REVISITING SECTION 40 OF THE VALUE ADDED TAX ACT: LEGAL THEORIES FOR AMENDING AND EXPUNGING SPECIAL ACCOUNT ADMINISTERED BY FEDERATION ACCOUNT ALLOCATION COMMITTEE

Olumide K. Obayemi*

ABSTRACT

This paper proposes legal theories and strategies for amending and/or abolishing the Special Account presently being administered by the Federation Account Allocation Committee (FAAC) under Section 40 of the Value Added Tax (VAT) Act. The solution to the VAT issue is simple. State-sourced VAT revenue belongs to the States. However allocation of federal sourced VAT revenue should be shared on the basis of derivation principle similar to the provision under Section 163 of the Constitution of the Federal Republic of Nigeria (1999) which governs proceeds accruing from stamp duties and capital gains tax. In addition, all VAT revenue collected by the Nigerian Customs Service (NCS) on account of imports and exports should be paid into the Federation Account to be shared by all the federating units. The fiction that all countries operating federal consumption tax regime have adopted the VAT format is inaccurate. Both the United States of America and India use sub-national Sales Tax regimes as opposed to a federal VAT. However, such a

law by the National Assembly would require an amendment to the 1999 Constitution. The paper also argues for increasing the powers of sub-national (State) governments to administer and collect revenue accruing from consumption taxes in Nigeria. In most federal constitutions, sub-national States usually have legal control over consumption taxes over and above the federal national governments. This paper proposes that the individual Nigerian sub-national States should possess an independent and uncontrollable authority to raise their revenues to support their own wants. In effect, with the sole exception of duties on imports and exports, the individual Nigerian sub-national States should retain taxing powers and authority over consumption taxes in the most absolute and unqualified sense; and any attempt on the part of the federal government to abridge them in the exercise of such powers, would be a violent assumption of power unwarranted by any article or clause of the Constitution. In conclusion, the paper recommends that Section 40 of the VAT Act be amended and/or expunged to meet the Consolidated Revenue Fund Account requirements under Sections 80 and 81 and other relevant provisions of the Constitution of the Federal Republic of Nigeria of 1999.

Key Words: Tax, Nigeria Value Added Tax, VAT, Special Account, Federal Account, Allocation, FAAC

1. INTRODUCTION

In Nigeria, extant Section 40 of the Value Added Tax Act (VAT Act)[1] provides for the creation of the "Special Account" presently being administered by the Federation Account Allocation Committee (FAAC) and for distributing the revenue accruing from the collection of Value Added Tax (VAT) which is contained in the Special Account. The distribution formula under Section 40 of the VAT Act is diametrically different from the procedure prescribed for the administration of other federal revenue as contained in the Consolidated Revenue Fund (CRF) Account under Sections 80 and 81 of the Constitution of the Federal Republic of Nigeria of 1999 (CFRN).[2] In this regard, Section 40 of VAT Act states thus:

> Distribution of revenue
>
> Notwithstanding any formula that any other law may prescribe, 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 Governments and the Federal Capital Territory, Abuja; and
>
> (c) 35% to the Local Governments:

*Department of Commercial & Industrial Law, Faculty of Law, University of Lagos, Akoka, Yaba, Lagos. (E-mail: obayemilaw@yahoo.com / Mobile: 011 234 (0) 818 571 8484).

[1]. Value Added Tax Decree No. 102 of 1993, now contained in the Value Added Tax Act Cap V1 Laws of the Federation of Nigeria (2004). (VAT Act).

[2] Constitution of the Federal Republic of Nigeria of 1999, Cap C23 Laws of the Fermion of Nigeria (2004). (1999 Constitution).

> The principle of derivation of not less than 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.

Consequently, under the 1999 Nigerian federal Constitution as well as the Nigerian federal structure, several issues, including, but not limited to those set out below, emanate from the operation of the provisions of Section 40 of the VAT Act:

(a) Should the Special Account presently being administered by the FAAC under Section 40 of the VAT Act be amended and/or abolished?;

(b) Should there be an increase in 'the powers of sub-national state governments to administer and collect revenue accruing from consumption taxes to the special account in Nigeria?;

(c) Should VAT revenue be separated from other revenues (including other tax revenue, such as Custom and Excise Duties,[3] Stamp Duties, Personal Income Tax (PIT),[4] Companies Income Tax (CIT),[5] Petroleum Profits Tax (PPT),[6] and Property Taxes[7]) all accruing to the Federal Government of Nigeria (FGN), but which are collected and deposited into the Consolidated Revenue Fund (CRF) Account?

---

[3]. Jane Lethbridge, "Tax Justice in Nigeria," a Publication of Public Services International Research Unit (PSIRU) September 14, 2016 at 5, (Lethbridge)..

[4]. Personal Income Tax Act Cap P8, Laws of the Federation of Nigeria 2004 (PITA) and the Personal Income Tax (Amendment) Act (2011), Government Notice No. 175, Federal Republic of Nigeria Official Gazette No. 115, Vol 98, of 24th June 2011.

[5]. Companies Income Tax Act Cap C21 LFN 2004 (CITA);.

[6]. Petroleum Profits Tax Act Cap P13 LFN 2004 (PPTA).

[7]. Land Use Charge Law of Lagos State No. 11 of 2001, Cap L79, Laws of Lagos State (2015)

(d) Whether Section 40 of the VAT Act is constitutional, given the provisions of Section 80(1) of the 1999 federal Constitution which states that "all revenues or other moneys raised or received by the Federation (not being revenues or other moneys payable under this Constitution or any Act of the National Assembly into any other public fund of the Federation established for a specific purpose) *shall be paid into and form one Consolidated Revenue Fund of the Federation*.?" (emphasis)';

(e) Whether the sharing formula under Section 40 of the VAT Act is constitutional, legal, and/or equitable?; and

(f) Whether the "Principle of Derivation" enunciated under Sections 162 and 163 of the 1999 federal Constitution should govern the distribution of VAT revenue?

The practice and jurisprudence under Section 40 of VAT Act has continued to create legal problems.[8] Everyone knows that on August 19, 2021, Rivers State government signed the Rivers State Value Added Tax Law (RSVATL) into law. Also, the Lagos State Government had followed suit by passing the *Lagos State VAT Law* (LSVATL) on 9th September 2021.

[8]. Unini Chioma, "Why VAT Cannot Work In States — FIRS," in *The Nigerian Lawyer*, September 8, 2021. Available at:https://thenigerialawyer.com/why-vat-cannot-work-in-states-firs/. Last accessed 5th January 2024; "Desperation as FIRS writes National Assembly, seeks exclusive power on VAT," *Punch Newspapers*, 8th September 2021. Available at: https://punchng.com/desperation-as-firs-writes-national-assembly-seeks-exclusive-power-on-vat/?amp. Last accessed 5th January 2024;Francis Agunbiade, "The Validity of Section 8 of The Value Added Tax Act Vis-à-vis Recent Judicial Pronouncements and the 1999 Constitution," *DNL Legal*. Available at: https://dnllegalandstyle.com/2021/the-validity-of-section-8-of-the-value-added-tax-act-vis-a-vis-recent-judicial-pronouncements-and-the-1999-constitution/. Last accessed 5th January 2024.

In Nigeria, the federal VAT Act was introduced in 1993, when the military government enacted the Value Added Tax (VAT) Decree No.102 of 1993—which, in its amended version, is the *current/extant* VAT Act 2004 *operative in Nigeria, today*.[9] Since then, VAT has continued to be one of the most stable and highest-yielding source of tax revenue for the FGN, with statistics showing that VAT has contributed ₦1.108 trillion, ₦1.19 trillion and ₦1.53 trillion respectively in 2018, 2019, and 2020.[10] However, constitutional powers for imposition and collection of VAT in Nigeria continues to be tenuous. Also contentious, is the formula for the sharing and allocation of VAT revenue.

The real question is, which tier of government is clothed with the authority to administer, collect, and/or impose consumption taxes, such as VAT, General Sales Tax (GST), or Sales Tax? For instance, Lagos State High Courts have always affirmed the constitutionality of sub-national States' sales tax law.[11] Also, private taxpayers have approached the Federal High Court (FHC) to challenge states' sales tax laws, as was evident in *Eko Hotels Ltd v AG Lagos*,[12] where the FHC upheld the constitutionality of the VAT Act while declaring the Lagos State 1982 Sales Tax Law[13] as null and void.[14]

---

[9]. VAT Act (n 1) which repealed the Sales Tax Decree, 1986. and the Lagos State Sales Tax Law, 1982

[10]. Michael Ango and Emmanuel Omoju, "Nigeria: An Analysis Of Federal High Court Decision Invalidating The VAT Act - Implications For VAT Administration And Compliance," Andersen Tax 09 June 2021. Available at: https://www.mondaq.com/nigeria/sales-taxes-vat-gst/1077894/an-analysis-of-federal-high-court-decision-invalidating-the-vat-act--implications-for-vat-administration-and-compliance. Last accessed on 30 December 2023. (Ango & Omoju).

[11]. See *Manufacturers Association of Nigeria v. The Attorney General of Lagos State & Anor*, 13 All NTC 539.

[12]. 5 All NTC 267.

[13]. This law was reactivated via Lagos State Sales Tax (Schedule Amendment) Order 2000.

[14]. This case went on appeal to the Supreme Court and was finally decided on 8th December, 2017 by the Supreme Court as reported in *Attorney General of Lagos State v. Eko Hotel*

When the matter ultimately reached the Supreme Court,[15] based on the concept of "covering of the field," the Supreme Court held that since the VAT Act was an existing law under Section 315 of the 1999 Constitution and because the VAT Act has covered the field on the Sales tax, therefore the VAT Act would prevail over Lagos State Sales Tax (Schedule Amendment) Order 2000. The Supreme Court underlined the doctrine of "covering the field," and held as follows:

> Not only do both legislations cover the same goods and services, they are also targeted at the same consumer. The tax has already been collected by the 1st Respondent pursuant to the VAT Act. When a dispute arose as to which of the two claimants the tax collected should be remitted to, it rightly approached the Court for direction. There is no doubt that it would amount to double taxation for the same tax to be levied on the same goods and services, payable by the same consumers under two different legislations.[16]

Subsequently, Lagos State enacted the Hotel Occupancy & Restaurant Consumption Law.[17] Sales Tax and VAT fields had always witnessed

International Plc & Anor, (2018) 7 NWLR (Pt. 1619) 518, where the apex court held that the Federal Government had the power to collect consumption tax.

[15]. *Attorney General of Lagos State v. Eko Hotel International Plc & Anor,* (2018) 7 NWLR (Pt. 1619) 518.

[16]. *Ibid*. at 547.

[17]. The Hotel Licensing Law, Cap H.6., Laws of Lagos State of 2003; The Hotel Occupancy and Restaurant Consumption Law, Cap H8 Laws of Lagos State, 2009 of No. 30 Vol. 42, Lagos State of Nigeria Official Gazette. After Lagos State Government had enacted the Hotel Occupancy & Restaurant Consumption Law, in *A.G. Federation v A.G. Lagos State* (2013) 16 NWLR (Pt. 1380) 249, the Supreme Court validated the law. The Hotel Licensing Law is a specie of a consumption tax on supply of goods and services made in hotels and restaurants

conflicting decisions between the State High Courts and FHC with several litigation on this issue.[18] For instance, in *Nigerian Soft Drinks v. AG Lagos State,*[19] following the 1985 Supreme Court decision in *AG Ogun State v. Aberuagba*,[20] the Court of Appeal in 1987, upheld the 1982 Lagos State Sales Tax Law. Lagos State Board of Internal Revenue (LSBIR) v. Nigerian Bottling Company Ltd. held that the 1982 Lagos State Sales Tax Law did not seek to tax items covered in the Exclusive Legislative List. As the *Nigerian Soft Drinks* decision predates the 1993 introduction of the VAT Act, this was the State of affairs, until the VAT Act was introduced in 1993 to replace the sales tax laws of the States. It must be noted that the VAT Act was not immediately challenged before the law courts because of the ouster clause contained in the Federal Military Decree (Constitution Suspension and Modification) Decree No. 1 of 1984, since it was introduced under the Military Regime.[21]

Further, in *AG Federation v. AG Lagos*,[22] the federal government had sought to invalidate Lagos State Hotel Occupancy & Restaurant Consumption Law that regulate hotel occupancy, licensing and restaurant operation within Lagos State.[23] The Supreme Court held that the federal government's power to enact laws on tourist traffic under Item 60 of the Exclusive List (Part 1 of Second Schedule to the 1999 Constitution) would not oust Lagos State's power to regulate *intra-state* hotel businesses. However, in *Nigerian*

within Lagos State. The validity of the Hotel Licensing Law *is diametrically opposed to the ruling in A.G. Lagos State v Eko Hotels.*

[18]. See *Mas Everest Hotels Ltd & Anor v. Attorney-General of Lagos State,* 7 All NTC 93*; Princel Court Limited v. Attorney General of Lagos State,* 7 All NTC 74.

[19]. (1987) 2 NWLR (Pt 57) 444 at 429 (SC).

[20]. *AG Ogun State v. Aberuagba* (1985) 1 NWLR (Pt 3) 395.

[21]. Ango & Omoju (n 10).

[22]. (2013) 12 TLRN 55

[23]. The Hotel Licensing Law (n 17).

Employers Consultative Association (NECA) v. AG Federation,[24] the FHC declared the Sales Tax of Kaduna State null and void.

Surprisingly, in October 2019, the FHC invalidated the VAT Act for the first time in *Registered Trustees of Hotel Owners and Managers Association of Lagos v. AG Federation (HOMAL*).[25] There, the FHC considered the validity of the Hotel Occupancy and Restaurants Consumption Law of Lagos State and upheld the powers of Lagos State government to charge and collect consumption tax from hotels, restaurants and event centres within Lagos State. The FHC went on and held that based on the 1999 Constitution and the Taxes and Levies (Approved List for Collection) Act, [26] the power to impose consumption tax was a residual power within the exclusive competence of sub-national States. It restrained the Federal Inland Revenue Service (FIRS) from imposing VAT on goods and services consumed in hotels, restaurants and event centres as the Lagos State law already covered this. *Inter alia*, the Court examined the powers of the Finance Minister to amend the Schedule to the Taxes and Levies Act, and held that delegated legislation is an exercise of powers given by the Legislature to another body to give effect to the enabling principal legislation and not to override enabling principal legislation. The Schedule to the enabling principal enactment cannot be amended by delegated legislation since the Schedule is actually part of the enabling principal legislation having the same legal force as the enabling principal Act itself. Therefore, any exercise of power that affects

[24]. Unreported decision of the Federal High Court, Abuja Division in Suit No.: FHC/ABJ/ CS/965/2017
CS/965/2017.
[25]. Unreported decision of the Federal High Court (Lagos Division), Suit No. FHC/L/CS/1082/2019 delivered
8 May 2020.
[26]. Cap T2 LFN (2004).

the terms and wordings of the enabling principal enactment cannot be delegated legislation but an amendment to the enabling principal legislation. Thus, as to the validity of FIRS Circular 9801 made pursuant to the Ministerial amendment of the Schedule to the Taxes and Levies Act, and whether the Minister can validly amend the provisions of a Schedule to the Taxes and Levies Act, the Schedule being an integral part of the Act itself without the risk of running afoul of the principle of separation of power, the *HOMAL* court struck down the Minister's Amending Order together with the FIRS Circular pursuant thereto. Also, the Court upheld the constitutionality of the Hotel Occupancy and Restaurants Consumption Law of Lagos State. It proceeded to declare sections 1,2,4,5 and 12 of the VAT Act as being inconsistent with section 4(2),(4)(a)&(b),(7)(a)&(b) of the Constitution and consequently unconstitutional and invalid. The Court granted perpetual injunction against FIRS from collecting VAT from hotels, restaurants and event centres in Lagos.

Consequently, in *Emmanuel Ukala v. FIRS & AG Federation,*[27] Hon. Justice I.O. Oshomah sitting at FHC Port Harcourt Division on 11th December 2020, expressly held that the National Assembly had no power to enact the VAT Act. Ukala had asked the Court to declare that there was no constitutional basis for the imposition, demanding and collection of VAT by FIRS from him since the constitutional powers and competence of the National Assembly were limited to those specifically listed in Item 59, which did not include VAT or any other species of sales tax. The FHC declared the VAT Act a nullity.

[27]. (2021) 2 NRLR 1; (2021) 56 TLRN 1. (*Ukala v. FIRS*).

With the above expose on the various decisions on the VAT Act, this paper proposes legal theories for amending and/or abolishing the Special Account presently being administered by the FAAC under Section 40 of the Value Added Tax (VAT) Act and also for increasing Sub-National State governments' powers to administer and collect revenue from consumption taxes in Nigeria, and recommends that Section 40 of the Value Added Tax Act be amended to meet the requirements of the Consolidated Revenue Fund Account under Sections 80 and 81 of the Constitution of the Federal Republic of Nigeria of 1999.

This paper is divided into Six Parts. Part 1 is the introductory part. Part 2 attempts to define 'Tax,' 'Value Added Tax,' 'Sales Tax,' and 'General Sales Tax.' Part 3 reviews the foremost judicial decisions on constitutional taxing powers on consumption taxes in *Attorney General of Ogun State v Aberuagba.* Part 4 looks at the judicial attempt aimed at curtailing federal powers in *A.G. Rivers State v. FIRS & AG Federation*.[28] Part 5 critiques the current imbalance in the collection and allocation of VAT revenue. Part 6 reviews the issue of usurpation of the provisions creating the Consolidated Revenue Fund (CRF) Account. Part 7 also argues that the "Federal Account" under Sections 162 and 163 of the 1999 Constitution should be adopted over and above the Special Account under Section 40 of VAT Act to accord with Fiscal Federalism requirements. Part 8 is the Conclusion.

[28]. Unreported decision of Hon. Justice Stephen Pam of the Federal High Court (Port Harcourt Division) dated August 9, 2021, Suit No. FHC/PH/CS/149/2020. (*A.G. Rivers v. FIRS*).

2. DEFINITION OF 'TAX,' 'VALUE ADDED TAX,' 'SALES TAX,' AND 'GENERAL SALES TAX'

2.1. The Definition of 'Tax'

There are varied definitions of tax. Tax was judicially defined in the Australian case of *Mathews v. Chicory Marketing Board*[29] as 'a compulsory exaction of money by a public authority for public purpose or raising money for the purpose of government utilizing contributions from individual persons. In *United State v. Butler*,[30] tax was stated as an exaction for the government's support. *Michigan Employment Sec Commission v. Platt*;[31] defined tax as a nonvoluntary or donation, but an enforced/compulsory contribution, exacted pursuant to legislative authority. In its simplest form, however, a tax is an enforced proportional contribution from a person, property, transaction etc. levied by the State by virtue of its sovereignty for the support of government. A major tax characteristic is that it constitutes an exercise of sovereign authority by the State imposing it. Thus, tax has been further defined as:

> 'a monetary charge imposed by the government on persons, entities, transactions or properties to yield revenue.'…. 'the enforced proportional contributions from persons and property, levied by the State by virtue of its sovereignty for the support of Government and for all public needs.' Taxes may also be defined as a 'pecuniary burden laid upon individuals or property to support government expenditure.' A tax 'is not a voluntary payment or donation, but an enforced and compulsory contribution, exacted pursuant to legislative authority" and is "any contribution

[29]. (1938) 60 CLR263, at 276.
[30]. 229 US 1 (1935) at 61 per Justice Robers
[31]. 4 Mich App 224;14 N.W 2nd 663.

imposed by government," whether under the name of duty, custom excise, levy or other name.[32]

2.2. Definition and Nature of 'Value Added Tax'

VAT is a transaction tax charged at 7.5% on the supply of goods and services in Nigeria. VAT is a general tax levied on all goods and services bought and sold for use or consumption in Nigeria.[33] The supply of goods and services within Nigeria (including inter-state and intra-state acquisition of goods and services in Nigeria) is subject to VAT. In particular, Section 2(1) of the VAT Act provides that:

> The tax shall be charged and payable on the supply of all goods and services (in this Act referred to as "taxable goods and services") other than those goods and services listed in the First Schedule to this Act.

It is also instructive to note that apart from the VAT Act, the Black's Law Dictionary, defines a "Value Added Tax" as:

> "a tax assessed at each step in the production of a commodity, based on the value added at each step by the difference between the commodity's production cost and its selling price….a value added tax acts as a sales tax on the ultimate consumer."[34]

---

[32]. Federal Ministry of Finance, *National Tax Policy* (Abuja 2012) at 21-26. (NTP 2012); See, also, Svden Stenimo, *Taxation and Democracy* (Yale University Press, New Haven & London, 1993) at 1; Taxes are imposed under the authority of the legislature, and are levied by a public body with an intention for public purposes; See Major J, in *Re Eurig's Estate* (1998) 165 DLR (4th) 1, at 10, citing Duff J in *Lawson v Interior Tree, Fruit and Vegetable Committee of Direction* [1931] SC R 357 (Can).

[33]. VAT Act (n 1) at Section 2.

[34]. Bryan A. Garner, *Black's Law Dictionary*, 9th ed., (Thomson West Publishing Co., Texas, 2004) at 1217. (Black's Law Dictionary).

Currently, VAT is a consumption tax levied at each stage of the supply or consumption chain and is borne by the final consumer. At each stage of the production, sale and supply of goods and services, VAT is charge at 7.5% by the merchant from the purchaser, up and until the final consumer. Like 'General Sales Tax' (GST), VAT applies to all stages of production: Manufacturing, Distribution, Wholesale and Retail. What distinguishes VAT from GST and 'Sales Tax' regimes is the operation of Output Tax and Input Tax mechanisms—which enables the merchant to deduct his input tax from the output tax, so that the burden of VAT is passed on to the final consumer. This operation of Output Tax and Input Tax mechanisms serves as the impetus for the merchants to collect on behalf of the FIRS and remit same to the FIRS. Clearly, VAT paid by businesses engaged in production of tangible goods, on purchases, which is known as *input tax,* is recoverable from VAT charged on the company's sales, known as *output tax*. *Only the excess of a company's output tax over its input tax is payable to the Federal Inland Revenue Service through designated banks*. However, under Section 13A(2) of the VAT Act, input VAT on fixed assets is to be capitalised with the cost of the assets, whilst input VAT on overheads, general administrative expenses and services is to be expensed in the company's profit and loss account.

2.3.'General Sales Tax' (GST)

GST is another species of Consumption Taxes, except that the input and output tax mechanisms do not apply. Like VAT, GST applies to all stages of production: Manufacturing, Distribution, Wholesale and Retail. However,

the merchant *cannot* deduct his input tax from the output tax, and the burden of GST is *not* passed on to the final consumer.

2.4. Definition and Nature of 'Sales Tax'

Sales Tax is just like the GST and VAT—except that it is a one-stop consumption tax—levied at the distribution stage. Thus, Sales Tax is another specie of Consumption Taxes, except that the input and output tax mechanisms do not apply. Further, unlike VAT and GST, it does not apply to all levels of production as it only applies at the distribution stage. Also, the merchant *cannot* deduct his input tax from the output tax, and the tax burden is *not* passed on to the final consumer. Therefore, similar to VAT, Sales Tax is the tax imposed on persons, entities, and/or businesses within a sub-national geographical authority and on businesses within its borders based on the concept of "being engaged in business."[35] This means that a person or company in business in a jurisdiction when it has personnel, facilities, equipment, inventory, and representatives, including having presence in a state through the act of deriving financial benefit or availing itself of the commercial marketplace of that jurisdiction, must pay sales and/or use taxes for carrying on business within that territory. In the same breadth, a sales tax is imposed on the sale of goods and services and is usually measured as a percentage of the price of such goods or services. There is

[35]. Olumide K. Obayemi, "What Manner of Sales Tax?: UAC of Nigeria PLC, & Ors. Vs. FBIR, & Ors: The Nature and Incidence of Sales Tax Law Revisited," ThisDay Newspaper July 18, 2005. Available at: http://www.thisdayonline.com/nview.php?id=22935 (Obayemi I); Olumide K. Obayemi, "Should Lagos State Continue to Impose Sales Tax Within Its Boundaries in the Aftermath of Lagos Board of Internal Revenue v. Nigerian Bottling Company Plc and Anor, Suit No. ID/45/2002," Proshareng.com, Monday September 19, 2011 (Obayemi II).

therefore no difficulty in appreciating that the consumer bears the burden of both VAT and the Sales Tax and that the seller/supplier merely acts as an agent for collection of the taxes. As stated above, even the tax burden of input VAT paid along the production line for goods, is effectively transferred to the consumer who pays the "ultimate" tax.

3. A REVIEW OF THE JUDICIAL DECISIONS ON CONSTITUTIONAL TAXING POWERS ON CONSUMPTION TAXES IN *ATTORNEY GENERAL OF OGUN STATE V ABERUAGBA* [36]

There is also a need to discuss the effect of the foremost Supreme Court's decision in *Aberuagba* on this topic. Perhaps the time has come for the Supreme Court to revisit and reinstate its earlier decision in *Aberuagba,* where the Supreme Court adopted the principle of "trade and commerce clause"[37] to interpret the validity of Sales tax Law of Ogun State in the context of the 1979 Constitution which provisions are *in pari materia* with 1999 Constitution thereby ascertaining the limits of the taxing powers of the federal and State government in the Federation under the federal Constitution.

In *Aberuagba,*[38] the Court considered (a) the extent of the federal government's power to make tax laws on *trade and commerce*; (b) whether

[36]. As discussed above, the starting point on the subject may also include a study of *Nigerian Soft Drinks v AG Lagos State* (1987) 2 NWLR (pt. 57) 444; *AG Lagos State v Eko Hotels Ltd* (2017) LPELR-43713(SC); *Mama Cass Restaurant Ltd and Others v FIRS and Another* (2010) 2 T.L.R.N. 1.

[37]. Trade and Commerce Clause. This was contained under Item 61 of Part I to Schedule II of the expunged 1979 Constitution. See, also, 1999 Constitution (n 2) at Item 62 of Part I to Schedule II, for similar Commerce Clause.

[38]. *Aberuagba* (n 20).

Sales Tax Law of Ogun State of 1982 was in conflict with the 1979 Constitution; and (c) whether the Sales Tax Law of Ogun State was in conflict with the Public Order Act. The *Aberuagba* decision is considered the *fons et origos* of Nigerian case law on Consumption Tax—i.e., Sales Tax, and, implicitly, VAT in Nigeria. The relevance of *Aberuagba* case is three-fold, to wit,

- First, it is the earliest Nigerian case bordering on fiscal federalism,
- Secondly, it throws light on the origin of Sales Tax and
- Thirdly, it is precedent that sub-national State units have power to legislate on Sales Tax.

The taxpayers, who were wholesale purchasers of beer in Ogun State, commenced a representative action against Ogun State and sought a declaration that Ogun Sales Tax Law was inconsistent with Section 4 (particularly Section 4(2)&(3)) of the 1979 Constitution and accordingly void. The thrust of their case was that since the federal national Legislature was vested with exclusive power, by virtue of the Exclusive Legislative List, to legislate on *customs and excise (item 15)* and *Trade and Commerce (item 61)* of the 1979 Constitution, the sub-national Ogun State legislature had no competence to legislate on same. This argument was based on the doctrine of *covering the field*, meaning that *where, in a Federal set up, both the Federal and State legislatures are vested with power to legislate on the same subject and the former, in pursuance of such power, enacts a law, any State legislature on that same subject is deemed to be inconsistent and invalid because the Federal legislation has covered the field*.

As to the issue of whether the omission to include item 38 of the Exclusive Legislative List of the 1960 and 1963 Constitutions in the 1979 Constitution showed an intention to regard the Sales Tax Law as a residual subject or whether the power to legislate on all fiscal subjects have been vested in the Federal Government, the Supreme Court in *Aberuagba*, laid down the rules that the Federal Government has the power to legislate on international trade and inter-state trades, while the states had power to legislate on *intra-state* trade.[39] According to Honourable Justice, Mohammed Bello JSC (as he then was) in *Aberuagba*:

> …it is very tempting to accept the view that since the 1960 and 1963 constitutions specifically shared the power to make sales tax law between the Federation and the Regions and that power is omitted in the Exclusive and Concurrent Lists of the present Constitution, then there is a presumption that sales tax is left as a residuary matter to the States. It is also equally appealing to agree with the contrary view that since trade and commerce…are exclusively reserved for the Federation and… sales tax is an incident of trade and commerce, then it follows that sales tax is…within the exclusive specifically reserved for the Federation. While trade and commerce within a State is left as a residuary matter to the States…Accordingly, I would not invalidate the Sales Tax Law of Ogun State by reason of the proposition that…a State has no power at all over trade and commerce. I reject the proposition because it has no constitutional basis.[40]

[39]. Obayemi II (n 36)
[40]. *Aberuagba* (n 20) at 412-416 (SC).

Further, as to whether Ogun State Sales Tax Law was valid and constitutional in so far as it imposed tax on purchasers of taxable goods, Bello JSC went on to hold thus:

> My answer…is also No…to the extent that the law imposes the sales tax on inter-State trade and commerce and also in respect of taxable goods the prices of which have been controlled by the Federal Government.[41]

The practical implication of the foregoing is as follows:

- The federal government is competent to impose a sales tax on any of the matters within the Exclusive and Concurrent Legislative Lists;
- The federal government is not competent to impose sales tax on any of the matters within the Residual List;
- The state government is not entitled to impose sales tax on any matter within the Exclusive Legislative List;
- The state government is entitled to impose sales tax on any matter within the Concurrent Legislative List *subject to the rules of inconsistency and covering the field*.
- The state government is entitled to impose sales tax on any matter within the Residual List.

We must note that VAT is fundamentally and functionally different from Sales Tax, thus, *Aberuagba* specifically dealt with Sales Tax, which does not have the twin elements of Output and Input Taxes. Thus, the Supreme Court

[41]. *Ibid.*

has to revisit and reinstate its 1985 decision, which predates the advent of the VAT Act in 1993.

4. FURTHER JUDICIAL ATTEMPT TO CURTAIL FEDERAL POWERS IN *A.G. RIVERS STATE V. FIRS & AG FEDERATION.*

The controversies surrounding the appropriate government tier accorded with constitutional authority to legislate on, administer, impose and/or collect Consumption Taxes, i.e., VAT, GST, and Sales Tax, as was espoused in the 9th August 2021 decision in *A.G. Rivers State v. FIRS & AG Federation,*[42] by Hon. Justice Stephen Pam of FHC Port Harcourt Division, Rivers State is instructive. Rivers State, via an originating summons, had sought the determination of the following questions:

i. Whether upon proper interpretation of Section 4(7) and Items 58 and 59 of the 1999 Constitution the Federal Government has the power to levy or impose any form of Sales Tax such as Value Added Tax or any other form of Levy?

ii. Whether upon a proper interpretation of Items 7 and 8 of the Concurrent Legislative List, the Federal Government can delegate the collection of taxes to any other person other than a State Government or authority of a State?

iii. Whether the Taxes and Levies (Approved List of Collection) Act is not void and unconstitutional to the extent that it makes a provision for other taxes which are not provided for in the Constitution.

[42]. *A.G. Rivers v. FIRS* (n 29).

FIRS filed a motion on notice on 27th November 2020 asking the Court to state certain questions for the opinion of the Court of Appeal pursuant to section 295(2) of the 1999 Constitution. FIRS also argued that the case was an abuse of court process, a rehash of the *Ukala v. FIRS.*[43] Rivers State argued that the imposition of taxes such as VAT, Withholding Tax (WHT), Education Tax and Technology Tax by the Federal Government are *ultra-vires* the constitutional powers of the Federal Government and, therefore, null and void. FIRS contended that WHT, Education Tax and Technology Tax are taxes on the incomes of taxable persons which fall within the purview of Item 59 and that the Taxes and Levies (Approved List of Collection) Act[44] is an existing law under Section 315(4)(b) of the Constitution. Subsequently, in *A.G. Rivers State v. FIRS*, it was held that

i. Items 58 and 59 of the Exclusive List must be read to exclude other species of taxes like VAT, withholding tax, education tax, technology tax. If the framers of the 1999 Constitution intended to allow the Federal Government to impose and collect these taxes, they would have specifically mentioned them in the Constitution. Since this was not done, this Court lacks the power to do otherwise.

ii. The Taxes and Levies Act being unconstitutional, any tax or levy provided for in the Act is automatically unconstitutional, null and void, except such tax is provided for by the 1999 Constitution or any other law validly made by a competent legislature.

43. *Ukala v. FIRS* (n 28).
44. (n 27).

In essence, the FHC held that Rivers State, and not the central Federal Government, is empowered to collect VAT and Personal Income Tax (PIT)[45] in Rivers State, and that there are no constitutional provisions backing the collection of VAT, Withholding Tax,[46] Tertiary Education Tax,[47] and Technology Levy under National Information Technology Development Agency (NITDA) Act[48] within the territory of Rivers State, or any other State of the Federation, by the FIRS as the federal government is restricted by the Constitution of the Federal Republic of Nigeria, 1999 *only* to taxation of incomes, profits and capital gains.[49] Items 58 and 59 of the Part 1 of the 2nd Schedule of the Constitution (the Exclusive List) would not extend to VAT or any other levy other than "taxation of incomes, profits and capital gains."[50]

However, subsequently, FIRS filed an appeal before the Court of Appeal (Port-Harcourt Division) in *FIRS v. AG Rivers State*,[51] where Hon Justice Haruna Tsanami (who read the lead decision), granted an *interlocutory injunction* on 14th September 2021, which currently restrains the execution and/or performance of the earlier FHC judgment—by ruling thus:

---

45. PITA (n 4).
46. Olumide K. Obayemi, "The Jurisprudence of Withholding Tax Exemption Applicable to Contracts and Sales in the Ordinary Course of Business Under the Finance Act Bill 2020" (2021) Vol. 7 No. 1 University of Jos Journal of International Law and Jurisprudence 47-60 (Obayemi III); See, also, CITA (n 5), at Sections 78-84; PITA, (n 4), at Sections 69-75, PPTA (n 6), at Sections 54 and 56; Personal Income Tax Act Rates e.t.c of Tax Deducted at Source (Withholding Tax) Regulations (PITA WHT Regulations); and Companies Income Tax Act Rates e.t.c of Tax Deducted at Source (Withholding Tax) Regulations (CITA WHT Regulations).
47. Tertiary Education Trust (Establishment) Fund Act No 56 of 2011
48. No 28 of LFN 2007. (NITDA Act).
49. 1999 Constitution (n 2), at Items 58 and 59 Part 1 of the 2nd Schedule to the 1999 Constitution (Exclusive Legislative List of the Constitution),
50. These are the items specifically mentioned in Items 58 and 59 of the Exclusive Legislative List of the Constitution).
51. *FIRS v. AG Rivers State*, Court of Appeal (Port-Harcourt Division), Appeal No.: CA/

> "That the *status quo ante-bellum* SHALL be preserved and/or maintained by the parties pending the hearing and the determination of the pending Motions for stay of execution/injunction and Joinder of the Attorney-General of Lagos State as a Respondent. That is to say, the parties SHALL refrain from taking any action to give effect to the Judgment of the Federal High Court in Suit No.: FHC/PH/CS/149/2020: Attorney-General of Rivers State V. Federal Inland Revenue Service & Anor delivered on the 9th day of August, 2021 pending the hearing and determination of the applications alluded to above."[52]

It is now reported that the Rivers State wants the Supreme Court to set aside the order of the Court of Appeal directing parties to the appeal on VAT collection to maintain status quo.[53]

5. CURRENT IMBALANCE IN COLLECTION, DISTRIBUTION, AND ALLOCATION VAT REVENUE

In line with Section 40 of the VAT Act, VAT revenue is currently being shared 15% to the central national government; 50% to subnational States and the FCT; and 35% to Local Governments (LGs). The derivation principle of not less than 20% is reflected in the distribution to States and LGs.

PH/282/2021,

[52]. *Ibid*. per Hon Justice Haruna Tsanami (who read the lead decision).

[53]. Ameh Ejekwonyilo, "Rivers State govt takes VAT collection battle to Supreme Court," Premium Times, September 15, 2021. Available at: https://www.premiumtimesng.com/news/top-news/48490 0-rivers-state-govt-takes-vat-collection-battle-to-suprem e-court.html. Last accessed on 30th December 2023.

Although not stated in the VAT Act, other factors used in the distribution are equality (50%) and population (30%). There is a 4% cost of collection payable to the FIRS and 2% payable to the Nigerian Customs Service (NCS) in the case of import VAT.

There have been so many complaints, especially by sub-national States, about the collection, allocation and distribution of VAT revenue. Some States are of the view that because the federal government is in control of VAT revenue sourced from *within* the States' geographical territories, the source States are deriving less than their actual share of VAT revenue. Other States appear to be getting more allocations from VAT revenue that are far over their VAT contributions. Empirical studies can be obtained from the Federation Allocation Committee (FAAC)'s Information Release[54] showing what each State generated between January –August 2021 and the allocation to each of them.

Table of Allocation and Collections of VAT Revenue in Nigeria[55]

VAT Revenue that each State generated between January –August 2021 and the allocation to each of them3

[54]. Editorial, "The VAT controversy and the need for interrogation and engagement," September 27, 2021
Available at: https://www.naijatimes.ng/the-vat-controversy-and-the-need-for-interrogation-and-engagement/. Last accessed on 30th December 2023. (Editorial.).
[55]. ONLINE DISPUTE RESOLUTION: ANOTHER VOICE IN THE COVID-19 PANDEMIC DIALOGUE IN NIGERIA *Ibid*.

No.	STATE	VAT GENERATED	VAT ALLOCATION
1	Abia	2.290b	20.020b
2	Adamawa	3.689b	22.260b
3	Akwa Ibom	8.39b	27.749b
4	Anambra	5.938b	25.001b
5	Bauchi	5.309b	25.613b
6	Bayelsa	12.536b	17.659b
7	Benue	1.268b	24.527b
8	Borno	3.442b	25.896b
9	Cross River	2.347b	20.478b
10	Delta	13.964b	27.854b
11	Ebonyi	7.894b	18.768b
12	Edo	8.284b	22.588b
13	Ekiti	6.635b	19.756b
14	Enugu	5.485b	20.729b
15	Gombe	4.028b	17.650b
16	Imo	1.941b	25.111b
17	Jigawa	3.375b	26.369b
18	Kaduna	18.262b	32.726b

19	Kano	24.492b	47.082b
20	Kastina	3.738b	31.539b
21	Kebbi	1.284b	22.162b
22	Kogi	3.286b	22.282b
23	Kwara	3.471b	18.998b
24	Lagos	429.203 b	139.587b
25	Nassarawa	2.495b	16.872b
26	Niger	3.723b	25.042b
27	Ogun	11.823b	25.141b
28	Ondo	4.554b	22.107b
29	Osun	1.995b	24.766b
30	Oyo	64.646b	45.136b
31	Plateau	5.208b	21.433b
32	Rivers	90.293b	46.270b
33	Sokoto	4.978b	24.219b
34	Taraba	1.756b	18.469b
35	Yobe	9.445b	20.525b
36	Zamfara	598.133m	35.716bn
37	FCT	235.794bn	NOT ELIGIBLE

Statistics here show that Lagos generated N429.203 billion, Rivers generated N90.293 billion, and Oyo came third by generating N64.646 billion between January and August of 2021, respectively. Thus, the highlights of revenue generation into the Special Account showed that Lagos, Rivers, and Oyo States record the highest in generation. There is an imbalance evident where Kano State generated N24.492billion but displaced Rivers and Oyo States in collections. There is also an imbalance that is evident, where Zamfara generated only N75m but received N4.5 billion monthly. Kaduna recorded VAT revenue of N18.262 billion between January and August of 2021, while Katsina generated N3.738billion.

The imbalance in distribution and allocation is also highlighted in the collection from the FAAC, which shows that Lagos received the sum of N139.587 billion between January and August 2021 while Kano received the second highest allocation of N47.082 billion.[56] This is a clear imbalance because Kano is now second with the highest collection (displacing Rivers and Oyo in collections).[57] Rivers is in the third position in collections as it collected N46.270 billion. Further imbalance is evident with Zamfara collecting N4.5billion monthly,[58]—Zamfara stands out as a peculiar state with the least generation of VAT revenue, as it was the only State that recorded less than a billion in the eight-month period of review—generating only N598.33million with an average of about N75million per month. However, Zamfara received the sum of N35.716billion (about N4.5billion monthly), placing it at the fourth position on the allocation table. Kaduna

[56]. Yet, it had generated N24.492billion between January and August 2021.
[57]. In the allocation of VAT revenue, Kano came second, displacing Rivers and Oyo from the top places on the table, after Lagos.
[58]. Yet, Zamfara generates N75m monthly in VAT.

which recorded a VAT revenue of N18.262billion, came after Zamfara with an allocation of N32.726billion. Katsina which generated N3.73 billion in the period under review got N31.539 billion.

There is also, an analysis of the Allocation and Collection of VAT revenue which is based on the Six (6) Geo-Political Zones.[59] South-West had the highest allocation of N256.737billion, particularly because of the huge allocation to Lagos State. North-West had the second highest allocation of N219.813 billion. The oil-producing region of South-South collected N162.598billion,while the North-East received N129.801 billion. Finally, North-Central received N129.154 billion and South-East kept the rear with N 109.629 billion allocations, respectively.

The -evidenced imbalance in the collection and distribution of funds from the Special Account underlies the agitation for the improvement and/or abolition of the Special Account. Commerce-driven states such as Lagos, Rivers, Oyo and Ogun feel shortchanged with the lopsided allocation to economic redundant states. There is no logical reason behind the oil-rich South-South region lagging behind the South-West region in collection ranking.

6. USURPATION OF THE PROVISIONS CREATING THE CONSOLIDATED REVENUE FUND (CRF) ACCOUNT

Section 40 of the VAT Act offends the constitutional provisions under Section 80 of the 1999 federal Constitution which mandates that ***all*** revenues or other money raised or received by the Federation (not being revenues or

[59]. Emma Ujah, "VAT: What states generated, received in past 8 months," Vanguard Newspaper, September 18, 2021. Available at: t-8-months/" https://www.vanguardngr.com/2021/09/vat-what-states-generated-received-in-past-8-months/ Last accessed on 30th December 2023. (Ujah).

other money payable under this Constitution or any Act of the National Assembly into any other public fund of the Federation established for a specific purpose) *shall be paid into and form one Consolidated Revenue Fund of the Federation*. For clarity, Section 80 states thus:

Part E - Powers and Control over Public Funds

Section 80. (1) All revenues or other moneys raised or received by the Federation (not being revenues or other moneys payable under this Constitution or any Act of the National Assembly into any other public fund of the Federation established for a specific purpose) shall be paid into and form one Consolidated Revenue Fund of the Federation.

(2) No moneys shall be withdrawn from the Consolidated Revenue Fund of the Federation except to meet expenditure that is charged upon the fund by this Constitution or where the issue of those moneys has been authorised by an Appropriation Act, Supplementary Appropriation Act or an Act passed in pursuance of Section 81 of this Constitution.

(3) No moneys shall be withdrawn from any public fund of the Federation, other than the Consolidated Revenue Fund of the Federation, unless the issue of those moneys has been authorised by an Act of the National Assembly.

(4) No moneys shall be withdrawn from the Consolidated Revenue Fund or any other public fund of the Federation, except in the manner prescribed by the National Assembly.

Clearly from the above, VAT revenue ought to be part of the revenue in the *Consolidated Revenue Fund of the Federation*. The VAT Act cannot prevail over the Constitution. In addition, there are also other constitutional arguments against the operation of the Special Account.

First, the VAT Act is ***not*** an existing law under Section 315 of the 1999 Constitution. A good reason for barring the national Legislature from taxing purely *intra-state* transactions is that the VAT Act is fundamentally flawed. Section 315 of the 1999 Constitution preserves as valid, all federal Acts/enactments existing and/or in force in Nigeria as of 30th May 1999, subject to the requirements that such Acts must be within the competence of the central federal Legislature to make such enactments and within the context of the powers granted under the Exclusive List and the general provisions in the Constitution.[60] *However,* the matters of Consumption Taxes, VAT, and Sales Taxes are *not* within the legislative competence of the central Legislature. Also of note is that unlike the Land Use Act and the National Youth Service Corps Act, Section 315(5) would not apply to preserve the VAT Act.

Further, it may be pointed out that the sub-national governments (or state governors) that were legally required to have joined in signing the 1993 VAT Decree into state laws as required by Section 315 of the 1999 Constitution, failed or neglected to do so in 1993. This omission completely takes the VAT Act away from the purview of existing laws within States.

[60]. 1999 Constitution (n 2), at Section 315(1)&(2).

Even if the VAT Act is an existing law under Section 315 of the Constitution, from the above, it is clear that the Special Account under Section 40 of the VAT Act is not for any "specific purpose" under Section 80(1) of the federal Constitution, e.g., for public health, road construction, election etc.

Further, the Special Account under Section 40 of VAT Act also violates Section 80(3)&(4) of the 1999 federal Constitution which states that no moneys shall be withdrawn from any public fund of the Federation, other than the Consolidated Revenue Fund of the Federation, unless an Act of the National Assembly has authorised the issue of those moneys and that no moneys shall be withdrawn from the Consolidated Revenue Fund or any other public fund of the Federation, except in the manner prescribed by the National Assembly.

Similarly, to the extent the FAAC spends and distributes funds from the Special Account under Section 40 of VAT Act without the approval of the National Assembly, such is unconstitutional in view of Section 81 of the 1999 Constitution which governs the preparation and presentation of Appropriation Bill thus

Section 81. (1) The President shall cause to be prepared and laid before each House of the National Assembly at any time in each financial year estimates of the revenues and expenditure of the Federation for the next following financial year.

(2) The heads of expenditure contained in the estimates (other than expenditure charged upon the Consolidated Revenue Fund of the Federation by this Constitution) shall be included in a bill, to be known as an Appropriation Bill, providing for the issue from the Consolidated Revenue Fund of the sums

> necessary to meet that expenditure and the appropriation of those sums for the purposes specified therein.
>
> (3) Any amount standing to the credit of the judiciary in the Consolidated Revenue Fund of the Federation shall be paid directly to the National Judicial Council for disbursement to the heads of the courts established for the Federation and the State under section 6 of this Constitution.
>
> (4) If in respect of any financial year it is found that –
>
> > (a) the amount appropriated by the Appropriation Act for any purpose is insufficient; or
> >
> > (b) a need has arisen for expenditure for a purpose for which no amount has been appropriated by the Act,
> >
> > a supplementary estimate showing the sums required shall be laid before each House of the National Assembly and the heads of any such expenditure shall be included in a Supplementary Appropriation Bill.

There has never been any 1st, 2nd, 3rd, or 4th reading nor any public comment on the FAAC spending formula, at any time. This is unconstitutional.

Additionally, the Special Account under Section 40 of VAT Act does not meet the Vote-On-Account Emergency Funding requirement for President/Executive purposes under Section 82 of the 1999 Constitution which states that

Section 82. If the Appropriation Bill in respect of any financial year has not been passed into law by the beginning of the financial year, the President may authorise the withdrawal of moneys in the Consolidated Revenue Fund of the Federation for the purpose of meeting expenditure necessary to carry on the services of the Government of the Federation for a period not exceeding six months or until the coming into operation of the Appropriate Act, whichever is the earlier:

Provided that the withdrawal in respect of any such period shall not exceed the amount authorised to be withdrawn from the Consolidated Revenue Fund of the Federation under the provisions of the Appropriation Act passed by the National Assembly for the corresponding period in the immediately preceding financial year, being an amount proportionate to the total amount so authorised for the immediately preceding financial year.

Finally, the Special Account under Section 40 of VAT Act does not meet the requirements for legislature approval for Supplementary Budget in cases of urgent and unforeseen need for expenditure, for which no other provision exists, to make advances from the Fund to meet the need, under Section 82 of the 1999 Constitution which states that:

Section 83. (1) The National Assembly may by law make provisions for the establishment of a Contingencies Fund for the Federation and for authorising the President, if satisfied that there has

> arisen an urgent and unforeseen need for expenditure for which no other provision exists, to make advances from the Fund to meet the need.
>
> (2) Where any advance is made in accordance with the provisions of this section, a Supplementary Estimate shall be presented and a Supplementary Appropriation Bill shall be introduced as soon as possible for the purpose of replacing the amount so advanced.

In conclusion, the paper recommends that Section 40 of the Value Added Tax Act be amended or expunged to meet the requirements of the Consolidated Revenue Fund Account under Sections 80 and 81 of the 1999 Constitution.

7. THE "FEDERAL ACCOUNT" UNDER SECTIONS 162 AND 163 OF THE 1999 CONSTITUTION SHOULD BE ADOPTED OVER AND ABOVE THE SPECIAL ACCOUNT UNDER SECTION 40 OF VAT ACT TO ACCORD WITH FISCAL FEDERALISM REQUIREMENTS

As shown above, there are two components of VAT revenue, to wit- (a) federal VAT collected from import and export and also from *inter*-state supply of goods and services and (b) state sourced VAT revenue accruing from purely *intra*-state supply of goods and services. The question remains whether the National Assembly may create a Special Account under Section 40 of VAT Act without meeting the fiscal federalism requirements?

The solution to the VAT issue is simple.

One, for federal VAT collected from import and export and also from the *inter*-state supply of goods and services should be deposited into the Federal Account under Section 162(1) of the 1999 Constitution, viz:- "The Federation shall maintain a special account to be called "the Federation Account" into which shall be paid all revenues collected by the Government of the Federation, except the proceeds from the personal income tax of the personnel of the armed forces of the Federation, the Nigeria Police Force, the Ministry or department of government charged with responsibility for Foreign Affairs and the residents of the Federal Capital Territory, Abuja."[61] Further, upon receiving advice from the Revenue Mobilisation Allocation and Fiscal Commission, the President shall table before the National Assembly proposals for revenue allocation from the Federation Account.[62] Also, in determining the formula, the National Assembly shall take into account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density—"provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources."[63] Thus, allocation of federal VAT revenue should be shared on the basis of derivation principle similar to the provision under Section 163 of the 1999 Constitution which governs proceeds accruing from stamp duties and capital gains tax. In addition, all VAT revenue collected by the NCS on account of imports and exports should be paid into the Federation Account to be shared by all the federating units.

---

[61]. *Ibid.* at Section 162(1).
[62]. *Ibid.* at Section 162(2).
[63]. *Ibid.*

Two, as to state-sourced VAT revenue accruing from purely intra-state supply of goods and services, such revenue should be collected, administered, and regulated by individual sub-national states in accordance with the principles of fiscal federalism and *Aberuagba*. The fiction that all countries operate federal consumption tax regime have adopted the VAT format is not accurate. Both the United States of America and India operate sub-national Sales Tax regimes as opposed to a federal VAT. However, such a law by the National Assembly would require an amendment to the 1999 Constitution. As an illustration, in Osun State, X purchases goods sold for N1000. Assuming Osun State operates a 5% Sales Tax, X would pay 5% Sales Tax. The cost would therefore be N1,050. If X goes to Sokoto State which also operates a 5% Sales Tax, and sells the same good to Y at N2,000, it would cost Y N2,100, i.e., N2,000 plus 5% Sales Tax at N100. The 5% paid in Osun has been recovered, and the 5% charged in Sokoto has been remitted to the Sokoto Internal Revenue Service. There is no injustice to either X or Y, or even to their respective states. That is why VAT is an indirect tax. The burden shifts to the final consumer.

India operates Sales Tax regime at the sub-national level without a federal GST. Nigeria can learn from India. Also many models of VAT can be adopted to suit Nigerian circumstances. The majority of arguments against States' Sales Tax are based on the present VAT model we are using in Nigeria, which may be changed.

The principle of fiscal federalism is well entrenched under the Sections 162 and 163 and Items 7 and 8, Part II to the 2nd Schedule of the 1999 Constitution. This was elaborated in *AG Abia v A.G. Federation*,[64] where

[64]. (2003) LPELR- 632 (SC)

Honourable Justice Kutigi, JSC, while establishing the principles for revenue generation and management under the 1999 federal constitution, stated that funds in the Federation Account can only be allocated among then three tiers of government. Furthermore, as to the rule of fiscal federalism, he stated thus:

> " ... if any of the three tiers of Government decides to form, create or constitute new bodies, or things whatsoever, the tier and that tier of government alone must be prepared to fund such things or bodies from its own share of allocation and not any more directly from the Federation Account."[65]

At this juncture, it is appropriate to examine the provisions at the "Federal Account" under Sections 162 and 163 of the 1999 Constitution

Sections 162

> (1) The Federation shall maintain a special account to be called "the Federation Account" into which shall be paid all revenues collected by the Government of the Federation, except the proceeds from the personal income tax of the personnel of the armed forces of the Federation, the Nigeria Police Force, the Ministry or department of government charged with responsibility for Foreign Affairs and the residents of the Federal Capital Territory, Abuja.
>
> (2) The President, upon the receipt of advice from the Revenue Mobilisation Allocation and Fiscal Commission, shall table before the National Assembly proposals for revenue allocation from the

[65]. *Ibid*. at 39-40, paras E-A.

> Federation Account, and in determining the formula, the National Assembly shall take into account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density;
>
> Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources.
>
> (3) Any amount standing to the credit of the Federation Account shall be distributed among the Federal and State Governments and the Local Government Councils in each State on such terms and in such manner as may be prescribed by the National Assembly….[66]

In underling that in making distributions from the Federal Account, the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue, Section 163 of the Constitution further provides:

> Section 163
>
> Where under an Act of the National Assembly, tax or duty is imposed in respect of any of the matters specified in item D of Part II of the Second Schedule to this Constitution, the net proceeds of such tax or duty shall be distributed among the States on the basis of derivation and accordingly -

[66]. 1999 Constitution (n2) at Section 162(1),(2),&(2).

> (a) where such tax or duty is collected by the government of a State or other authority of the State, the net proceeds shall be treated as part of the Consolidated Revenue Fund of that State;
>
> (b) where such tax or duty is collected by the Government of the Federation or other authority of the Federation, there shall be paid to each State at such times as the National Assembly may prescribe a sum equal to the proportion of the net proceeds of such tax or duty that are derived from that State.[67]

Clearly, Section 40 Special Account is *not* a federation account, and the federal government's creation of the Special Account can only put its own fund into that account. Generally, as to their taxing and spending power in a federation, the states retained all such powers normally associated with political sovereignty, except insofar as the Constitution explicitly provided otherwise. As Alexander Hamilton, writing in *The Federalist* in 1788, declared:

> "[T]he individual States should possess an independent and uncontrollable authority to raise their own revenues for the support of their own wants…. I affirm that (with the sole exception of duties on imports and exports) they would retain that authority in the most absolute and unqualified sense; and that any attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power unwarranted by any article or clause of the Constitution."[68]

---

[67]. *Ibid*. at Section 163.

[68]. Alexander Hamilton, *The Federalist No. 32* (Washington, DC: US Congress, 1788) 197-201; Gianluigi Bizioli & Claudio Sacchetto, *Tax Aspects of Fiscal Federalism Subtitle: A Comparative Analysis* (Amsterdam: IBFD, 2011) 31.

Nigeria operates a federalism under which power and responsibilities are shared between the federal, State and local government authorities, with *separate* revenue, expenditure, and assigned to them. A review of constitutional provisions is necessary. Fiscal federalism recognizes that two or three governments and not one central government must perform the role of the State in economic management—each level with different expenditure responsibilities and taxing powers, with the federal system of administration allowing both a centralized and decentralized collective choice. Fiscal Federation places the economy at a higher utility level than a centralized system.[69] According to Professor Benjamin Nwabueze, *true federalism presupposes that the national and regional governments should stand to each other in a relation of meaningful independence resting upon a balanced division of powers and resources*.[70] Nwabueze has identified the following additional characteristics in a federal system:

a. The power sharing arrangement should not place such a preponderance of power in the hands of either the national or regional government to make it so powerful that it is able to bend the will of the others to its own;

b. Federalism presupposes that the national and regional governments should stand to each other in a relation of meaningful independence resting upon a balanced division of powers and resources. Each must

[69]. Olumide K. Obayemi, "Constitutional Fiscal Federalism and Delegated Legislative Powers: Whether the Federal Inland Revenue Service (FIRS)'s Recent Publications Were Issued in Accordance With Relevant Tax Laws and the Constitution?" (2020) Vol. 7 University of Benin Journal of Public Law 89-111 (
Obayemi IV).

[70]. Benjamin Nwabueze, *Federalism in Nigeria under the Presidential Constitution* (Sweet & Maxwell

have powers and resources sufficient to support the structure of a functioning government, able to stand on its own against the other.

c. From the separate and autonomous existence of each government and the plenary character of its powers within the sphere assigned to it, by the Constitution, flows the doctrine that the exercise of these powers is not to be impeded, obstructed or otherwise interfered with by the other government, acting within its powers.[71]

The principle of fiscal federalism and taxing powers are well entrenched under Sections 4, 5. 162 and 163 together with Items 10, 58, 59, and 62 of Part 1 of the 2nd Schedule to the Constitution (Exclusive List) and Items 7 and 8 of Part II to the 2nd Schedule of the 1999 Constitution.

The 1999 Constitution is silent on consumption tax. Sections 3 and 4 of the Constitution empower the central federal Legislature to legislate on matters contained in the Exclusive Legislative List and certain items under the Concurrent Legislative List. The 2nd Schedule to the Constitution—i.e., at items 7 and 8 of Part II (Concurrent Legislative List) provide that the central federal Legislature in exercise of its power to impose tax or duty on persons other than companies, may prescribe that such tax or duty be collected or administered by the State.

Relevant to taxing powers, the Exclusive List, under Items 10, 58, 59, 62, and 68 of Part 1 of the 2nd Schedule to the Constitution states that the central federal Legislature has legislative powers on:

1983) 6.

i. Item 10: Commercial and industrial monopolies, combines and trusts.

ii. Item 58. Stamp duties

iii. Item 59. Taxation of incomes, profits and capital gains, except as otherwise prescribed by this Constitution.

iv. Item 62. Trade and commerce, and in particular –

(a) 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;

(b) establishment of a purchasing authority with power to acquire for export or sale in world markets such agricultural produce as may be designated by the National Assembly;

(c) inspection of produce to be exported from Nigeria and the enforcement of grades and standards of quality in respect of produce so inspected;

(d) establishment of a body to prescribe and enforce standards of goods and commodities offered for sale;

(e) control of the prices of goods and commodities designated by the National Assembly as essential goods or commodities; and

(f) registration of business names.

v. Item 68 of the exclusive list also empowers the National Assembly to legislate on 'any matter incidental or supplementary to any matter mentioned elsewhere in the list'.[72]

As to taxing powers under the Concurrent Legislative List, Items 7 and 8 of Part II of the 2nd Schedule to the Constitution (Concurrent List) give the sub-national state legislature powers on:

i. Item 7: In the exercise of its powers to impose any tax or duty on –

(a) capital gains, incomes or profits or persons other than companies; and

(b) documents or transactions by way of stamp duties,

the National Assembly may, subject to such conditions as it may prescribe, 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.

ii. Item 8: Where an Act of the National Assembly provides for the collection of tax or duty on capital gains, incomes or profit or the administration of any law by an authority of a State in accordance with paragraph 7 hereof, it shall regulate the liability of persons to such tax or duty in such manner as to ensure that such tax or duty is not levied on the same person by more than one State.

[72]. Linus Osita Okeke, 'The VAT Decree and the Nigerian Constitution' (2000) 27 TPIR 7.

Thus, the Nigerian central federal Legislature has the following constitutional powers

i. The exclusive legislative power to make laws with respect to matters provided in the exclusive list.[73]
ii. The legislative powers over matters contained in the concurrent list, only to the extent provided for in the concurrent list.[74]
iii. (In addition to the powers contained in the exclusive list and the concurrent list), the legislative powers over matters that are expressly reserved for it by any provision(s) of the Constitution.[75]
iv. Incidental and Supplemental Legislative constitutional powers to legislate on incidental matters associated or connected to express powers listed in the Exclusive List.[76]

Similarly, the Supreme Court of Canada used the 'trade and commerce clause under Section 91(2) of the Canadian Constitution Act 1867 to hold, in *Dominion Stores Ltd v The Queen*,[77] that the Canadian federal parliament can regulate international and interprovincial (i.e. inter-state) trade and commerce. Correspondingly, the sub-national Nigerian states are constitutional authorizes to enact laws on:

[73]. 1999 Constitution (n 2).
[74]. *Ibid*., at Section 4(4)(a).
[75]. *Ibid*., at Section 4(4)(b).
[76]. *Ibid.*, at Item 68 of Part 1 of the 2nd Schedule.
[77]. 42 [1980] 1 SCR 844.

i. Matters contained in the concurrent list, to the extent stipulated therein.[78]

ii. Any other matters with respect to which it is empowered to make laws in accordance with any specific provision of the Constitution.[79]

iii. Any matter *not* listed in the exclusive list and/or the concurrent list,[80] or any matter in respect of which the Constitution has *not* vested legislative power in the National Assembly or the House of Assembly.[81]

According to leraned authors Jude Odinkonigbo and Nduka Ikeyi,[82] it is this power of the sub-national Legislature to make laws in respect of any matter *not* listed in the exclusive list and/or the concurrent list, or in respect of which the Constitution has *not* vested legislative power in the central Legislature or sub-national Legislature, that is regarded as the *residual powers* of the sub-national states to make laws; and this power is exclusive to the sub-national states.[83] Thus, the central federal Legislature cannot legislate on those residual matters—as the Nigerian

[78]. 1999 Constitution (n 2), at Section 4(7)(b).
[79]. *Ibid*., at Section 4(7)(c).
[80]. *Ibid*., at Section 4(7)(a)&b).
[81]. For a detail discussion of constitutional taxing powers over consumption taxes in Nigeria, see, especially, Jirinwayo Jude Odinkonigbo and Nduka Ikeyi "Is the power of a state to impose sales tax in Nigeria fettered by the imposition of value added tax by the federal government?," Commonwealth Law Bulletin, 2015 Vol. 41(4) 577–596, at 583. (Odinkonigbo & Ikeyi).
[82]. *Ibid.*
[83]. *Ibid.*

Supreme Court in *AG Abia v AG Federation*[84] had held on the existence of Constitutional residual matters thus:

> The Constitution of the Federal Republic of Nigeria 1999, like most constitutions, does not provide for a residual list. And that is what makes the list residual. The expression emanates largely from the judiciary, that is, it is largely a coinage of the judiciary to enable it exercise its interpretative jurisdiction as it relates to the Constitution. Etymologically, residual merely means that which remains. In legislative or parliamentary language, residual matters are those that are neither in the exclusive nor concurrent legislative list; that is what remains or is not covered by the exclusive and concurrent legislative lists.[85]

In this connection, in *AG Ogun State v Aberuagba*,[86] the Supreme Court (per Bello, JSC), while explaining the exclusive power of a sub-national legislature on residual matters, held that:

> A careful perusal and proper construction of Section 4 of 1979 Constitution would reveal that the residual legislative powers of the government were vested in the States. By 'residual legislative powers' within the context of s 4 [of the Constitution], [it] is meant what was left after the matters in the Exclusive and Concurrent legislative lists and those matters which the Constitution expressly empowered the Federation and the States to legislate upon had been

[84]. (2006) 16 NWLR (Pt 1005) 26-50.
[85]. *Ibid.* at 38.
[86]. *Aberuagba* (n 20), at 434 -464.

> subtracted from the totality of the inherent and unlimited powers of a sovereign legislature. The Federation has no powers to make laws on the residual matters[87]

Clearly, Nigeria operates as a federalism under which power and responsibilities are shared between the central federal and sub-national state government authorities, with *separate* revenue, expenditure, and assigned responsibilities. Also, the powers to legislate, collect, and administer taxes are shared among the different levels of government. Therefore, against the background of constitutional fiscal federalism, legislative history, administrative law principles, tax statutes, and case law, this paper reviews the constitutional powers to legislate VAT/sales tax.[88] The Special Account under Section 40 of the VAT Act cannot operate to cover revenue accruing from items under the residuary list such as Sales Tax and VAT. The Special Account must be expunged, and all federal sourced VAT proceeds must be paid, instead, into the Federal Account under Section 162 of the 1999 Constitution. The only limitation is that upon receiving advice from the Revenue Mobilisation Allocation and Fiscal Commission, the President shall table before the National Assembly proposals for revenue allocation from the Federation Account.[89] Further, in determining the formula, the National Assembly shall take into account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density—"provided that the principle of

---

[88]. *Ibid.*
[88]. 1999 Constitution (n 2), at Items 10 and 62 of Part 1 of the 2nd Schedule to the 1999 Constitution (Exclusive List)
[89]. *Ibid.* at Section 162(2).

derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources."[90] Thus, allocation of federal VAT revenue should be shared on the basis of derivation principle similar to the provision under Section 163 of the 1999 Constitution which governs proceeds accruing from stamp duties and capital gains tax.

8. CONCLUSION

To reiterate, allocation of federal sourced VAT revenue should be shared on the basis of derivation principle similar to the provision under Section 163 of the 1999 Constitution which governs proceeds accruing from stamp duties and capital gains tax. In addition, all VAT revenue collected by the Nigerian Customs Service on account of imports and exports should be paid into the Federation Account to be shared by all the federating units. Also, the fiction that all countries operating federal consumption tax regime have adopted the VAT format is inaccurate, as both the United States of America and India operate sub-national Sales Tax regimes as opposed to a federal VAT. However, such a law by the National Assembly would require an amendment to the 1999 Constitution. This paper also reiterates proposals for legal theories for amending and/or abolishing the Special Account presently being administered by the FAAC under Section 40 of the VAT Act and for increasing Sub-National State governments' powers to administer and collect revenue from consumption taxes in Nigeria. This is necessary to redress the imbalances currently being created by the operation of the Special Account. For instance, the recent 2021 Lagos and Rivers States' VAT laws together

[90]. *Ibid.*

with the judgment in *AG Rivers v. FIRS,* will have the following implications. If the Special Account under Section 40 of the VAT Act continues to exist, the federal government (FGN) may be the biggest winner because, in 2020, Nigeria earned N1.531tr from VAT. While local VAT was N763bn, foreign VAT — collected by FGN — was N768bn. Therefore, according to Simon Kolawole, rather than take just 15% (N230bn) from the N1.531trn, FGN may now pocket the entire N768bn from foreign VAT since it does not go into federation account and may not be subject to the regular sharing formula under Sections 162 and 163 of the 1999 federal constitution—that would deprive the sub-national States, Rivers and Lagos inclusive, of about half of the total VAT revenue.[91] The Special Account under Section 40 of the VAT Act cannot operate to cover revenue accruing from items under the residuary list, such as Sales Tax and VAT. The Special Account must either be amended to exclude revenue accruing from purely *intra-state* activities or be expunged. There are various forms of VAT models,[92] it is suggested that the variety most suitable for the Nigerian tax terrain should to be adopted and operated by the sub-national States.

[91]. Simon Kolawole, "Ending the War Over VAT," ThisDay Newspaper September 11, 2021. Available at https://www.thecable.ng/ending -the-war-over-vat. (ThusDay)
[92]. There are about 6 different models of VAT operated by different countries.