The Federal High Court's Judgement on VAT Administration in Nigeria and Matters Arising

Background

VAT was introduced in Nigeria via Decree No.102 of 1993. It replaced sales tax operated under Decree No.7 of 1986, administered by states and the FCT. By contrast, VAT is administered by the FIRS, and the revenue is shared among all three levels of government. Both VAT and sales tax fall under the category of consumption tax.

Recently, the Rivers and Lagos State governments passed VAT laws to enable both to collect VAT within their respective states. This development has generated serious controversies regarding VAT administration in Nigeria in recent times.

Position of the Constitution

Sections 3&4 of the Constitution empower the National Assembly to legislate on matters in the Exclusive Legislative List and certain items under the Concurrent Legislative List.

The 2nd Schedule to the Constitution, items 7 & 8 of Part II (Concurrent Legislative List), provide that the National Assembly, in the 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.

FHC's Judgement

The Federal High Court in Port Harcourt, on Monday 9 August 2021, ruled that the Rivers State Government (and not the FIRS) is entitled to collect VAT in the state. This is because only the state is constitutionally permitted to impose taxes within its territory of the nature of consumption or sales tax.

Appeal of the FHC's Judgement by FIRS

The FIRS appealed the above judgement of the FHC and the Court of Appeal sitting in Abuja on 10 September 2021 ordered both Rivers and Lagos States to maintain the "status quo" on the collection of value added tax (VAT) pending the resolution of the appeal of the Federal Inland Revenue Service (FIRS) on the Federal High Court's judgment in the case: *Attorney General for Rivers State v. Federal Inland Revenue Service and Attorney General of the Federation.*

Reacting to the above Court of Appeal's order, the Rivers State Government has approached the Supreme Court (SC) to dismiss the decision of the Court of Appeal (COA) delivered on Friday, 10 September 2021, which ordered all the parties to maintain *status quo* on the collection of Value Added Tax (VAT) pending the determination of the Federal Inland Revenue Service (FIRS)'s appeal against the Federal High Court (FHC)'s judgment in *Attorney General of Rivers State (AGRS) vs FIRS & Attorney General of the Federation.*

The AGRS submits that the:

- COA erred in law when it relied on Section 6(6) of the 1999 Constitution and its inherent jurisdiction to order all the parties to maintain the *status quo* on the dispute.
- COA does not have the powers to restore the parties to the *status quo* before the FHC's judgement.
- COA denied Rivers State fair hearing on the matter by relying only on an oral application made by FIRS for the stay-of-execution.

Consequently, the AGRS prayed the SC to set aside the decision of the COA on the maintenance of the *status quo*, dismiss the oral application made by the FIRS and order the FIRS' appeal at the COA to be heard and determined by a new panel.

Commentaries

Ironically, the biggest losers will be the states except for Lagos if the suit eventually favours Rivers state. A few states like Kano, Rivers, Oyo, Kaduna, Delta and Katsina may experience minimal impact. In contrast, at least 30 states which account for less than 20% of

VAT collection will suffer significant revenue decline. The federal government may be better off given that FCT generates the second highest VAT after Lagos and import and non-import foreign VAT.

Currently, section 40 of the VAT Act requires that the VAT pool be shared 15% to the FG, 50% to states, and 35% to LGs (net of 4% cost of collection by the FIRS). 20% of the pool is shared based on derivation. This arrangement favours more states than what is currently being pursued by Rivers and Lagos States.

In 2020, for instance, total VAT collection was about N1.53 Tr with import VAT being N348 bn (or 22.7%) while foreign non-import VAT was N420 bn (or 27.4%) and local VAT amounted to N763 bn (or 49.8%). With this trend, the Federal government is likely to retain more than the 15% it currently shares, while states and LGs will have less to share, especially if we consider VAT on FG contracts included in local VAT, which will also be due to the FG.

A previous Supreme Court judgement held that VAT covered the field (of consumption tax), and therefore a state cannot impose a consumption tax in addition to VAT. This means any state intending to impose VAT will have to repeal its existing consumption tax.

The pending judgement may also have implications for taxes collectable by Local Governments, which are currently administered by States, and the amendment via Finance Act 2020, which introduced Electronic Money Transfer levy in place of stamp duties, among others. In addition, complications may arise for businesses, including SMEs, who may have to deal with multiple tax authorities for VAT purposes and consequently a decline in Nigeria's ease of paying taxes and doing business ranking.

Finally, the filing of this suit at the SC demonstrates that the last may not have been heard of this matter pending the decision of the COA on the substantive appeal before it. Therefore, taxpayers are encouraged to keep abreast of the situation and engage their advisers to ensure that they are consistently on the right side of the compliance divide.

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