% VAT to Lagos State.

One can see that the above have created the impression that the present distribution from the pool benefits the Northern States more than the Southern States. It points to the fact that VAT is another part of the Northern hegemonies agenda. The VAT controversy should not be between the North and the South. All hands should be put together towards getting a formula that will engender progress, benefit all Nigerians in all States and set pace for industrialization.

## **7. Conclusion**

Consumption taxes are a significant source of revenue for governments across the world. Despite the potentials of consumption tax as a sufficient source of tax revenue, many governments including Nigeria are immersed in a battle of which of either the federal or state government had the jurisdiction to impose and administer it. Value added tax, Sales tax and Tourism tax are the types of consumption tax that have witnessed a lot of power tussle or debate of who has control of each.

The consumption tax should only be levied by the tax jurisdiction where the goods and services are consumed. The constitutional demarcation and boundaries of the government on the power to impose same should be respected to reduce rancor in the drive to control and administer the tax.

A State has the power to impose tax on all matters in the concurrent legislative list, save prohibited by the same constitution and the residuary matters. This means that state taxing

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<sup>82</sup> N Adedokun, 'VAT War: Political or Economic in the Casle network', the cable.ng of 16/09/2021.

<sup>83</sup> KJ Bielu, 'Legal Regime for Achieving an Effective Revenue Generation in Nigeria issue and prospects', a Dissertation presented to the faculty of law, Nnamdi Azikiwe University, Awka in partial fulfillment for the award of Doctor of philosophy (PhD) Degree in Law in August, 2017 page 37.

power over the concurrent matters is subject to the rule of inconsistency under section 4 (5) of the Constitution and the doctrine of covering the field. It is axiomatic that in the absence of any constitutional provision express or implied, to the contrary, the respective taxing power of the federation and of a State includes consumption tax. The federal government is entitled to levy consumption tax do the same only within its competence.

### **8. Recommendations**

For there to be a harmonious regulation of the consumption tax administration in Nigeria, the following suggestions are paramount,

- i. A constitutional amendment is imperative, items 62 in the Exclusive legislative list should be made to be restricted to inter-state and international trade and commerce. The phrase in particular in the specification of areas of control of the federal government should be removed.
- ii. The State should be free to impose and administer consumption tax within its jurisdiction; however, areas that will generate conflict and result in intolerable discriminations and neighbourly frictions should be avoided.
- iii. Wherever, the consumption law either with the name VAT or sales tax is made by the state, it must be emphasized that it should be within the competence of a state to make any law not to affect matters in the exclusive legislative list
- iv. There should be an understanding between the stake holders to be moderated by the Joint Tax Board on the issues emerging from the exercise of the powers by the two governments to avoid double taxation.