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Regulation of Taxing Powers of Local Government Councils by State Governments in Nigeria: Legislative Approach and Judicial Responses

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ABSTRACT

The Nigerian Constitution and the Taxes and Levies (Approved List for Collection) Act have delineated the taxes and levies collectible by each tier of government. However, despite the delineation, there appears to be usurpation of the taxing powers of the local government by the state government. The resultant effect of this is that the local government councils may not be able to meet up to expectation in the provisions of the needs of the citizenry. The main objective of this paper, therefore, is to examine the taxing powers of each tier of government with a view to determining the extent of the statutory powers of the state government to control and regulate the taxing powers of the local government. The methodology employed in this paper is library-based. It has been found that the state governments, under the guise of exercising their constitutional powers, are usurping the functions of the local government in the control and regulation of the taxing powers of the local government. The paper recommended that the Constitution needs to be amended to ensure clear provisions empowering only the local government councils to make bye-laws for the regulation and control of the matters specifically within the taxes and levies collectible by the local government.

I. INTRODUCTION

In a bid to curb the dilemma and complexity in the determination of taxing powers of the three tiers of government, the then Federal Military Government promulgated Decree No. 21 of 1998¹ which delineated the taxing functions of each tier of government. Upon the enthronement of democratic governance, the Decree became an Act of the National Assembly.² The Act is now embodied in *Cap T2, Laws of the Federation of Nigeria 2004* as Taxes and Levies (Approved List for Collection) Act. The provisions of Part III of the Schedule to the Act are *replica* of the provisions of the Fourth Schedule to the Constitution of the Federal Republic of Nigeria 1999 (as amended). Despite the delineation of the taxing powers, however, the regulation and control of items listed in Part III of the Schedule to the Taxes and Levies (Approved List for Collection) Act and the Fourth Schedule to the Constitution of the Federal Republic of Nigeria 1999 (as amended) such as control and regulation of outdoor advertising and hoarding, shops and kiosks; registration of births, deaths and marriages etc have been a conceptual discourse in a continuing legal controversy in the judicial interpretation of the relevant provisions of the law. The resultant effect of this is what appears to be usurpation of the taxing powers of the local government by the state government. The crucial issues to be resolved are: whether the state government has the power to enact any law to regulate and control the items listed in Part III of the Schedule to the Taxes and Levies (Approved List for Collection) Act and the Fourth Schedule to the

¹ Taxes and Levies (Approved List for Collection) Decree No. 21 of 1998.

² This is by the effect of Section 315 (1) (a) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). See also the case of *B.P.E v. N.U.E.E.* (2003) 13 NWLR (Pt 837) 382 at 407.

Constitution of the Federal Republic of Nigeria 1999 (as amended) and what is the effect of the exercise of such power? In resolving the issue, division of taxing powers vis-a-vis the power to legislate and collect taxes and levies on those items and judicial responses thereto shall be examined.

II. DIVISION OF TAXING POWERS

The age long principles of division of powers among the tiers of government is still very extant and subsisting. No tier of government is empowered to usurp the functions and powers of each tier of government. The Nigerian Constitution has delineated the functions and powers of each tier of government as far as the legislative competence to enact or make laws is concerned. Section 4(1) of the Constitution provides for the legislative powers of the Federal Republic of Nigeria as vested in the National Assembly. The sub-section provides as follows:

The legislative powers of the Federal Republic of Nigeria shall be vested in the National Assembly for the Federation which shall consist of a Senate and a House of Representatives.

Section 4 (6) of the same Constitution provides for the legislative power of a state of the federation as vested in the House of Assembly of the state and by force of section 4 (5) of the same 1999 Constitution:

If any law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other Law shall to the extent of its inconsistency be void.³

The Taxes and Levies (Approved List for Collection) Act as an Act of the National Assembly has specified the taxes and levies collectible by each tier of government. Part I of the Schedule to the Act expressly provides for the list of taxes collectible by the Federal Government as companies income tax; withholding tax on companies; residents of the Federal Capital Territory, Abuja and non-resident individuals; petroleum profit tax; value added tax; Education tax; Capital gains tax on residents of the Federal Capital Territory, Abuja, bodies corporate and non-resident individuals; stamp duties on bodies corporate and residents of the Federal Capital Territory, Abuja; personal income tax in respect of members of the armed forces of the Federation, members of the Nigeria police force, residents of the Federal Capital Territory, Abuja and staff of the Ministry of Foreign Affairs and non-resident individuals.

Taxes and levies collectible by the State Government under part II of the Schedule to the Act are personal income tax in respect of Pay-As-You-Earn (PAYE) and direct taxation (self-assessment); withholding tax (individuals only); capital gains tax (individuals only); stamp duties on instruments executed by individuals; pools betting and lotteries, gaming and casino taxes; Road taxes; Business premises registration fee in respect of urban and rural areas; Development levy (individuals only); naming of street registration fees in the state capital; Right of occupancy fees on lands owned by the State Government in urban areas of the state; and market taxes and levies where state finance is involved.

The Act also provides, in Part III of its Schedule, for taxes⁴ and levies collectible by the local Government as follows: shops and kiosks rates; tenement rates; on and off liquor licence fees; slaughter slab fees; marriage, birth and death registration fees; naming of street registration fees, excluding any street in the state capital; right of occupancy fees on lands in rural areas, excluding those collectible by the Federal and State Governments; market taxes and levies excluding any market where state finance is involved; motor park levies; domestic animal licence fees; bicycle, truck, canoes, wheelbarrow and carf fees, other than a mechanically propelled truck; cattle tax payable by cattle farmers only; merriment and road closure levy; radio and television licence fees (other than radio and television transmitter); vehicle radio licence fees (to be imposed by the local government of the state in which the car is registered); wrong parking charges; public convenience, sewage and refuse disposal fees; customary burial ground permit fees; religious places establishment permit fees; and signboard and advertisement permit fees.

From the above, it is glaringly clear that the local government is the appropriate tier of

³ See also the following cases: *Attorney-General of Oyo State v. Attorney-General of the Federation* (1992) 1-2 SC, 13 at 125, *Lakemba v. Attorney-General of Oyo State* (1994) 4 FSR 713 at 722.

⁴ And for the purpose of this paper, taxes are rates, fees, fines, tolls and charges collectible by the local government.

government to collect levies in respect of the items listed in Part III of the schedule to the Act. A perusal of Part II of the Schedule to the Act which stipulates the taxes and levies collectible by the state government does not give the state government powers to collect taxes or levies in respect of the items listed in Part III of the schedule to the Act. Hence once the National Assembly has enacted a law,⁵ the state government has no power to enact any similar law in respect of which the National Assembly has already enacted law. Thus, pursuant to section 4(5) of the 1999 Constitution, such law, if enacted by the state government shall be null, void and of no effect whatsoever to the extent of its inconsistency. Such is the position of the Court in *Attorney-General of Ondo State v. Attorney-General of the Federation*.⁶

Aside the Provision of the Taxes and Levies (Approved List for Collection) Act, Section 7(5) of the 1999 Constitution provides for the functions to be conferred upon Local Government Councils. The section provides as follows:

The functions to be conferred by law upon local government councils shall include those set out in the fourth schedule to this constitution.

It is humbly submitted that in as much as the items in the Fourth Schedule to the constitution and those of Part III of the Schedule to the Taxes and Levies (Approved List for Collection) Act are made pursuant to Section 7 (5) of the 1999 Constitution and the Taxes Levies (Approved List for Collection) Act respectively, both Schedules form integral parts of the Constitution and the Act respectively.⁷

III. CONTROL OF LOCAL GOVERNMENT'S TAXING POWERS BY THE STATE GOVERNMENT

The various State Houses of Assembly are responsible for legislation that will enable the local governments in the State effectively discharge their duties with respect to the collection of revenue within their jurisdiction.⁸ Section 7(1) of the Constitution guarantees the system of Local Government by democratically elected local government councils and accordingly the government of every State must ensure existence of the local government council under a law which provides for the establishment, structure, composition, finance and functions of such councils. Items 9 and 10 of Part II of the Second Schedule to the same Constitution also empowers the House of Assembly of a state to make provisions for the collection of any tax, fee or rate or for the administration of the law providing for such collection by a local government council and shall also regulate the liability of persons to the tax, fee or rate in such a matter as to ensure that such tax, fee or rate is not levied on the same person in respect of the same liability by more than one local government council. The implication of this is that the Constitution empowers the state government to confer on a local government council powers to collect tax, fee or rate or the administration of any law providing for such and the avoidance of multiple taxation on the same person in respect of the same liability.⁹ A local government, therefore, cannot just assume its tax function as they are not self-executing. The House of Assembly of a state must pass a law conferring those functions on the local government.¹⁰ With respect to revenue generation, therefore, it is expected that the local government councils shall carry out their functions in strict adherence and compliance with the relevant legislation as may be enacted by the State House of Assembly. When required, the local government council shall approach the State House of Assembly to enact such laws as may be required for the efficient and effective discharge of their functions.¹¹

Flowing from the above, it is clear that the local government's powers under Section 7 and the Fourth Schedule to the Constitution are limited to mere collection and administration of taxes and rates as may be prescribed by the enabling State Law. Any exercise of power by a local government in excess of the enabling state's law or the constitution may be declared *ultra vires* and therefore null and void.¹²

A holistic approach would reveal that the powers of the state government is limited to enacting laws for the local government to control, regulate and collect taxes and levies falling within the purview of the Fourth Schedule to the Constitution and part III of the Schedule to the Taxes and Levies

⁵ Such as the Taxes and Levies (Approved List for Collection) Act.

⁶ (2002) 6 SCNJ 1 at 40.

⁷ The law is settled that the schedule is an integral part of legislation. See the case of *NEP v. Argo* (2011) 15 NWLR (Pt 737) 627.

⁸ The law is settled that the schedule is an integral part of legislation. See the case of *NEP v. Argo* (2011) 15 NWLR (Pt 737) 627.

⁹ *National Tax Policy*, <http://www.firs.gov.ng/News/National-Tax-policy.aspx>, accessed on 04 October 2014.

¹⁰ Yusuf T. A., "The Signboard of a Law Firm: An Outdoor Advertisement Subject to the Taxing Powers of a Local Government Council" (2013) 16(1).

¹¹ Nig L.J. (Nigerian Association of Law Teachers) 158-159.

¹² Ibid. p. 159.

¹³ *National Tax Policy*, <http://www.firs.gov.ng/News/National-Tax-policy.aspx>, accessed on 04 October 2014.

¹⁴ Abiola Sami, "Division of Taxing Powers" in Abdulkarim M.T (ed) *CITD Nigerian Tax Guide and Statutes*, 650 at 667.

(Approved List) for Collection) Act. It³¹ cannot, by itself, collect such tax or rate in respect of the items³² stated in the Act and the Constitution.

IV. JUDICIAL RESPONSES TO THE REGULATION OF TAXING POWERS OF LOCAL GOVERNMENT

Based on the provision of Section 7(5) of the 1999 Constitution of the Federal Republic of Nigeria, some states of the Federation enacted laws for the regulation and control of the items in respect of which the local government has power to collect taxes and levies.³³

The crucial issue arising from this is whether the state government has the legislative power and competence to enact any law to regulate and control matters such as signage structures and outdoor advertising in view of the Fourth Schedule to the 1999 Constitution and the Schedule to the Taxes and Levies (Approved List for Collection) Act or put succinctly different, whether such law as made by the state government are not inconsistent with the Fourth Schedule to the Constitution and part III of the Schedule to the Taxes and Levies (Approved List for Collection) Act.

In *Knight Frank & Rutley (Nigeria) & Anor v. Attorney-General of Kano State*,³⁴ the Supreme Court considered the functions of local government as enshrined in the 4th Schedule to the 1979 Constitution³⁵ vis-à-vis whether a state government was competent to enter into contract for valuation and collection of tenement rates.

By a majority of 4 - 1, the Supreme Court held, per Uwais CJN, reading the leading judgment as follows:

The powers exercisable by the Federal, State and Local Governments have been clearly identified by the 1979 Constitution. With the exception of the items under the Concurrent Legislative List each of the three tiers of Government exercises exclusive power over the subject under its control. By the provisions of Section 274 Subsection (4) of the 1979 Constitution the provisions of the Interpretation Act, 1964, No. 1 of 1964 shall be employed in interpreting the provisions of the 1979 Constitution. It is clear from the provisions of paragraph 1 (b) and (j) of the Fourth Schedule read together with the provisions of Section 7 subsection (5) of the constitution that the intendment of the Constitution is that only Local Government Councils have the power to assess and impose rates on privately owned property. In interpreting that power section 10 subsection 2 of the Interpretation Act, 1964 provides:

"(2) An enactment which confers a power to do any act shall be construed as also conferring all such other powers as are reasonably necessary to enable that act to be done or are incidental to the doing of it."

It follows from these provisions that the power to award the contract entered into between the parties in this case is exercisable by the Local Government Council and not Kano State Government.³⁶

In *Eti-Osa Local Government V. Mr. Rufus Jegede & Anor*,³⁷ the Court of Appeal had to determine whether the local government is empowered to impose and levy tax outside the provision of Decree No. 21 1998.³⁸ The Court of Appeal held that the appellant (a local government) is not competent to impose taxes outside the provisions of the Fourth Schedule to the 1999 Constitution.

At it appears, there is no conflict between the decisions of the courts in both *Knight Frank & Rutley Nigeria & Anor v. Attorney-General of Kano State* and *Eti-Osa Local Government v. Mr. Rufus Jegede*. However, the recent decisions of the Court of Appeal in its Lagos and Calabar Divisions in *UAC of Nigeria Plc & Ors v. Attorney-General of Lagos State & Ors*³⁹ and *Attorney General of Cross River State*

³¹ The State Government

³² Items stated in Part III of the Schedule to the Taxes and Levies (Approved List for Collection) Act and the Fourth Schedule to the 1999 Constitution.

³³ For example, the Lagos State Structures for Signage and Advertisement Law, 2006 and the Kano State Structures for Signage and Advertisement Law, 2006.

³⁴ (1999) 7 NWLR (Pt 55) 1.

³⁵ Which is in paragraph 1 (b) of the 4th Schedule to the 1999 Constitution (as amended).

³⁶ *Knight Frank & Rutley (Nigeria) & Anor v. Attorney-General of Kano State* (1999) 7 NWLR (Pt 55) 1 at 19.

³⁷ (2009) 11 NWLR (Pt 1042) 419.

³⁸ That is the Taxes and Levies (Approved List for Collection) Act.

³⁹ (2011) All FWLR (Pt 594) 154.

& *Anor v. Mathew Ojua, Esq*,⁴⁰ decided in January and March 2010 respectively have left more questions than answers. The decisions have seriously impacted on what appears to be a settled position of the law and have far-reaching implications on the regulation and control of the taxing powers of the local government councils.

In *UAC of Nigeria Plc & Ors v. Attorney-General of Lagos State & Ors*,⁴¹ the Plaintiffs/Appellants were using signage and advertisement boards for promotion of their business. They claimed that in destroyed and/or removed their signage and advertisement Agency⁴² at different times damaged, despite their series written and oral protests. It is against this background that the appellants filed State Signage and Advertisement Agency Law, 2006 under which the officers and agents of the Lagos State Signage and Advertisement Agency claimed to have the authority to demolish, damage and remove the signage and advertisement boards of the Appellants.

Among other issues that arose for consideration, the issue before the court was whether the Lagos State Signage and Advertisement Agency Law, 2006 is inconsistent with Section 7(5) of the Constitution of the Federal Republic of Nigeria, 1999 read together with paragraph 1 (k) (i) of the 4th Schedule to the Constitution⁴³. The trial court held that the Constitution of the Federal Republic of Nigeria, 1999 did not give the Local Government the function of controlling the Structures for Signage and Advertisement. On appeal to the Court of Appeal, dismissing the appeal, the Court of Appeal held that paragraph 1 (k)(i) of the 4th Schedule of the Constitution gives control and regulation of outdoor advertisement and hoarding to Local Government. The Court went further to distinguish *Knight Frank & Rutley (Nig) Ltd & Anor v. Attorney General of Kano State*⁴⁴ from *UAC of Nigeria Plc v. Attorney-General of Lagos State & Ors*, holding that the issue in *Knight Frank & Rutley (Nig) Ltd* concerned contract award in the area that had been assigned to local Government to control, whereas the situation in *UAC of Nigeria Plc* has nothing to do with award of contracts. The court went further and held, per Galinje JCA delivering the leading judgment, as follows:

The question here is whether the State Government can make laws to regulate those areas that are listed under paragraph 1 (k) (i) of the 4th Schedule to the Constitution of the Federal Republic of Nigeria, 1999. I am of the firm view that the State Government can. I therefore hold that the Lagos State Structures for Signage and Advertisement Law, 2006, No. 9 is not inconsistent with Section 7(5) of the Constitution of the Federal Republic of Nigeria, 1999 read together with paragraph 1 (k) (i) of the 4th Schedule to the same Constitution. Both the State and Local Government in Lagos State have concurrent powers to legislate on the functions enumerated under the 4th Schedule to The constitution of the Federal Republic of Nigeria, 1999.⁴⁵

In *Attorney-General of Cross River State & Anor v. Mathew Ojua, Esq*,⁴⁶ the plaintiff/ respondent, a legal practitioner and property owner in Ikrom, Cross River State of Nigeria, was served with assessment notices for the payment of urban development tax, tenement rate, sanitation levy and refuse collection charges in respect of his properties located in Ikrom in 2005. By an originating summons, he challenged the constitutionality of the Urban Development Tax Law, 2004 upon which the assessment was predicated since he is paying similar taxes to the local government. He therefore sought a declaration that by virtue of the Taxes and Levies (Approved List for Collection) Act, Cap. T2, Laws of the Federation of Nigeria, 2004 and the doctrine of covering the field, the Cross River State Urban Development Tax Law, 2004 is unconstitutional, illegal, null and void and of consequence whatsoever and an order setting aside the assessment notices for the payment of urban development tax, tenement rate, refuse collection charge and sanitation levy on his properties. The trial court granted his claims. On

⁴⁰ (2011) All FWLR (Pt 594) 151.

⁴¹ (2011) *supra*.

⁴² An agency established pursuant to the Lagos State Structures for Signage and Advertisement Law, 2006.

⁴³ That is the control and regulation of outdoor advertising and hoarding.

⁴⁴ (1999) *supra*.

⁴⁵ *UAC of Nigeria Plc & Ors v. Attorney-General of Lagos State & Ors* (2011) (Supra) at 1583.

⁴⁶ (2011) All FWLR (Pt 594) 151.

appeal to the Court of Appeal, the issues, among others, are whether the Cross River State Government can impose and collect taxes and levies outside those specified in part II of the Taxes and Levies (Approved List for Collection) Act for collection by the State Government and whether the Cross River State Government has power and capacity to legislate, determine and demand taxes and levies outside the Taxes and Levies (Approved List for Collection) Act. In a considered judgment, the Court of Appeal held that:

If the constitution has given the function of assessing and collecting property tax to Local Government, the State House of Assembly cannot validly make any law conferring the assessment and collection of that same tax to the state government or any agency of the state government.²⁹

In view of the fact that the cases of *Knight Frank & Rutley Nigeria*,³⁰ *UAC of Nigeria Plc*³¹ and *Attorney-General of Cross River State*³² border on the interpretation and applicability of either the provisions of the Fourth Schedule to the Constitution of the Federal Republic of Nigeria and the Taxes and Levies (Approved List for Collection) Act, *vis-à-vis* the Constitutional and statutory functions and powers of the local government to impose and collect taxes and levies, it is humbly submitted that the State Government can only make law for the local government for the control and regulation of the items enumerated in part III of the Schedule to the Taxes and Levies (Approved List for Collection) Act and the Fourth Schedule to the Constitution. However, the state government cannot make such law(s) to empower the state government or any of its agencies to assess, impose or collect taxes and levies specifically assigned to the local government councils under any guise. It suffices to conclude, therefore, that any state law which purports to confer the power to assess, impose or collect taxes and levies on the state government or any of its agencies in respect of those matters statutorily and constitutionally assigned to the local government will be inconsistent with the Act of the National Assembly³³ and the Constitution,³⁴ and therefore null, void and of no effect whatsoever to the extent of its inconsistency.

This position is supported by the view of the Supreme Court³⁵ in *Knight Frank & Rutley Nigeria*, where Uwais CJN put the position succinctly thus:

It is clear from the provision of paragraph I (b) and (j) of the fourth schedule read together with the provision of section 7 (5) of the Constitution that the intendment of the Constitution is that only local government councils have the power to assess and impose rates on privately owned property.³⁶

Similarly, the court put the provisions of Section 7 (5) of the 1999 Constitution and the Taxes and Levies (Approved List for Collection) Act into consideration in *Attorney-General of Cross River State & Anor v. Mathew Ojua, Esq*³⁷ and held unequivocally that:

This being the case, the Urban Development Tax Law, Cap U3, Laws of Cross River State, 2004 is inconsistent with Section 4 (7); 7 (5) of the Constitution of the Federal Republic of Nigeria, 1999 read along with paragraph D10 of the Second Schedule and paragraph I (b) and (j) of the Fourth Schedule to the Constitution of the Federal Republic of Nigeria, 1999. The State House of Assembly cannot lawfully legislate and deprive any local government council the function assigned to it under the Constitution by excising certain towns in the state and giving the power to assess and collect rates on privately owned houses to the state government for the purpose of promoting tourism in the state.³⁸

It is on the basis of the above that one tends to submit that the position of the Court of Appeal in *UAC of Nigeria Plc & Ors v. Attorney-General of Lagos State & Ors*³⁹ cannot be right in its conclusion

²⁹ *Attorney-General of Cross River State & Anor v. Mathew Ojua, Esq.* (2011) (Supra) at 169.

³⁰ (1998) (Supra)

³¹ (2011) (Supra)

³² (2011) (Supra)

³³ That is the Taxes and Levies (Approved List for Collection) Act, Cap T2 laws of the Federation of Nigeria 2004.

³⁴ Particularly the Fourth Schedule to the Constitution of the Federal Republic of Nigeria 1999 (as amended).

³⁵ (1998) Supra

³⁶ *Knight Frank & Rutley Nig v. Attorney-General of Kano State* (1998) 7 NWLR (Pt 56) 1 at 19.

³⁷ (2011) (Supra)

³⁸ *Attorney-General of Cross River State v. Mathew Ojua* (2011) Supra, at 170.

³⁹ (2011) (Supra)