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Abdulkabir Badmos<sup>1</sup>

## **THE LAW AND ECONOMIC IMPLICATIONS OF NIGERIA'S FOCUS ON CONSUMPTION TAXES**

### **INTRODUCTION**

The recent changes in the rates of taxes in Nigeria have not gone unnoticed by would-be tax payers and defaulters. The world over, tax compliance has always been a topical issue with every government devising creative means of collecting all taxes due on various incomes/transactions carried out within its jurisdiction. The dwindling income from crude oil which is Nigeria's major source of revenue compels the government, both at the Federal and state levels, to explore alternative sources of revenue through taxation, to sustain the economy and to undertake capital projects.

In this piece, the author examines the meaning of consumption tax, the behavioural patterns of persons upon whose expenditures the tax is charged and the attitude of the Courts and tax payers (including merchants) alike to the tax regime.

### **WHY TAX CONSUMPTION?**

Consumption taxes are indirect taxes. A tax is indirect when the tax burden is borne by one other than the person from whom the tax is collected. These taxes are levied on consumption of goods and services. Their collection ensures some level of accountability, probity and reliable remittance, hence their preference. Examples are Value Added Tax

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<sup>1</sup> Abdulkabir Badmos, Dispute Resolution Department, S. P. A. Ajibade & Co., Lagos, Nigeria.

(VAT), Sales Tax, and Stamp duties. The vendor usually bears no liability whatsoever other than acting as a collecting agent.

It is not uncommon to find the terms “Sales Tax” and “Value Added Tax” being used interchangeably when discussing the subject of consumption taxes, however, these taxes are essentially not the same. In defining what Sales Tax is, the Supreme Court in the case of **A.G. OGUN STATE v. ALHAJA AYINKE ABERUAGBA**,<sup>2</sup> stated as follows:

Sales Tax is Tax chargeable to the Purchaser or rather, the ultimate consumer of goods, made in Nigeria and circulating in Nigeria. Such ultimate consumer will exclude the manufacturer or the wholesaler or indeed the retailer who is a middle man between the wholesaler and the consumer. Matches are made in Nigeria (not just assembled in Nigeria). The ordinary cigarette smoker who buys from a hawker is a consumer and if he is asked to pay tax on the matches, he is paying a Sales Tax not Excise Duty. And this goes for cigarettes or any of those articles made in Nigeria as opposed to those imported into Nigeria.

The apex court, continued<sup>3</sup> as follows:

Sales Tax is tax on consumption and until the goods have arrived at the point of consumption, it is not due and payable. This is distinct from excise duty which is levied at the point of manufacture.

From the above dicta, it is beyond doubt that the basis of liability to pay sales tax is consumption. By parity of reasoning, it goes without saying that where a person consumes more of a particular class of goods and services subject to a consumption tax, he is liable to be charged a corresponding rate based on his consumption.

Based on the nature of human activity, consumption of goods and services is inevitable, various state governments, knowing that they have been shut out by the federal statutes (through the doctrine of covering the field) have devised other means to impose the consumption taxes under different heads. Expectedly, these actions have not gone without challenge by business owners and tax payers. The case of **A.G. Lagos State v. Eko Hotels Ltd**<sup>4</sup> is very instructive in this regard. The Eko Hotels had approached the Court to determine the validity of the Lagos state law that charges 5% on her earnings.<sup>5</sup> These

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<sup>2</sup> (1985) LPELR-3164 (SC) Per KAYODE ESO, J.S.C (Pp. 88-89, paras. F-B).

<sup>3</sup> Per IRIKEFE, J.S.C. at P. 65, para. B.

<sup>4</sup> (2017) LPELR 43713 (SC).

<sup>5</sup> The VAT Act has been amended by the provisions of the Finance Act, 2019, increasing VAT rate in Nigeria to 7.5%.

charges came right after the FIRS, based on the VAT Act, had assessed her to tax on the same services. This case went up to the Supreme Court where it was held that although the Lagos State Government, has the right to legislate on Sales Tax, such right is held in abeyance in view of the existence of a federal statute, the VAT Act, which has covered the field, stating that allowing both legislations to run concurrently would cause confusion and in fact lead to double taxation.

As clear as this admonition of the Supreme Court was, one would naturally think that the issue had been resolved. However, the contrary is the case despite that decision. Various states have still continued to enact Sales tax laws and state Courts of first instance have been looking at the issue from different points of view.

In the case of **Nigeria Employers Consultative Association (NECA) and Retail Supermarkets Nigeria Limited, operators of Shoprite v. A.G. Federation & 2 Ors**<sup>6</sup>, the Federal High Court, Abuja<sup>7</sup>, nullified Section 96 and 97 of the Kano State Sales Tax Law that levied taxes on items already covered under the Value Added Tax Act. The Court declared that the imposition of consumption tax under the Kano state law upon the same goods and services which were already subject to the VAT amounts to double taxation.

However, the same Federal High Court, in its judgment delivered on the 3<sup>rd</sup> of October, 2019 in the case of **The Registered Trustees of Hotel Owners and Managers Association of Lagos (Hotel Owners) v Attorney General of Lagos State (AG Lagos)**<sup>8</sup>, rightly, in our view, upheld the powers of the Lagos State government to enact laws regarding consumable items in hotels, restaurants and events centres.

Interestingly, the Lagos Court went further to hold that since the **Taxes and Levies Act** (as amended in 2015) was enacted after the VAT Act of 1993, its provisions have tacitly repealed any provisions of the VAT Act concerning hotels, restaurant and event centres and should thus prevail. The Court therefore restrained the FIRS from collecting VAT on transactions relating to the consumption of goods and services in hotels, restaurants and event centres in Lagos.

It is obvious from the above that these decisions of the Federal High Court are in conflict with one another. While it is conceded that the Supreme Court has validated the right of the state governments to make laws regarding sales tax, it is the writer's view that going a step

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<sup>6</sup> (Unreported) but contained in the 23<sup>rd</sup> July 2018 electronic issue of "The Guardian" at <https://guardian.ng/news/court-nullifies-kano-state-law-on-consumption-tax/> accessed on 25<sup>th</sup> October 2019.

<sup>7</sup> Per John Tsoho, J. (Ag. Chief Judge of the Federal High Court)(as he then was).

<sup>8</sup> (Unreported) decision of the Lagos Division of the Federal High Court, available at <http://www.mondaq.com/Nigeria/x/858674/tax+authorities/Federal+High+Court+Upholds+State+Government+s+Powers+to+Collect+Consumption+Tax> accessed on 25<sup>th</sup> October, 2019.

further to restrain the FIRS from collecting VAT in hotels, restaurants and event centers in Lagos is one decision worthy of being tested in the appellate courts.

### **ADMINISTRATIVE ISSUES RELATING TO CONSUMPTION TAXES**

Nigeria's massive unbanked populace definitely poses a challenge to the collection of consumption taxes. The country's proportion of financially excluded adults stood at 46.3 percent in 2010. Only about 30.7 million of the 85 million Nigerians above the age of eighteen have access to formal financial service.<sup>9</sup>

For this reason, majority of the business transactions that occur on Nigerian streets are neither recorded nor receipted. Thus, obtaining the necessary data that would enable assessment of the chargeable consumption taxes would naturally pose a challenge. The Supreme Court, voiced this frustration as far back as 1985, in the case of **Aberuagba**<sup>10</sup> where **Bello JSC** stated inter alia:

In developed countries where retail trade is carried on in departmental stores, supermarkets, drug stores and shops where all sales are accounted for and the business addresses registered, it is convenient and safe for any government to appoint retailers as its agents for the collection of Sales Tax. Every penny collected will ordinarily reach the government. The position is entirely different in Nigeria. It is notorious fact that except in few departmental stores, shops and drug-stores, where accounts of sales are kept, the bulk of the retail trade is carried on by swam of amorphous trades in the market places and in their homes, on our streets and highways, under our bridges and trees. They do not keep record or account of their business dealings and they cannot be reached by any Government. It would be a bonanza to those retail traders to appoint them as agents for the collection of any sales tax. Except in the case of the few retailers that I have mentioned, not a kobo would reach the government. Consequently, for any meaningful sales tax to reach the government, it must be collected by agents, such as distributors, whose accountability to the government for the tax collected is assured.

Although, not much has changed since His Lordship made that profound statement in 1985, it has encouraged the relevant tax authorities to evolve creative way/strategies for collecting

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<sup>9</sup> Kama, Adigun: (2013) "Financial Inclusion in Nigeria: Issues and Challenges" pg. 26 available electronically at <https://www.cbn.gov.ng/out/2014/rsd/occasional%20paper%20no.%2045%20issues%20and%20challenges.pdf>, accessed on 6<sup>th</sup> March 2020.

<sup>10</sup> Ibid at 399.

these taxes. A more recent one is the fifty naira (₦50) stamp duty paid on receipts issued in respect of deposits made into a bank.<sup>11</sup>

It will be recalled that on 15<sup>th</sup> January 2016, the Central Bank of Nigeria (CBN) relied upon the decision of the Federal High Court in *Standard Chartered Bank Nigeria Limited v. Kasmal International Services Limited and 22 Ors*<sup>12</sup> and proceeded to issue a circular titled 'Collection and Remittance of Statutory Charges on receipts of Nigeria Postal Service under the Stamp Duties Act'.<sup>13</sup> That circular directed all deposit-money banks and financial institutions to charge a duty of ₦50 (Fifty Naira) for services rendered in respect of electronic transfers and teller deposits from ₦1000 (one thousand Naira) and above on behalf of the Nigeria Postal Service.<sup>14</sup>

The public outcry that later led to the stamp duty regime being suspended shows that the Nigerian consumer is already averse to paying more taxes on goods and services. Notwithstanding, the recent increase in the VAT rate<sup>15</sup> from 5% to 7.5% is also an indicator of government's interest in raking in more revenue from consumption taxes. While it appears too early in the day to assess the pain or gains of the increase in VAT rate, it is submitted that the coming days will determine whether or not the decision was in the right direction.<sup>16</sup>

This writer is of the view that although the government's desire to deploy consumption taxes to stimulate growth and development of the economy is laudable, it should be wary of taking decisions that may be counterproductive to achieving its aims. An example is the issue of stamp duties on POS transactions. Extreme care has to be taken to ensure that the lofty ideals of driving a cashless economy is not threatened by the preference of consumers for cash-based transactions, in obvious protest of the ₦50 stamp duty. The question a would-be stamp duty payer in the circumstance may ask is, "if I can make cash deposit without incurring extra costs, why not?"

## CONCLUSION

Previous Nigerian governments have paid little or no attention to many of the transactions that go on in the informal sector of the economy. The recent enthusiasm to toe the line of international best practices in taxation, may have given rise to the government's decision to focus on consumption taxes as a way to close the gap on its deficits. This desire to widen

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<sup>11</sup> Available electronically at <https://www.cbn.gov.ng/Out/2019/PSMD/Review%20of%20Process%20for%20Merchants%20Collection%20on%20Electronic%20Transactions.pdf> accessed on 9<sup>th</sup> March 2020.

<sup>12</sup> (Unreported) Suit No.: FHC/L/CS/1710/2013.

<sup>13</sup> Available electronically at <https://www.cbn.gov.ng/Out/2016/CCD/SCAN0001.pdf>

<sup>14</sup> <http://www.mondaq.com/Nigeria/x/677670/Financial+Services/Proposed+Changes+To+The+Stamp+Duties+Act+Under+The+Stamp+Duties+Amendment+Bill+2017> accessed on 30<sup>th</sup> of October, 2019.

<sup>15</sup> Section 34, Finance Act, 2019.

<sup>16</sup> The increase in VAT rate came into effect on 1<sup>st</sup> February 2020.

the tax net has made many tax authorities explore all avenues to ensuring tax compliance. However, there have been concerns (including litigations) on payment of consumption taxes to two different taxing bodies simultaneously. As the apex court has observed, subjecting the same tax base to deductions for the same goods/services rendered would amount to double taxation. The relevant tax authorities and indeed other major stakeholders, like the Central Bank of Nigeria, should pay particular attention to the manner of implementing some of her policies in order to effectively achieve the government's economic goals.

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For further information on this article and area of law, please contact **Abdulkabir Badmos**  
at: S. P. A. Ajibade & Co., Lagos by telephone (+234.1.460.5091, 460.5092),

Mobile (+234.813.466.7233; +234.815.088. 2799) or

Email ([abadmos@spaaajibade.com](mailto:abadmos@spaaajibade.com))

[www.spaaajibade.com](http://www.spaaajibade.com)