



## VALIDITY OF THE VAT ACT IN VIEW OF RECENT JUDICIAL PRONOUNCEMENTS

The Value Added Tax Act, LFN 2004 (VATA) is the enabling law imposing Value Added Tax (VAT) on the supply of taxable goods and services in Nigeria, and in furtherance of this, the Act has empowered the Federal Inland Revenue Board to be responsible for the administration and collection of this tax.

It is trite that "Acts" in Nigeria are laws enacted by the National Assembly, that is, the law making body at the Federal level. The 1999 Constitution (as amended) empowers the National Assembly to legislate on matters contained in the Exclusive and Concurrent Legislative list provided in the 2<sup>nd</sup> schedule of the Constitution, and by necessary implication, the National Assembly does not constitutionally possess the power to legislate on matters not specifically listed, save for instances where the constitution itself has permitted same.

In light of the above, the powers of the FIRS to administer and collect VAT as provided in VATA, and in fact the validity of the VATA itself has constantly been a subject of contention, as there have been various arguments to the effect that when it comes tax matters, the National Assembly may only legislate on matters pertaining to profits/income of persons/companies, capital gains and stamp duties on instruments listed as items 58 & 59 on the Exclusive Legislative list, and that VAT which is a Sales/Consumption tax is not covered on the list.

These claims have usually been decided by the courts in favour of the FIRS. One of these important decisions can be found in the case of Attorney General of Lagos State v. Eko Hotels and Another, where the Supreme Court held that the VATA being an enactment of the National Assembly has covered the field on the issue of Sales Tax and prevails over the then Sales Tax Law of Lagos State.

Things however took a dramatic turn for the FIRS when the court in Federal High Court in **Ukala v. FIRS** held that the National Assembly had no power to enact the VAT Act, thereby lending credence to the Plaintiff's position that the constitutional powers of the Federal Government to impose taxes are limited to the items listed in Item 59 of Part 1 of the 2<sup>nd</sup> Schedule to the 1999 Constitution (as amended) and does not include the power to impose VAT.

## RECENT PRONOUNCEMENTS OF THE COURTS: EMMANUEL CHUKWUKA UKALA v. FIRS; AG OF RIVERS STATE v. FIRS

In 2020, the Plaintiff in **Ukala's** case through an Originating Summons sought before the Federal High Court amongst other reliefs, the following:

- A declaration that there is no constitutional basis for the imposition, demand and collection of Value Added Tax (VAT) by the Defendants (FIRS) from the Plaintiff being that the constitutional powers and competence of the Federal Republic of Nigeria and the Federal Government of Nigeria is limited to the taxation of incomes, profits and capital gains which does not include Value Added Tax or any other species of sales tax;
- A declaration that in so far as the Value Added Tax Act purports to impose, levy or authorize the demand and collection of Value Added Tax by the FIRS or any other agency of the Federal Government, it is unconstitutional, illegal, null and void to the extent of its inconsistency with the provisions of the 1999 Constitution of Nigeria, as amended;
- A declaration that all the statutory provisions made or purportedly made in exercise of the legislative powers of the Federal Republic of Nigeria, which contain provisions which are inconsistent or in excess of the powers to impose tax as prescribed by item 59 of Part 1 of the Second Schedule of the Constitution or in excess of the power to delegate the duty of collection of taxes are to the extent of their inconsistency or excess, unconstitutional, null and void.

Following a consideration of the arguments put forward by both parties, the court held that a combined reading of items 59 of the Exclusive list and items 7-10 of the Concurrent list shows that the express mention of taxation of incomes, capital gains, and duties on documents and transactions expressly excludes any references to any tax, levies, rates and fees. The court further held that vesting the National Assembly with the powers to arrogate itself the authority to allocate powers to impose, levy or collect any form of Sales Tax including Value Added Tax is considered contrary to the express provisions of the 1999 Constitution.

A similar stance to the decision of the Federal High Court in the above matter has now even more recently been taken in the case of **Attorney General of Rivers State V. Federal Inland Revenue Service**, where the powers of the FIRS to enforce and administer taxes not expressly listed under items 58 and 59 of Part 1 of the Second Schedule to the 1999 Constitution was again in question.

The Federal High Court sitting in Rivers State held:

- That the provisions of the Constitution must be interpreted literally as the words are plain and unambiguous;
- Tax laws must be construed strictly, with no room for presumption or intendment, and therefore the specific mention of some types of taxes under the Exclusive Legislative List, is deemed to exclude other types of taxes not expressly mentioned therein;
- The Constitution empowers the Federal Government to enact laws in relation to stamp duties, taxation of income/profits and capital gains only;
- The Federal Government has no constitutional authority to impose and collect VAT or any other sales tax, Withholding Tax, Education Tax and others not specifically stipulated;
- The National Assembly may only delegate the powers to administer or collect taxes to the State government, failure of which will render such delegation null and void;
- The Taxes and Levies (Approved Collection List) Act is unconstitutional, and any tax or levy provided for therein is void, except same is provided for by the Constitution or any other law made by a competent legislature.

The FIRS has however sought an appeal of this decision, and the matter is now before the Court of Appeal.

## COMMENTARY

The superiority of the constitution over any other law enacted by the legislature (irrespective of the level of government) cannot be over emphasized, and where there are inconsistencies between the provisions of the constitution and any other enactment on a subject matter, such becomes null and void to the extent of its inconsistency. However, one must not forget that the powers to determine the intentions of any enactment (including the constitution) regarding a subject matter is the exclusive preserve of the courts. These pronouncements in themselves become laws, especially when issued by the apex courts and can only be overturned when that law is amended.

Therefore, it is advisable that tax payers and tax advisers alike to maintain the status quo on VAT compliance pending the final determination of the matter by the courts or otherwise, to avoid incurring unnecessary tax liabilities in the event same is ultimately decided in favour of the FIRS.

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