

Constitutionality Of Lagos State Sales Tax Law

Operating a democratic government in Nigeria have been very expensive. With dwindling revenues from the Federation Account to the State and Local Governments, most State Governments have again resorted to imposing various forms of levies and taxes in order to, at the minimum, settle their recurrent expenditures. The Lagos State Government has by its Sales Tax (Schedule of Amendment) Order, 2000 amended the schedule to the Sales Tax Law, Cap 175, Laws of Lagos State of Nigeria, 1994 ("the Law"). The commencement date for this Order is 2 nd November 2000 .

Brief History Of Sales Tax & VAT

A majority of the tax legislation in Nigeria have been adopted from tax legislation enacted in Britain . An appreciation of the history of tax legislation in Britain is therefore necessary for a greater appreciation of the tax legislation in Nigeria .

Sales Tax was introduced in Britain during the Second World War as a form of indirect tax on goods, to assist the British Treasury prosecute its war effort. This tax was replaced in Britain in the early 1970's by the Value Added Tax ("VAT") principally because the Sales Tax was very easy to evade, difficult to administer and more importantly, because the number of affected taxpayers were limited.

VAT was introduced into Nigerian legislation by the Value Added Tax Decree, 1993 ("VAT Act"). Interestingly, Section 41 of the VAT Act repealed the previously existing Sales Tax Decree, 1986.

VAT is imposed on the supply of all goods and services in Nigeria except goods and services specifically exempted in Schedule 1 of the VAT Act. The rate chargeable is 5% of the value of all goods or service. The exempted goods and services include medical and pharmaceutical products, basic food items, books and educational materials, baby products, locally manufactured fertilisers, all exports, plants and machinery utilised in the Export Processing Zone, etc.

VAT is administered, on behalf of the Federal Government of Nigeria ("FGN") by the Federal Board of Inland Revenue ("FBIR") as a sort of Trustee for the State Governments of the

Federation. Under the VAT arrangement, all the States benefit collectively and equally to the tune of 50% of the entire Vat proceeds collected whilst the Local Governments share 35%. The 15% that is left is utilised to cover the cost of administering this tax regime.

Lagos State Sales Tax Law

The Law has as its commencement date, 19 th July 1982. The Law is principally a legislation authorising the Lagos State Government to impose the tax upon certain

goods and services rendered in Lagos State . The rate of the tax is also 5% of the classes of goods and services enumerated in Schedule 1 of the Law.

Taxable goods and services covered under this Law include beer, wine, liquor, spirits, cigarette and tobacco, jewels and jewellerys, electrical and electronic equipment, soft drinks, building materials, furniture and finishing products, sales and services in registered hotels, motels, catering establishments, restaurants (excluding drinks), etc.

The Taxing Agent under this Law is the "Seller or Supplier" who is defined in Section 13 of the Law to include *?. a manufacturer , importer or distributor but does not include a retailer*". The Italics and underlining are mine.

To comply with the fair hearing requirement of the Nigerian Constitution, the Law requires that any objection to an assessment under the Law must be made within 15 days of the service of the order by the Lagos State Board of Internal Revenue ("the Board").

Should the assessed party remain dissatisfied, he may appeal against the assessment to a Lagos High Court. This right of appeal is however subject to the Appellant paying into Court, within 7 days from the date of the filing of the Notice of Appeal, by way of security, a sum equal to the estimated assessed amount.

Contravention of the Law attracts a fine of =N=1,000 (One Thousand Naira) for a first offender and =N=2,000 (Two Thousand Naira) for any second or subsequent offences.

Constitutional Authority For Lagos State Sales Tax Law

The principal authority that has been canvassed as the constitutional basis of the Law is the fact that since the 1979 and 1999 constitutions do not confer exclusive jurisdiction over Sales Tax on the Federal Government, as it was under the 1960 and 1963 Nigerian Constitutions, it meant that

it was a residual matter over which the State Governments could make laws.

Also, reliance has been placed on the Supreme Court decision delivered in 1984 in the matter of OGUN STATE v. ALHAJI ABERUAGBA [1984] SC 20 or [1997] 1 NRLR (Part 1) page 51 where the Supreme Court held, amongst others, that both the Federal and State Governments had the residual power to impose Sales Tax on any matter within their respective legislative competence.

The Supreme Court further held that only the Federal Government had the power to make Laws in respect of international trade and commerce and inter state trade and commerce whilst the State Government had the power to legislate on intra-state trade and commerce.

The Supreme Court held further in the above suit that Section 3 (1) of the Ogun State Sales Tax Law was unconstitutional as it sought to tax goods brought into Ogun State , which was a discriminatory tax against inter state or international trade and commerce. The taxes on petrol, diesel and petroleum products were equally held to be unconstitutional and void as these were items under the exclusive list to which the Federal Government had absolute control.

Comments On The Above Authorities

The first comment is that at the time the Supreme Court decided the Aberuagba's case, there was no VAT Act neither was there the Taxes and Levies (Approved List of Collection) Decree, No. 21, 1998 (?the Approved List Act?).

We concede that Section 1 of the Approved List Act, which expressly overrides Section 1(1) of the 1979 constitution and by implication the 1999 constitution (on the supremacy of the constitution), is invalid and unconstitutional to the extent of its inconsistency, the remaining sections of this Act remains an integral part of Nigerian Law by virtue of Section 315 of the 1999 Constitution.

The above Section of the 1999 Constitution provides that ?subject to the provisions of this constitution, any *existing Law* shall have effect with such modification as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be an Act of the National Assembly?. Italics and underlining are mine.

Also, there is no assurance that the implementation of the Law, in its present form, would not lead

to double taxation, as the goods are also liable to tax under the VAT Act. It was held in the Second Street Properties' case, which is an American case, that "to constitute double taxation, the two taxes must be imposed on the same property, by the same governing body during the same period for the same taxing purpose".

A brief comment on the Approved List Act is that the Act was promulgated by the military government at the time to harmonise and stem the taxes and levies that each tier of government was permitted to collect. In practice, this Act brought a lot of sanity and clarity to tax collection in Nigeria . As this Act is an existing Law under our Constitution, the items under the Lagos Law cannot be residual matters upon which the State can legislate.

Secondly, the definition of a Seller or Supplier under the Law to include a Manufacturer or Importer falls into the same error in the Aberuagba's case as it connotes that Lagos State can charge excise duty on goods manufactured within its territory by a Manufacturer and, import duty on goods imported by an Importer. This would be unconstitutional, as excise and import duties are items under the exclusive legislative list reserved for the Federal Government under the 1999 constitution.

Of equal concern is the requirement that an Appellant appealing against an assessment can only lodge a valid appeal if he deposits a sum equal to the amount charged as security for the appeal. This may not be constitutional as it might infringe on the Appellant's constitutional right and financial ability to prosecute the Appeal. Should this situation arise, it is suggested that the Appellant should challenge the Law itself instead of the assessment.

Conclusion

It is critical that all forms of double taxation must be discouraged, as they are another disincentive to the promotion of free private enterprise. The Lagos State Sales Tax Law should therefore be repealed.

Following from the above and in the interest of equity and fairness, the Federal Government should amend the VAT Act so that the distribution of its proceeds is based on **derivation** , the same way that its collection and charge is also based on residence. To continue with the current practice of equal distribution of proceeds between all the States and Local Governments, irrespective of the amount generated from each State, will only encourage multiple and or double taxation, unnecessary constitutional challenges, and political and economic tension between the

States and the Federal Government.

Both the Federal and State Governments should also equip adequately the Federal and State Boards of Internal Revenue as this is the only way almost all the taxes due to all tiers of governments will be collected and available funds increased.

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