NIGERIA'S VALUE ADDED TAX ACT AND THE MURKY WATERS OF ADMINISTRATION, COLLECTION AND VALIDITY.

by Olusegun Mabawonku

INTRODUCTION

Taxation is the livewire of any low-income country whose export earnings does not contribute a significant part of its annual Gross Domestic Product due to trade deficit.

While taxation remains an obligation, there exists various of these obligations imposed by the Government of Nigeria of which value added tax is one. Value added tax unlike other kind of taxes is an indirect tax borne by the final consumer of goods and services that are subjected to this tax. It spreads through the whole value chain/supply process and ends up on the invoice of the person benefitting from the goods supplied or services rendered.

Similar to value added tax is the sales tax operated in some jurisdictions and charged on supply of goods and services. While both taxes are consumption and indirect taxes borne by the final consumer, what differentiates them is the collection mechanism. Unlike sale tax that is collected by the retailer at the final point of sale in the supply chain, value added tax is collected by sellers at each stage of the supply chain i.e. from the manufacturer- distributor-wholesaler-retailer-final consumer.

Value added tax is mostly preferred by the government due to the fact that revenue is collected all through the chain of supply unlike the sale tax which is paid only at the final point of sale by the final consumer of the goods supplied or services rendered.

According to the National Bureau of Statistics Sectorial Distribution of Value Added Tax[2]. Nigeria generated N275.12bn in the Q3 of 2019; N324. 58bn in Q1 2020; N327.20bn in the Q2 of 2020; N424.71bn in the Q3 of 2020; N454.69bn in the Q4 of 2020 and N496.36bn in the Q1 2021 as Value added tax.

The value added tax in Nigeria is taxed pursuant to the provisions of the Value Added Tax Act[3]and the relevant amendments in the Finance Act of 2019[4]which set the VAT rate at 7.5% from the usual 5% of the value of all taxable goods and services as contained in the VAT Act, and the cumulative provisions of the Finance Act 2020 [5] which set the effective date.

Generally, all goods and services apart from those listed to be exempted in the VAT Act are chargeable to VAT either at zero rate or at 7.5% of the value of the goods or services. The following goods are exempted from VAT: medical and pharmaceutical products; basic food items; books and educational materials; baby products; fertilizer; locally produced agricultural and veterinary medicine; farming machinery and farming transportation equipment; all exports; plant; machinery and goods imported for use in the export processing zone or free trade zone: provided that 100 percent production of such company is for export; plant, machinery and equipment purchased for utilisation of gas in down-stream petroleum operations; Tractors; ploughs and agricultural equipment and implements purchased for agricultural purposes; locally manufactured sanitary towels, pads or tampons; commercial aircrafts; commercial aircraft engines, commercial airlines registered in Nigeria

Also, the following services are exempted from VAT: medical services; services rendered by microfinance banks; people's banks and mortgage institutions; plays and performances conducted by educational institutions as part of learning; all exported services; tuition relating to nursery, primary, secondary and tertiary institutions; airline transportation tickets issued and sold by commercial airlines registered in Nigeria; hire, rental or lease of tractors, ploughs and other agricultural equipment for agricultural purposes".

The following are classified as zero-rated[7] goods and services: non-oil exports; goods and services purchased by diplomats; goods purchased for use in humanitarian donor funded projects "humanitarian donor funded projects" includes projects undertaken by Non Governmental Organisations and religious and social clubs or societies recognised by law whose activity is not for profit and in the public interest[8].

ADMINISTRATION VAT IN NIGERIA

The Federal Inland Revenue Service (FIRS) is saddled with the administration of the tax[9].The VAT Act further mandates every taxable person to register upon commencement of business with FIRS for the purpose of the tax.[10].

Furthermore, every ministry, statutory body and other agency of government are compelled to register as collecting agents of the FIRS and production of evidence of registration with the FIRS shall be a condition precedent before any contractor transacting business with the Federal, State or Local Government shall be awarded any such contract.

All non-resident company that carries on business in Nigeria are to register for VAT with the FIRS, using the address of the person with whom it has a subsisting contract, as its address for purposes of correspondence relating to the tax and such taxes shall be include in its invoice which the person to whom the goods or services are supplied in Nigeria shall withhold and remit the tax to the FIRS in the currency of the transaction. [11] All registered persons shall keep such records and books of all transactions, operations, imports and other activities relating to taxable goods and services as are sufficient to determine the correct amount of the tax due [12].

Prior to the enactment of the Finance Act 2019, the VAT Act ensured an all-inclusive participation of the respective States and the FIRS in the administration of value added tax by creating a Value Added Tax Committee referred to as the 'Technical Committee'[13]comprising of the chairman of the FIRS, all the directors of the FIRS, the legal adviser of the FIRS, a director of the Nigerian Custom Services and three representatives of the State Governments who shall be members of the Joint Tax Board[14].

However, notwithstanding the scrapped Technical Committee, Section 40 of the VAT Act allows for the redistribution of the revenue collected by the FIRS and its appointed collecting agents thus:

"Notwithstanding any formula that may be prescribed by any other law, the revenue accruing by virtue of the operation of this Act shall be distributed as follows- (a) 15% to the Federal Government; (b) 50% to the State Government and the Federal Capital Territory, Abuja; and (c) 35% to the Local Government: provided that the principle of derivation of not less that 20% shall be reflected in the distribution of the allocation amongst States and Local Governments as specified in paragraphs (b) and (c) of this section."

The above section to my mind, seeks to cater for the agitations of the various State actors who might want to and have been raising objections to the placing of the administration and collection of Value Added Tax in the Federal Inland Revenue Service, considering the fact that VAT charged on good and services rendered within the States may be argued, as ought to be collected by the relevant State Internal Revenue Services.

CONFLICT IN THE ADMINISTRATION AND COLLECTION OF VAT

While the VAT Act place in the exclusive domain of the FIRS, the administration of value added tax in Nigeria[15],the Federal Inland Revenue Service Establishment Act provides in Section 25(1) thus:

"The Service shall have power to administer all the enactments listed in the First Schedule of this Act and any other enactment or law on taxation in respect of which the National Assembly may confer power on the service."

A perusal of the First Schedule to the FIRS Establishment Act reveals the Value Added Tax Act as one of the Acts the FIRS is empowered to administer. In addition to this, the Taxes and Levies (Approved List for Collection) Act provides that notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria (as amended) or in any other enactment or law, the Federal Government shall be responsible for the collection of Value Added Tax.[16] This provision is a bold one as it is couched to override any conflicting provisions of any other enactment.

Query: To what extent will this be valid where its provisions are seen to be in conflict with that of the Constitution. Section 1(1) and (3) of the Constitution of the Federal Republic of Nigeria provides for its supremacy:
"*This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria… if any other law is inconsistent with the provision of this Constitution, this Constitution shall prevail and that other law shall to the extent of the inconsistency be void*[17].

This question has recently been answered by the Court of Appeal in Uyo Local Government V. Akwa Ibom State Government & Anor[18]. (2020) LPELR-49691 (CA) Pp. 31-36, Paras D-B where the Court of Appeal invalidated the whole Taxes and Levies (Approved List for Collection) Act thus:

"The supremacy of the constitution is never in doubt and section 1(3) above is to the effect that if any other law is inconsistent with the provisions of the constitution, the constitution shall prevail and that other law shall to the extent of its inconsistency be void. I am also of the view that having commenced its provisions with a clause that undermines the supremacy of the constitution, there is nothing that can operate to save any part of that law. Thus, the virus in the introductory clause of the Act has infested the entire Act and thereby rendering it unconstitutional."

The outcome of the Appeal to the Supreme Court is awaited.

There currently exists, pending and imploding conflicts which the Courts have in recent times, taking divergent position on with respect to: the powers of the FIRS to collect VAT on goods and services rendered and supplied in a State; the powers of the States to enact their own Value Added Tax or Sales Tax or Consumption Laws and the big question of the Validity of the Value Added Tax in itself. I shall attempt to address these issues in the light of Judicial decisions in this regard.

Divergent Positions

There seems to be a misinterpretation of the locus classicus case of Attorney General Ogun State V. Aberuagba (1985) 1 NWLR (Pt. 3) 395. In this case, the issue in contention as slated by Mohammed Bello JSC (as he then was) in his leading judgment, concerned the Federal and State taxing powers having regard to the provisions of the 1999 Constitution of the Federal Republic of Nigeria. What was in issue was the validity of the exercise of its legislative powers by the Ogun State House of Assembly in enacting the Sales Tax Laws of 1982, which imposed a tax on the purchase of specified goods and services and made provisions for the collection of same. His lordship, Bello JSC (as he then was) held as follows:

"Accordingly, I hold that in so far as the Law purports to impose sales tax on taxable products brought in the state, it offends the provisions of inter-state or international trade and commerce and contravenes Section 4(3) of the Constitution of the Federal Republic of Nigeria, 1999. I declare the law unconstitutional to that extent. Furthermore, item 61(e) empowers the Federation to control the prices of goods and commodities. Under the Price Control Act 1977 and the Price Control Commodities, Order 22 1979, the Federal Government has controlled the prices of petrol, diesel oil and petroleum products. I have earlier shown that the Act and the Order are existing laws. Since the sales tax is intended to be paid by the consumer, it is tantamount to an increase in my view in the prices of the taxable product, namely petrol, diesel oil and petroleum the prices of which have been controlled by the Federal Government. That being the case, I hold the sales tax to be inconsistent with the Price Control Act and the order made thereunder. Consequently, the Sales Tax on petrol, diesel oil and other petroleum products is unconstitutional, null and void. Having regard to the following, I may summarize that the Federation has implied exclusive power to make sales tax in all matters within the exclusive and concurrent list, while the states have implied or residuary power to enact sales tax law on all matters outside the said list".

A curative look at the above dictum will reveal that the Supreme Court in Aberuagba's case never said the State House of Assembly cannot make Sales Tax Laws or collect consumption taxes, but it had to be on items not contained in the Exclusive Legislative List and where the State enacts sales tax laws on items contained in the Concurrent list which the National Assembly has already legislated upon, then such a law if it contains a provision inconsistent with that of the National Assembly, will be null and void to the extent of its inconsistency, where there exist no inconsistency, such a law enacted by the State will become inoperative in accordance with the doctrine of covering the field[19].

This position was reverberated in the case of A.G. Lagos State V. Eko Hotels Ltd (2019) All FWLR Pt. 1006 Pg. 643 where the major issues was; who was entitled between the Federal Inland Revenue Service and the Lagos State Revenue Service, to collect from Eko Hotels Ltd. the money due from the latter as tax on its sales to its customers, pursuant to the provisions of the Value Added Tax Act (Decree) N0. 102 of 1993 and Sales Tax Law Cap. 175 of Lagos State.

The supreme Court in A.G. Lagos State V. Eko Hotels Ltd. (Supra) Was careful in restricting itself to the issues of who is entitled to collect the money already taxed and expressly refused to comment on the issue of the Validity of the VAT Act, since it was not an issue before it. Per Kekere-Ekun JSC at page 675 Paras. F-A stated:

"It is necessary to reiterate here that the issue in dispute in this case is not the constitutionality of the Sales Tax Law of Lagos State nor the validity of the Value Added Tax Act… thus, the issue upon which the learned trial judge predicated his judgment was the single question raised by the plaintiff in its originating summons, to wit: "whether remittance of money collected as tax by the plaintiff on it sales to its customers be paid to Federal Board of Inland Revenue (1st Defendant/2nd respondent) or Lagos State Government (2nd defendant/appellant in view of provisions of sections 1, 2, 10, 11, 12, 13, 14, 15 and 16 of the Value Added Tax Decree No. 102 of 1993 and Sections 1, 2, 3, 4, 5 and 6 of the Sales Tax Law Cap. 175 and Sales Tax (Schedule Amendment) Order 2000."

The Supreme Court in restricting itself to the issue raised, went ahead to hold that by virtue of Section 315 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) by which the Value Added Tax Act (an existing law) became an Act of the National Assembly, the provisions of the VAT Act had covered the field on the goods and services sought to be taxed at the same rate by the Lagos State Tax Law. As such, the Lagos State Sales Tax law will be inoperative and the money collected by Eko-Hotels from its customers be remitted to the FIRS in line with the provisions of the Value Added Tax Act. This represents the current position as at date.

There have also been pockets of conflicting decisions of the Federal High Court with respect to the powers of the State to make consumption tax laws on goods and services rendered by Hotels, Event Centers and restaurants to their customers. While the powers of the state to make laws regulating the activities of Hoteliers has been laid to rest by the supreme Court in A.G. Federation V. A.G. Lagos[20], the issue of collection of consumption tax (a sale tax) from hotels restaurant and event centers[21] remains unsettled. In 2018, the Federal High Court nullified the Kano State Consumption Tax Law on the basis that it imposed consumption tax at 5% on goods and services which were already subject to VAT[22]. However, in 2019, the Federal High Court sitting in Lagos State in The Registered Trustees of Hotel Owners & Managers Association of Lagos v. AG Lagos & Anor[23]held that based on the provisions of the 1999 Constitution and the Taxes and Levies (Approved List for Collection) Act, the powers to impose consumption tax was residual and within the purview of the State and further restrained the FIRS from imposing VAT on goods and services consumed in hotels, restaurants and event centers covered under the Hotel Occupancy and Restaurant Consumption Laws of Lagos State. The Court relied on Part II Item 13 of the Tax and Levies (Approved List for Collection) Act, pursuant to the provisions of the Schedule to the Taxes and Levies (Approved List for Collection) Act (Amendment) Order, 2015 which included Hotel, Restaurant or Event Centre Consumption Tax as one of the Taxes and Levies to be collected by the State Government.

Query:

a.Can the Finance-Minister pursuant to powers under Section 1(2) of the Taxes and Levies (Approved List for Collection) Act, Cap T2 LFN 2004, make an Order that seeks to render inoperative the powers conferred on the FIRS pursuant to the VAT Act?

b.To what extent is the Validity of the Taxes and Levies (Approved List for Collection) Act, Cap T2 LFN 2004 and the Order made thereto in 2015, when the principal legislation itself has been held to be invalid by the Court of Appeal in the case of Uyo Local Government V. Akwa Ibom State Government & Anor (Supra) for being inconsistent with the provisions of the Constitution.

These are salient issues the Courts will have to consider in nearest future.

VALIDITY OF THE VAT ACT

Amidst the divergent decisions of the Federal High Court, a particular position is of utmost interest and ought to be keenly pursued as it has the capacity to radically change Nigeria's VAT regime.

The Value Added Tax was imposed by Decree No. 102 of 1993 which was later assumed to have become an Act of the National Assembly by virtue of Section 315(1)(a) of the 1999 Constitution (as amended), which made all existing laws prior to the Constitution, with respect to which the National Assembly is empowered to make laws on, an existing law with such modifications as may be necessary to bring it inform with the Constitution thus:

"(1) subject to the provision of this constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this constitution and shall be deemed to be-

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

It is beyond ambiguity that for any law in existence before the Constitution was promulgated to be an Act of the National Assembly, it must be a law on a subject with respect to which the National Assembly is empowered by the Constitution to make laws on.

The question then is, is Value Added Tax a subject which the National Assembly can validly make laws on? This question was left unanswered by the Supreme Court in the case of A.G. Lagos V. Eko Hotels Ltd (Supra) because it was considered not to be in issue before the Court. However, the Federal High Court has recently answered this question in the case of Ukala V. FIRS.[24] and Attorney General of Rivers State V. FIRS & Anor[25]. Where the Federal High Court held that the taxing powers of the National Assembly is limited to Item 59 of Part 1 of the Second Schedule and by stretch, Item 7 of the Part II of the Second Schedule of the 1999 Constitution of the Federal Republic of Nigeria 1999 (as amended), respectively. The Court held that what the National Assembly has power to make tax laws on are: Taxation of Incomes (company and personal), profits and capital gains and stamp duties on documents and transactions. As such, the FIRS is not empowered to administer Value Added Tax nor could such powers be delegated to it since Value Added Tax is within the residual domain of the States[26].

While this may have an economic implication on the revenue accruing to the Federal Government and other State actors, I am inclined with the above position which goes back to question the applicability of the doctrine of covering the field that was relied on in the A.G. Lagos V. Eko Hotels Ltd (Supra) and has been relied on in a host of subsequent decisions on this issue.

It is trite that an Act of the National Assembly for the purpose of covering the field can only be said to be a "predominant paramount" legislation if it is validly enacted or could be deemed to have been validly enacted with respect to any matter the National Assembly is empowered by the Constitution to make laws on.

The Supreme Court in A.G. Lagos V. Eko Hotels Ltd (Supra) ought not to have shied away from determining the Validity of the VAT Act and the Sales Tax Law vis-à-vis the respective powers of the National and State Houses of Assembly under the Exclusive and Concurrent Legislative Lists.

The Supreme Court by holding that the VAT Act had already covered the field without first determining the validity of the VAT Act in itself was putting the cart before the horse. It is one thing that the VAT Act by virtue of being in existence before the 1999 Constitution qualified to be considered to be an Existing Law under Section 315 of the Constitution, it is another thing to consider whether the VAT Act could have been validly made by the National Assembly giving the provisions of the Constitution.

Where one of this condition precedence is missing, an Act no matter how beautifully worded cannot be considered to be an existing law, not to mention being held to have covered the field. The determinant factor for the applicability of the doctrine of covering the field is hinged on the validity of the predominant legislation.

CONCLUSION

Although the Value Added Tax Act has been in existence for about 28years, its application still remains an issue from which different conflicts keep arising. The administration, collection and validity of the VAT Act is still largely unsettled. Though not a new concept, it remains a gray-area as the jurisprudence of this tax is yet to be properly developed and maximally harnessed.

Both the Federal and State Governments require revenue to enable it fulfill its obligations to the citizenry under the social contract theory. It will therefore, be a herculean task between the Federal Government tax agencies and State agencies unless there is a proper delimitation of the goods and services subject to VAT and Sales Tax respectively and the validity of the VAT Act is resolved.

Where this is not done, taxpayers will be faced with the burden of double taxation, continuing dilemma of the appropriate taxing authority to file returns and remit monies deducted to and the attendant fines and penalties in the event that such taxes have been paid to the wrong taxing authority before these conflicts are resolved.

RECOMMENDATIONS.

There is therefore need for a consensus of all stakeholders i.e. Legislature, Executive, Judiciary, FIRS and States Internal Revenue Services. In-order to reach a lasting solution to these conflicts, I am recommending the following:

1.An amendment of the Constitution of the Federal Republic of Nigeria to reflect the current realities or in the alternative;

2.The FIRS Establishment Act, VATA and Taxes and Levies (Approved List for Collection) Act be amended to make the FIRS a central record registry alone (for filing of input and output VAT returns) only, while the States are responsible for collecting the VAT they generate. OR;

3.VAT be abolished and replaced with Sales Tax to be collected at the final point of sale and administered solely by the States.

REFERENCE

[1]By: Olusegun MABAWONKU.
[2]https://www.nigerianstat.gov.ng/pdfuploads/Sectoral_Distribution_Of_Value_Added_Tax_Q3_2020.pdf https://www.proshareng.com/news/Taxes%20&%20Tariffs/N496.39bn-Generated-as-VAT-in-Q1-2021---NBS/57152
[3] Section 1: "There is hereby imposed and charged a tax to be known as the Value Added Tax (in this Act referred to as "the tax") which shall be administered in accordance with the provisions of this Act".
[4] Section 5 of the VAT Act (amended by Section34 of the 2019 Finance Act) provides thus: "Section 4 of the Value Added Tax Act is amended in line 1 by substituting for the expression, 5%, the expression, 7.5%"
[5] Section 42 of the Finance Act 2020 provides: "The tax shall be computed at the rate of 7.5% with effect from 1 February 2020, on the value of all goods and services, except that goods and services listed under Part III of the First Schedule to this Act shall be taxed at zero rate".
[6] First Schedule to the VAT Act with amendments contained in Section 47 of the Finance Act 2019 and Section 45 of the Finance Act 2020.
[7] Goods liable to VAT but at zero percent.
[8] Part III of the VAT Act.
[9] Section 7 of the VAT Act.
[10] Section 8 of VAT Act amended by Section 35 of the Finance Act 2019 (a punishment of N50,000 for the first month in which failure to register occurs; and N25,000 for each subsequent month in which the failure continues) and where a taxable person permanently ceases to carry on a trade or business in Nigeria, the FIRS is to be notified of its intention to deregister for tax purposes within 90days of cessation of trade or business.
[11] Section 10 of VAT Act amended by Section 36 of the Finance Act 2019
[12] Section 11 of the VAT Act
[13] Section 21 – 24 of the VAT Act (now deleted by the provisions of Section 41 of the Finance Act, 2019.
[14] Established pursuant to Section 86(1) of Personal Income Tax Act cap. P8, LFN, 2004, comprising of: The executive chairman of the FIRS serving as the chairman of the JTB; One member from each state being experienced in income tax matters nominated by the state; Representatives of Federal Road Safety Commission, Federal Capital Territory Administration, Federal Ministry of Finance and Federal Inland Revenue Services; a Secretary and a Legal adviser.
[15] Section 7
[16] Section (1) Part 1
[17] Abacha V. Fawehinmi (2000) 4 SC (Pt. II) 1 (2000) 6 NWLR (660) 228.
[18] Judgment delivered on Friday, 22nd May, 2020
[19] The doctrine renders the paramount legislation predominant and the subordinate legislation remains inoperative so long as the paramount legislation remains operative. Where there is obvious inconsistency, the subordinate legislation is void. AG. Ogun State v. AG. Federation (1982) NSCC (Vol. 13) 1 at 35 lines 18 - 30
[20] [2013] 6 NWLR (Pt. 1380), 249 at 303
[21] Hotel Occupancy and Restaurant Consumption Law, Cap H8, Laws of Lagos State, 2015 and Hotel Occupancy and Restaurant Consumption (Fiscalisation) Regulation 2017
[22] Nigeria Employers Consultative Association (NECA) & Anor. V. Attorney General of the Federation & Two Others (Suit No: FHC/ABJ/CS/965/2017).
[23] Unreported judgment delivered by Hon. Justice R. M. Aikawa of the FHC in Suit No. FHC/L/CS/360/201
[24] (2021) 56 TLR 1
[25]Suit No. FHC/PH/CS/149/2020
[26]Notwithstanding the Appeal lodged by the FIRS to the Court of Appeal, Rivers State has proceeded to pass a Value Added Tax Law on the 19th of August, 2021.

OLUSEGUN MABAWONKU
ASSOCIATE
segun@rouqandco.org