

Division of Taxing Powers under The 1999 Constitution

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1. INTRODUCTION

During military rule the country was governed mainly as a unitary state.¹The military era witnessed the enactment of certain tax Decrees and Edicts some of which are bound to generate jurisdictional conflicts between the Federal and State Governments with the coming into effect of a new Constitution, i.e. the Constitution of the Federal Republic of Nigeria 1999. For instance, the Lagos State recently declared its intention to re-introduce the collection of “sales tax” as permissible under fiscal federalism² notwithstanding the existence of a Value Added Tax Decree.³The question is whether a State Government can impose its independent sales tax simultaneously with VAT, which is a federal tax applicable throughout the country.

Will such a measure not amount to double taxation?

This paper attempts to examine the division of taxing powers under the 1999 Constitution and the constitutionality of some of the existing Federal and State tax statutes in view of the provisions of the Constitution.⁴

The paper is divided into four parts. Part one introduces the work. Part two examines the concept of taxing power, the division and the scope of the powers of the three tiers of government.

Part three considers the validity or otherwise of some specific statutes under the present Constitution. At the state level, our comments will be restricted to the *Personal Income Tax Law*⁵ and *Stamp Duties Law of Lagos State*.⁷ At the federal level, *the Value Added Tax Decree, and Levies, Taxes and Levies (Approved List of Collection) Decree*,⁹*Education Tax Decree*,¹⁰ *inter alia*, will be examined. The paper is concluded in part four with suggestions.

II. TAXING POWERS

2.1 Taxing Power Defined

Taxing power within the context of this paper means the power of a tier of government to *impose* a tax by its own law and prescribe conditions for the collection and due administration of the tax either by its own agency or that of another tier of government. This must be distinguished from the power to merely *collect* taxes or levies which is executive or administrative in character.

The definitions and the distinguishing features of a tax have been sufficiently elaborated elsewhere¹¹ and therefore need not engage our attention here.

2.2 Techniques of Division of Taxing Power

The most important factor that determines the division of taxing powers in a country is whether the country is operating a federal or unitary system of government. There is no universal technique for the division of taxing powers in a federal system just as there is no universal system of federalism. **Arrangements for the division of taxing powers therefore differ from country to country and from Constitution to Constitution depending on the prevailing national policies and economic realities.** However, from the study of, the Nigerian Constitutions the following techniques seem to have been adopted over the years irrespective of certain fiscal changes:

(a) the division of taxing powers broadly follow the division of legislative powers. Thus, a tier of government can impose taxes only in respect of the subject matters within its competence;

(b) the Constitution may specifically mention certain taxes by name¹² or their bases¹³ and exclusively reserve them for a tier of government;

(c) the power to legislate with respect to certain elements of a tax¹⁴ may be reserved for one tier of government while some other elements¹⁵ are vested in another tier. Under this arrangement, each tier of government is competent to legislate on the elements within its competence;¹⁶

(d) a distinction could also be made between tier of implementation. For instance, the power to impose a tax may be reserved for one tier of government while the administrative power to collect it may be delegated to another tier of government.

As will soon become obvious, this is a distinct feature of the relationship between the State and Local Government Councils in the division of taxing powers under the 1999 Constitution;

(e) the power to impose and or collect a tax may be allocated to one tier of government while the proceeds of the tax is allocated to another tier of government or shared among the different tiers of government.

To a large extent, a combination of these techniques is employed in the 1999 Constitution.

2.3 Federal Taxing Powers

Although there are various taxes in Nigeria only four of them are specifically mentioned by name in the Second Schedule to the Constitution.¹⁷ These are customs duties,¹⁸ excise duties,¹⁹ export duties²⁰ and stamp duties.²¹ In addition, item 59 of the Exclusive Legislative List vests the federal government with powers on the "**taxation of incomes, profits and capital gains**"²² pursuant to which the Personal Income Tax,²³ Companies Income Tax,²⁴ Petroleum Profits Tax²⁵ and Capital Gains Tax²⁶ have been imposed by the Federal Government.

It is instructive to note that not all the taxes within the Exclusive Legislative competence of the Federal Government are collected by the Federal Government or even accrue to it. As a matter of fact, of all the Federal taxes, only custom duties, excise duties, Companies Income Tax and Petroleum Profits Tax are

administered by the Federal Government through its revenue agencies. The exclusive control of the Federal Government through its revenue agencies. The exclusive control of the Federal Government over these taxes is quite logical: federalism presupposes the existence of a minimum degree of fiscal and economic cohesion and uniformity. If state Governments were to be vested with powers to impose and collect custom duties and Companies Income Tax, it may obstruct the flow of goods between the States and create some distortion in the administration of these taxes. As it were a company based in Damaturu in Yobe State pays the same rate of Company's Income Tax and excise duties as its counterpart in Ikeja in Lagos State.

It may be pertinent to ask the question whether the power of the Federal Government is limited to the taxes specifically allocated to it in the Constitution either by name or by reference to the tax bases? In other words, does the taxing power of the Federal Government extend beyond customs duties, excise duties, Personal Income Tax, Companies Income Tax, Petroleum Profits Tax and Capital Gains Tax? In view of the specific allocation of these taxes to the Federal Government, it might be argued that all other taxes are residual to the States based on the principle of *expressio unius est exclusio alterius*.

This argument is however contrary to the fundamental principle that taxation is an inherent taxes of any government that can only be derogated from by express constitutional stipulation. The correct view therefore is that the taxing powers of each tier of government broadly follow the division of legislative powers under the Constitution. Hence, each tier of government can exercise taxing powers to the extent of its legislative powers.

Therefore, the Federal Government can impose tax on any of the 67 subject matters on the Exclusive Legislative List pursuant to its implied power in item 68. This view has received the judicial support of the Supreme Court in the celebrated case of *Attorney General, Ogun State v Alhaja Ayinke Aberuagba*.²⁷ From a purely legal angle, the Federal Government may, for instance, impose a privilege tax on the ownership of arms pursuant to item 2 of the Exclusive Legislative List.

However, the government for reasons of expediency may choose to raise the required revenue (or otherwise regulate the particular activity) by imposing a fee or levy. The point being made here is that there are no legal fetters on the powers of the Federal Government if it chooses the tax options.

2.2.1 Delegation of The Administration Of Federal Taxes

The Constitution authorizes the Federal Government to delegate the collection of the Personal Income Tax, Capital Gains Tax and Stamp duties being federal taxes to State Governments. The legal basis of the delegation is contained in item D-7 of the Concurrent Legislative List, which provides thus:

D-7 in the exercise of its power to impose any tax or duty on-

(a) capital gains, incomes or profits 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*²⁸

The initial controversy on whether these provisions had vested the States with concurrent power to impose Personal Income Tax, *inter alia*, is now settled. It is now beyond doubt that the provisions merely authorize the delegation of the *collection* of the taxes mentioned therein and not their *imposition*. Commenting on a similar provision in the 1979 Constitution, Okorodudu has this to say:

*Now it is very important to grasp the full import of this aspect of the distribution of legislative taxing powers. Item D paragraphs 7 and 8 merely empowers (sic) the Federal Government to delegate to the State Governments the exercise of an executive function of the collection of the taxes specified therein. It does not envisage the delegation of any form of concurrent legislative function to the State. The express wordings of the 1979 Constitution..., demonstrate clearly that only the Federal Government can legislate with regards to the imposition, levy, collection, and administration of any tax or duty envisaged under item D paragraphs 7 and 8, and all that the State Governments are assigned thereby, are tire responsibilities for the collection and administration of any tax or duty so imposed by an Act or Decree of the Federal Government.*²⁹

Consequently, section 2(2) of the *Personal Income Tax Decree* now vests the relevant tax authority of each State with the power to collect the personal income tax of the individuals' resident within the States except persons listed in section 2(b) of the Decree. It is pertinent to reproduce section 2(2) PITD:

*2(2) In the case of an individual other than all itinerant worker and persons covered under paragraph (b) of subsection (1) of this Section, tax for any year of assessment may be imposed only by the State in which the individual is deemed to be resident for that year under the provisions of the First Schedule and in the case of persons referred to in subsection (1)(b) of this Section tax shall be imposed by the Federal Board of Inland Revenue.*³⁰ (Emphasis supplied)

There is no direct delegation of the administration of the Capital Gains Tax to the State. Rather, what obtains is a case of implied delegation through the provisions of section 43 of the *Capital Gains Tax Decree*, which provides that:

*43 (1) Capital gains tax shall be under the care and management of the Board and the provisions of the Income Tax Acts in the Schedule of this Act shall apply in relation to income tax chargeable under those Acts subject to any necessary modification.*³¹

The adoption of the administrative provisions of the income tax undoubtedly follows front the fact that the Capital Gains Tax is a supplement to the income tax mainly to prevent evasion of income tax.

Section 4(2) of the *Stamp Duties Act* provides that:

*4(2) The State Government shall collect duties in respect of instrument executed between persons or individuals at such rates to be imposed or charged as may be agreed with the Federal Government.*³³(Emphasis Supplied)

The revenue collected by the State Governments from Personal Income Tax, Capital Gains Tax and stamp duties are wholly retained by them and form part of the Consolidated Revenue Fund pursuant to sections 120 and 163 (a) of the 1999 Constitution.³⁴

It is necessary to make further comments on the provisions of section 2(2) of the PITD and section 4(2) *Stamp Duties Act* which have been reproduced above. A cursory reading of the provisions, with particular reference to the word "**imposed**" may revive the old controversy on whether the State Governments can also impose Personal Income Tax, Capital Gains Tax and stamp duties. However, if the entire provisions of section 2(2) of the PITD are read together, it will become clear that the object is to identify the relevant tax authority in respect of the income of a taxable person and therefore avoid undue conflict of jurisdiction between the tax authorities of two or more States over the same income.

This view is reinforced by the last line of section 2(2) which provides *inter alia* that:

... tax shall be imposed by the *Federal Board of Inland Revenue*.³⁵

It is a notorious fact that the Federal Board of Inland Revenue is an agency of the Federal Government for the administration of federal taxes and devoid of any legislative powers. In view of the foregoing, it is submitted that the provisions of section 2(2) of the PITD and section 4(2) of the *Stamp Duties Act* are inconsistent with items 57 and 59 of the Exclusive Legislative List and therefore null and void to the extent of their inconsistencies.

2.2.2 Administration of Personal Income Tax, Capital Gains Tax and stamp duties by FBIR

It will be noted that section 2(2) of the PITD which delegates the administration of the Personal Income Tax to the tax authority of a State exempts the following categories of people and vests jurisdiction over them on the FBIR:

- (i) persons employed in the Nigerian Army, the Nigerian Navy, the Nigerian Airforce, the Nigerian Police Force other than in a civilian capacity;
- (ii) officers of the Nigerian foreign service,
- (iii) every resident of the Federal Capital Territory, Abuja and
- (iv) a person resident outside Nigeria who derives income from Nigeria.³⁶

In the same vein, section 4(1) of the *Stamp Duties Act* reserves to the Federal Government the power to stamp duties upon instrument executed between company and an individual, thus:

*4(1) The Federal Government shall be the only competent authority to impose, charge and collect duties upon instruments specified in the Schedule to this Act if such instruments relate to matters executed between a company and an individual, group or body of individuals.*³⁷

It must be noted that the joint administration of the personal income tax, capital gains tax and stamp duties by the Federal Government's agency is undertaken by the FBIR for the reasons of convenience

and securing uniformity and not to enhance the tax revenue of the Federal Government. This is because the proceeds of the Personal Income Tax collected by the Federal Government are remitted to the States pursuant to section 163(b) of 1999 Constitution³⁸ while that of the Capital Gains Tax and stamp duties are paid into the Federation Account.

2.3. State Taxing Powers

Unlike in the case of the Federal Government, no tax is specifically reserved for the State Governments under the 1999 Constitution. The only reference in the Constitution to 1999 constitution. The only reference in the Constitution to the powers of State Government in relation to taxation is contained in item D-9 and 10 of the Concurrent Legislative List.³⁹ Therefore, in order to determine the scope of the taxing powers of the State, we must turn to the provisions of legislative powers of the State in section 4(7) of the 1999 Constitution that provides that:

4(7) The House of Assembly of a State shall have power to make laws for the peace, order and good government with respect to the following matters that is to say-

(b) Any matter included in the Concurrent Legislative List set out in the First column of part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto and

(c) Any other matter with respect to which it is empowered to make laws in accordance with provisions of this Constitution.⁴⁰

It is clear from the above provisions, that the State Governments have plenary powers to make laws on any subject matter that is not on either the Exclusive or Concurrent Legislative List. Their power in respect of those on the Concurrent Legislative List is subject to the doctrines of inconsistency and covering the field. Consequently, the State Governments are not legally competent to impose customs duties, excise duties, export duties, stamp duties, income taxes, Capital Gains Tax or any other tax whose base falls within any of the 67 subject matters reserved on the Exclusive Legislative List.

The implication of this technique of division of legislative powers between the Federal Government and the States is that while the taxing power of the Federal Government can be specifically enumerated those of the States are left open-ended.⁴¹ An attempt was made recently in the *Taxes and Levies (Approved List for Collection) Decree*⁴² to delimit the scope of the taxing powers of the States. In practice however, Lagos State has imposed taxes such as Estate duties⁴³ Betting duties⁴⁴ Casino tax⁴⁵ Entertainment tax⁴⁶ Merriment tax⁴⁷ Sales tax⁴⁸ Personal income tax⁴⁹ tenement rates⁵⁰ *inter alia*.

2.4 Local Government Taxing Power

Since the Local Governments Reforms of 1974, Local Government Councils in Nigeria have gradually emerged from the status of purely administrative units into constitutional establishment.⁵¹ Section 7(1) of the Constitution guarantees a system of Local Government by democratically elected Local Government Council while section 7(3) grants the Local Government power to participate in the economic planning and development of its area. Each State is also mandated by the Constitution to

confer functions on the Local Government Council by its own law, including those set out in the Fourth Schedule to the Constitution.⁵² Once a State law has defined the structure and functions of the Local Government Councils, the State Government cannot validly take over those functions unless the law is amended.⁵³

The enhanced status of the Local Government Councils has raised the question whether or not they have independent power to raise their own taxes.⁵⁴

As a matter of strict conceptual analysis, Nigerian federalism is a partnership between the Federal government and the States. Hence, section 2(2) of the Constitution provides that:

*"Nigeria shall be a federation consisting of State and a Federal Capital Territory"*⁵⁵

Consequently, the division of legislative power under section 4 of the Constitution involves only the Federal and State Governments. Also, it will be observed that matters that the Constitution mandates the State Governments to vest in the Local Government Councils are matters within the residual power of the States. The implication of this is that the Local Governments have no legislative power of their own and cannot impose any tax on any subject matter whatsoever.⁵⁶

This is logical since taxation is mainly statutory. It is instructive to note that the provisions of Schedule 4 of the Constitution do not directly vest the Local Government Councils with the power to collect taxes.

Rather, a state Government must first enact appropriate enabling law, which will determine the taxable persons, assessment procedure, and method of collection, recovery and penalties for tax delinquency.⁵⁷ And where such a law has been enacted a Local Government Council must exercise its power within the limits prescribed by the law. For instance, where the Local Government Council charges rates it must be within the range prescribed by the law. Any exercise of power beyond the limits allowed by the Constitution or the enabling law will be *ultra vires, null and void*.

In Shell Petroleum Development Company of Nigeria Limited v. Burutu Local Government Council,⁵⁸ the Respondent is the rating authority for Burutu Local Government Area where the Appellants restaurants, waiting rooms, caravan, lawn tennis, petroleum oil and gas pipelines, tank farms, storage tanks among others are located. The Respondent raised an assessment of over N30m on the Appellant being tenement rates for 1981 to 1993. Although the Appellant did not object to the published rating, it refused to pay as assessed. Rather, it only paid N32,998.30 which it considered to be the amount due. The Respondent sued to recover the balance. At the trial, it was contended *inter alia*, that the properties that formed the basis of the ratings were jointly owned by the Appellant and the Nigerian National Petroleum Corporation (NNPC) and therefore not subject to the tenement rates. A copy of the Joint Venture Agreement between the Appellant and the NNPC which showed an ownership ratio of 20% to 80% shareholding in favour of the Federal Government was tendered and admitted in evidence. It was held that the Respondent was wrong in levying rates on the oil storage tanks or tank farms and oil pipelines, which are not privately owned. According to the learned Justice of the Court of Appeal:

*Paragraph 1(j) of the 4th Schedule to the 1979 Constitution Specifically limits the function of a Local Government Council With respect to tenement to assessment of privately owned house or tenements ... Any provision in a Law made by a State Legislature providing for assessment of any property not coming within privately owned houses or tenements is ultra vires, null and void.*⁵⁹

Also, a recent attempt by Apapa Local Government Council to impose a mobile advertisement tax on companies for display of their corporate names on vehicles vide the *Apapa Local Government Vehicle Mobile Advertisement Bye Law vide No 1 1999* was successfully challenged by eight companies in the case of *S.D. v. Nigeria Limited and others v Apapa Local Government Council*⁶⁰ where the applicants were granted injunction restraining Apapa Local Government Council from implementing bye law. According to the trial judge the mere display of the applicants name on their vehicles for the purpose of identification, without advertising any product, does not amount to advertisement or sign board advertisement.

It is crystal clear from the foregoing discussion that taxing powers of economic significance are allocated to the Federal Government while taxing powers of local significance are allocated to State Governments.⁶¹ Given the general nature of the economy, much more revenue will certainly be realized from the taxes allocated to the Federal Government than that residual to the States. However, all tax revenues collected by the Federal Government are paid into the Federation Account and distributed among the Federal, States and Local Governments pursuant to section 162(2) of the 1999 Constitution.⁶⁰

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3. CONSTITUTIONALITY OF SOME EXISTING TAX STATUTES

Having generally discussed the taxing powers of the of the three tiers of government under the 1999 Constitution tax statutes, this part of the paper will be devoted to a brief examination of the effect of the present constitutional arrangement on some existing State and Federal Government tax statutes. We begin with the *Personal Income Tax Law of Lagos State*.⁶²

3.1 Personal Income Tax Law

The Personal Income Tax Law of Lagos State (PITL)⁶³ which was enacted in 1981 to the Income Tax management Act, 1961⁶⁴ imposes a tax on the income economy, of persons other than companies.⁶⁵ By necessary implication, the PITL and the Personal Income Tax Laws of other states that were made pursuant to ITMA became invalid, null and void with the commencement of the 1979 Constitution which vested the Federal Government with exclusive powers on income tax generally including the income of

individual.⁶⁶Regrettably, however, the necessary modification or outright repeal of the various States Income Tax Laws were not made to streamline the imposition and administration of the personal income tax with the provisions of the 1979 Constitution.⁶⁷ The implications of this omission were two fold. First, income of individuals in Nigeria continued to be subject to State laws instead of a Federal law as envisaged by the Constitution. Second, the divergence in the Personal Income Laws and administration of the States that necessitated the new constitutional arrangement still continued unabated.⁶⁸ Happily, *the Personal Income Tax Decree (PITD)* was promulgated in 1993 to remedy the situation by establishing a uniform regime throughout the federation on chargeable income, rates, computation, allowances, assessment, recovery, administration, offences, penalties and appeal procedure *inter alia*.⁶⁹

The copious provisions of PITD on virtually every aspect of income tax law and administration should leave no one in doubt about the policy of the Federal Government to unify the income tax laws and administration throughout the whole federation.

Based on the foregoing, the PITL can be faulted on many grounds beginning from its title, which reads:

A law To impose Tax On The Income Of Persons Other Than Companies.⁷⁰ (*emphasis supplied*)

Also, Section 1(1) PITL provides:

*This law may be cited as the Personal Income Tax Law, and shall be read as one with the Income Tax law and shall be read as one with the Income Tax management Act (hereinafter referred to as the Principal Act).*⁷¹

Section 11(1) PITL⁷² also provides that income tax shall be payable on the total income of the taxpayer without stipulating the sources of income as is done in section 3 of PITD.⁷³

The obvious implication of the foregoing is that PITL is not a complete statute and cannot continue to be in operation since the Principal Act (ITMA) had been repealed. It is therefore submitted that the PITL and any other State laws on any aspect of Personal Income Tax is null and void to the extent of their inconsistency with the provisions of the PITD and the 1999 Constitution.

Where the provisions of any such laws are in harmony with the PITD then they are mere extras unnecessary.

It was clear that the Law Reform Commission of Lagos State was not aware of the existence of PITD during the law reform exercise otherwise the PITL ought not have been included in the consolidated laws of the State which stated the law as at 30th June, 1994.⁷⁴ Due to this oversight, the administration of Personal Income Tax and recovery of income tax in the State until recently was being made pursuant to the provisions of the *Personal Income Tax Law of Lagos State, Cap 142 1994* instead of PITD.⁷⁵ This is clearly wrong and unconstitutional in view of the provisions of item 59 of the Exclusive Legislative List that vests the Federal Government with the exclusive power to legislate on income taxes.

3.2 Stamp Duties Law

As stated earlier⁷⁶ stamp duties is specifically reserved for the Federal Government under item 58 of the Exclusive Legislative List, however the administration of the tax in respect of the instruments executed between persons or individuals is left to the States. Hence, the Federal Government in exercise of its power has enacted a uniform comprehensive statute charging the same duties on various instruments and granting the same exemptions throughout the country.⁷⁷ However, Lagos State has continued to retain in its statute book a *Stamp Duties Law* which contains identical provisions with that of the *Stamp Duties Act* except the provisions of the Act relating to companies and allied matters. Following our argument on the unconstitutionality of the PITL, it is also submitted that the *State Stamp Duties Law of Lagos State*⁷⁸ is inconsistent with the provisions of the 1999 Constitution and therefore null and void to the tent of its inconsistencies.

1.3 Value Added Tax

The *Value Added Tax* is an improvement on the sales tax hence section 41 of the *Value Added Tax Decree 102 1993* repealed the Sales Tax Decree, 1986.⁷⁹ Before the introduction of VAT in Nigeria, the jurisdictional competence of the State Government to impose sales tax was called to question in the celebrated case of *Attorney General of Ogun State v Alh. Ayinke Aberuagba*.⁸⁰ It is pertinent to state the historical background and the facts of the case if only for the purpose of serving as a reminder.

Under the Nigerian Independence Constitution, 1960, sales or purchase tax was under the Exclusive Legislative List.

Although the Constitution of the Federal Republic of Nigeria, 1963 turned the country into a Republic, there was virtually no change in the sharing of powers between the Federal Government and the States regarding the sales/ purchase tax. Thus the Exclusive Legislative List remained the same. In 1979, another Constitution for federal Republic of Nigeria was introduced. Unlike the two earlier Constitutions, the Exclusive Legislative List in the 1979 Constitution conspicuously omitted the item dealing with sales/ purchase tax.

It is against this background that the defunct House of Assembly of Ogun State enacted the Sales Tax Law, 1982, which imposed a tax upon the purchase of certain goods and services listed in the Schedule to the Law. The appellants, who were wholesale purchasers of beer in Ogun State instituted a suit in the High Court of Ogun State on behalf of wholesale purchasers of beer in the State claiming that section 3(1), 3(4), 3(7), 4, 5, 8 and 21 of the Sales Tax Law were inconsistent with the provision of the 1979 Constitution. Since the case raised very important constitutional issues concerning the Federal and State taxing powers, the Supreme Court invited all the Attorneys General in the Federation as *amici curiae* to file briefs on the issues and to appear for oral argument at the hearing.

The Plaintiffs/ Applicants submitted that the omission of the words "**sale and purchase**" (item 38) from the Exclusive Legislative List did not *ipso facto* make sales/ purchase tax residual.

Rather, the subject matter of sales/ purchase tax was impliedly covered by item 15 and/or 61 of the Exclusive Legislative List in the 1979 Constitution. It was argued that the phrase "in particular" in item 61

was one of emphasis and that the provision of item 61 unequivocally vested **"trade and commerce"** exclusively and without any limitation on the Federal Government.

Hence, sales tax/purchase tax was said to be an incidental matter within the exclusive power of the Federal Government.

The Defendant/Respondent on the other hand submitted that the effect of the omission of item 38 in the Exclusive List of the 1963 Constitution in the 1979 Constitution was to make the subject matter of the sales tax a residual matter on which States can legislate. It was argued that item 61 of the Exclusive Legislative List did not exclusively vest all aspects of trade and commerce throughout the country in the Federal Government. Rather the **"federal trade and commerce"** power under the item was limited to the matters set out in sub-items (a) to (f). Consequently, a State has an appreciable measure of control over trade and commerce within its territory. For instance, a State is entitled to regulate any business or trade within its territory or even, if it thinks fit, prohibit particular trades such as the sale and consumption of alcohol.

The Supreme Court rejected the extreme argument of both parties and held that both the Federal and State Governments have powers to impose sales tax on any saleable matters within their respective legislative competence. According to Bello JSC (as he then was):

"It is axiomatic that in the absence of any constitutional provision, express or implied, to the contrary, the respective taxing power of the Federation and of State includes sale taxing power.

Accordingly, the Federation is entitled to levy Sales Tax on any saleable matters within its competence. It must, however, be emphasized that it is not within the competence of a State:

(1) to make sale tax law affecting any of the matters in the Exclusive Legislative List, or

(2) to make any sales tax law in any matter in the Concurrent List which is inconsistent with any law validly made by the Federation; or

(3) to make any sales tax law on any matter in the Concurrent Legislative List where any law validly made by the Federation has covered the field. (Emphasis Supplied)⁸¹

VAT is imposed on the supply of all goods" and services except goods' and services specifically exempted in Schedule 1 to the Decree.⁸² The revenue from the tax is paid into a special account and shared among the three tiers of government in the ratio of 15 per cent to the Federal government, 50 per cent to the States and Federal Capital Territory, and 35 per cent to the Local Government.⁸³In spite of the review of the sharing favour of State Governments there is still clamour by so mc State Government especially Lagos Stale for a review of the formula for sharing VAT proceeds among the States. It has been contended that some States are taking a disproportionate share of the aggregate revenue relative to the amount of VAT being collected within their territories to the detriment of other States where the bulk of the tax is collected. This apparently provides the background for the recent "kite" flown by. Lagos States in its Year 2000 Budget Speech that it will soon resume the collection of sales tax.⁸⁴

On the question whether an introduction of a State sales tax will not result in double taxation, our answer is in the negative. The problem of double taxation can only arise if the VAT Decree is allowed to exist in the present form simultaneously with a State's sales tax or VAT if any. However, if both the Federal and State Governments are prepared to limit their powers to impose VAT to the extent permissible by the Constitution then the problem of double taxation is not likely to arise. However, the implication of introducing VAT at a State level is that State Governments will now have to administer VAT, which may pose serious but surmountable challenges for States with poor and inefficient tax administrative machinery.

This brings us again to the initial questions whether a State Government can impose and collect its independent sales tax in view of the existing VAT Decree and whether such a measure will not amount to double taxation? To answer the first question, it is instructive to note that neither the Value Added Tax nor sales tax is specifically allocated to either the Federal Government or State Governments under the 1999 Constitution just as it was not under the 1979 Constitution. Consequently, based on the decision in *Attorney General Ogun State v Ayinke Aberuagba*⁸⁵ both the Federal and State Governments can impose VAT on the supply of any goods and services within their respective sphere of influence. By necessary implication, a Federal VAT can only be validly imposed on international and inter-state supplies of goods and services. Therefore, it is submitted that the VAT Decree is valid to the extent that it imposes tax on international and inter-state supply of goods and services. The decree is void to the extent it imposes tax on purely intra –state supply of goods and services such as hotel services. Catering establishments, restaurants, beer, wine, liquor and spirits, soft drinks, cigarette and tobacco, jewels perfumes and cosmetics, electronic equipment, carpets and rugs which are contained in the Schedule to the Lagos Sales Tax law. As a matter of fact, State VAT, if imposed, can even be extended to profession, services and other intra-state supplies of services.

Consequently, since the various States Sales Tax Laws have not been expressly repealed they will be deemed to be existing laws under section 315(1) (b) of the Constitution,⁸⁶ subject to necessary modification.

On the question whether an introduction of a State sales tax will not result in double taxation, our answer is in the negative. The problem of double taxation can only arise if the VAT Decree is allowed to exist in the present form simultaneously with a State's sales tax or VAT if any. However if both the Federal and State Governments are prepared to limit their powers to impose VAT to the extent permissible by the Constitution then the problem of double taxation is not likely to arise. However, the implication of introducing VAT at a State level is that State Governments will now have to administer VAT, which may pose serious but surmountable challenges for States with poor and inefficient tax administrative machinery.

3.4 Personal Income Tax Act

*The Personal Income Tax Act 104*⁸⁷ has witnessed many the amendments since its commencement. However, our focus here shall be limited to section 6 of the (Miscellaneous Taxation Provisions) No31 1996 which amended section 85 of the PITD by inserting new section S5A – 85E.⁸⁸Section 85A

establishes for each State a Board of Internal Revenue (the Board)⁸⁹ while section 85E establishes for each Local Government Council, a Local Government Revenue Committee (Revenue Committee).⁹⁰Section 85B(1)(a) charges the Board with the responsibility of "ensuring the effectiveness and optimum collection of all taxes and penalties due to the State Government under the relevant laws." Section 2 (1) of *Taxes and Levies (Approved List for Collection) Decree*⁹¹ also prohibits a State's Board from appointing agents to assessor collect "any tax listed in the Schedule" to the Act.⁹² Section 85E (1) of PITD goes further to charge the Revenue Committee, inter alia, with the responsibility of assessing and collecting all taxes, fines, and rates under its jurisdiction.⁹³ The membership of the Board and the Revenue Committee are also prescribed by the Decree.⁹⁴ While it is conceded that the Federal Government can prescribe conditions for the states on the administration of income tax, capital gains tax, and stamp duties being Federal taxes delegated to the States, the pertinent question is whether it can do so in respect of purely state's taxes under the new Constitution.

The answer is in the negative since the subject matter of "collection of taxes and levies" is not on the Exclusive Legislative List. The state Governments, therefore have inherent powers not only to impose taxes within their competence but also prescribe conditions for their administration. For instance, from a strict legal viewpoint there is no impediment for a state that may chose, as a policy, to engage private tax consultants to administer the independent taxes. Therefore, it is submitted that the provisions of Sections 85A – 85 E PITD are null and void to the extent that they purportedly prescribe conditions for the administration of purely State and Local Government taxes and levies.

3.5 Taxes and Levies (Approved List of Collection) Act No 21.1998

As one of the measures to stem the problems of multicity of taxes and levies in Nigeria, the Federal Military Government enacted the *Taxes and Levies (Approved List Collection) Decree*.⁹⁵ The Decree limits the Federal Government to eight taxes and the States to eleven taxes. The Local Governments have twenty items ranging from tenement rates and cattle taxes to signboard and advertisement fees.⁹⁶ The mediate impact of the Decree when introduced was that it curbed to a large extent, the tendency of both States and Local Government Councils across the country for rapidly introducing new taxes and levies With astronomical rates. Notwithstanding its relative importance at that time, the Decree is capable of limiting the inherent powers of the Federal and State Governments to impose any form of taxes within the limits of their powers and call it any name.⁹⁷ In view of the foregoing it is submitted that the Taxes and Levies (Approved List (Collection) Decree is null and void to the extent of its inconsistencies with the provisions of section 4 of the 1999 Constitution.

3.6 Education Tax

The administration of the Education Tax Fund has been in the forefront of public discourse in recent times in Nigeria. The controversy is serious enough to form the basis of a separate research and therefore beyond the scope of this paper.

The education tax was introduced in Nigeria by the Federal Military Government vide Education Tax Decree⁹⁸ with a commencement date of 1st January 1993. The tax is raised to provide direct funding for certain aspects of primary, secondary and higher education at the Federal, State and Local Government

levels in the country. The name "Education Tax" might give a misleading impression that the base of the tax is "education" as is the case in income tax, capital gains tax etc. However, the base of the tax is the **"assessable profits of a company registered in Nigeria."**

Hence, the tax is generally in harmony with the constitutional division of taxing powers since the Federal Government has the exclusive power to impose taxes on the profits of companies. However, it is remarkable that the education tax technically amounts to double taxation of the profits of Nigerians companies and discriminates against them vis-a- vis foreign companies deriving income in Nigeria.

Since the subject matter of education is within the Concurrent Legislative List, there is no constitutional hindrance for a State that desires it to raise an independent tax to also specifically finance its educational objectives such as "free education programme". A State may want to bring other stakeholders such as individuals, firms, communities, clubs, co-operative societies etc. excluding companies into the State's education tax net provided that the tax is not imposed on the taxpayer's income. It is however suggested that a different name be given to such a tax in order to preclude any confusion between the Federal education tax and that of the States.

4. CONCLUSION AND SUGGESTIONS

From the foregoing discussion, it is crystal clear that the division of the taxing powers of the federation under the 1999 Constitution are in many ways similar to that of the 1979 Constitution. Generally, the taxing powers of each tier of government broadly follow the division of its legislative powers in the Constitution. Thus, a tier of government can impose taxes only in respect of subject matters within its competence. The Federal Government has the exclusive power to impose custom duties, excise duties, stamp duties, personal income tax, companies' income tax education tax, and VAT and any tax on any of the subject matters contained in the Exclusive Legislative List to the extent permitted by the Constitution. Notwithstanding the exclusive powers of the Federal Government to impose all the above-mentioned taxes, the Constitution authorizes the Federal Government, at its discretion, to delegate the administration of personal income tax; capital gains tax and stamp duties to the State Governments. Item D-7 of the Concurrent Legislative List, section 2 (2) PITD, section 43 (1) Capital Gains Tax Act and section 4(2) of the Stamp Duties Act which provided the legal framework for the delegation of the collection of those Federal taxes by the State Governments have been examined. We have also seen that the revenue collected by the Federal Government from the personal income tax is paid into the Federation Account subject to the right of the federal Government to retain the expenditure for collecting the tax. Hence, to all intents and purposes, it can be said that the personal income tax, capital gains tax and stamp duties tax are **"state taxes"** except that their imposition and administration are wholly subject to Federal laws.

Unlike the Federal Government, no taxing power is specifically reserved for the States in the Constitution except the power to collect personal income tax, capital gains tax and stamp duties in item D-7 of the Concurrent Legislative List. The implication of this technique is to vest the State Governments with residual taxing powers on any subject matters that is not contained in the Exclusive Legislative List. While the taxing powers of the States might appear to be bloated or impressive in theory, it is not so in

practice. As it can be seen from the example of Lagos State Government, the State's taxing powers have been exercised, in practice, only in respect of taxes of lesser economic significance such as betting duties, casino tax, entertainment tax, among others. The relatively weak taxing power of the State Governments *vis-a-vis* that of the Federal Government has necessitated the need for the States to partake in the sharing of the Federal revenue in the Federation Account pursuant to section 162(2) of 1999 Constitution.

The point has also been made that the Local Governments have no power to impose any tax whatsoever by their own by-law. Their powers under section 7 and the Fourth Schedule of the 1999 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 is *ultra-vires* and *null and void*.

Also, the validity of some existing tax Decrees and Edicts have been considered against the background of the provisions of the 1999 Constitution. It is submitted that the Personal Income Tax Law, Cap 142 and Stamp Duties Law Cap, 181 of Lagos State, 1994 are inconsistent with the provisions of the 1999 Constitution and are null and void to the extent of their inconsistency. It was also argued that the aspects of the VAT Decree relating to the intra state supply of goods and services are *ultra vires* the powers of the Federal Government based on the principle enunciated in the case of *Attorney General of Ogun State v Aberuagba*.

Hence, the VAT Decree as it is presently constituted is null and void to the extent that imposes tax on intra- state supply of goods and services. Also, the provisions of sections 85A-85E of PITD have been faulted to the extent that they prescribe or dictate to the State Governments on how to collect purely state taxes, rates, levies or fee such as tenement rates, marriages, death and birth certificates fees which are purely local matters. *The Taxes and Levies (Approved List of Collection) Decree* on its own part, tends to introduce a measure of constitutional rigidity into the taxing powers of the Federal and State Governments by circumscribing all the tiers of government to the taxes and levies contained in the Schedule to the Decree. A view has also been expressed that the Decree is also null and void to the extent of its inconsistencies with section 4 of the 1999 Constitution.

Against this background, it is suggested as follows:

1. That the Personal Income Tax Law Cap 142 and Stamp Duties Law Cap 181 of Lagos State 1994 should be repealed by the Lagos State House of Assembly with immediate effect;
2. The VAT Decree should be amended to exclude intra-state supply of goods and services that are within the residual powers of the State Government under the 1999 Constitution. Unless this is done, the imminent friction between the Federal Government and some State Governments over VAT might plunge the country into avoidable serious fiscal/ constitutional crisis in the nearest future.

The States on their part must be prepared to cope with the additional challenges of administering State VAT/sales tax by empowering their revenue with the necessary human and material resources on a sustainable basis.

3. Taxes and Levies (Approved List of Collection) Decree 21, 1998 should be amended appropriately or outrightly repealed by the National Assembly. With the entrenchment of a democratic system in Nigeria no government can impose new taxes or increase the rates arbitrarily without legislative approval.

The general principle is that there can be no taxation without representation.

4. The revenue from the company's income tax, capital gains tax and stamp duties collectible by the Federal Government should no longer be paid into the Federation Account. Rather they should be paid directly to States based on the principle of derivation.

5. Some of the independent revenue presently being wholly retained by the Federal Government, for instance, in the petroleum, telecommunication, aviation industries apart from tax revenues should be made payable into the Federation Account in order to enhance the quantum of the distribution among to the different tiers of government.

6. The plan to review the formula for sharing the revenue from the federation Account in favour of States and Local Governments by the Revenue Mobilisation and Allocation Fiscal Committee and the National Assembly should be expedited. It is suggested that the Federal Governments share be reduced by 15 per cent from 48.5 per cent and shared between the States and Local Government authorities on the ratio of 2:1.⁹⁹

7. Concerted efforts should be made by the State Governments to fully harness their revenue generating potentials. A situation where the state Governments simply wait for federal allocation and allow the machinery for generating revenue internally to rust is not acceptable. Efforts should be made to block the existing loopholes in the revenue generating agencies by empowering their relevant agencies through the provision of necessary human and material resources and job motivation. State Government may also explore the possibility of introducing new taxes such as property taxes, inheritance taxes and road taxes. Necessary cautions should however be taken in designing the structure of the new taxes to ensure that the revenue objectives is counter balance by other social and economic objectives such as redistribution of income and alleviation of poverty.

8. State Governments should provide the necessary legal framework and direction for the Local Governments to improve their revenue collection effort. The rates or fees collectible by Local Governments under certain state laws are ridiculous and laughable to say the least and therefore in urgent need for review.

9. In the final analysis, the three tiers of Government should ensure that they keep to their respective powers under the Constitution in the spirit of constitutionalism. Any infraction of the Constitution may be successfully challenged in the law court either by an affected taxpayer or tier of Government as was done in cases like Attorney General of Ogun State v Aberuagba,¹⁰⁰ Shell Petroleum Development Company of Nigeria Limited v Burutu Local Government Council and S.D.V. Nigeria limited & Ors v. Apapa Local Government Council.¹⁰²

1. For instance, the Federal Military Government was vested with sweeping powers to make laws on any subject matter whatsoever including subject matters that was hitherto residual to the state governments. The consent of the federal government was required before a state legislate on matters, which are on the current List. Not only that, the validity any Decree or Edict cannot be challenged in any law court. See generally sections 2 and 5 of the Constitution Suspension and Modification Decree 107, 1993. See also Multi-Purpose Ventures Limited Attorney General of Rivers State (1997) 1 NRLR (pt.1) 122, Toyin & Sons Bookshop Limited (1997) 1 NRLR (pt. 1) 143
2. See the year 2000 Budget Speech at Lagos State delivered by the Executive Governor, Alhaji Bola Ahmed Tinubu toLagos State House of Assembly on Thursday 23rd December 1999 to the Lagos State House of Assembly, p. 12.
3. Decree 102, 1993. See also, The Nigerian Tax Law (FIRS) 1995, p.475
4. See section 1(3) of the Constitution of the Federal Republic of Nigeria, 1999 which proclaims the supremacy of theConstitution. See also, Attorney General of Bendel State v Attorney General of Federation (1982) 3 NCLR 1, Adamolekun v Governor of Ondo State (1982) 3 NCLR 769
5. Cap 142, Laws of Lagos State 1994
6. Cap 181, Laws of Lagos State 1994
7. The comments apply mutatis mutandis to similar laws in other states, where there is any
8. Decree No 102, 1993.
9. Decree No. 21, 1998
10. Decree No 7, 1993
11. F. Vanistendae. "Legal Framework for Taxation." Tax law and Drafting, Vol 1, IMF, (1996) ed. V. Thuronyi, p. 63
12. See *Matthew v. Chicory Board (Vict)* (1938) 60 CLR263 at 276. *UnitedState v Butler* 297 R41, *More v The Commonwealth* (1951) 82 CLR547, *Nichols v Ames* 173 US 509 (1899) p. 515, O. Akanle, *Nigeria Income Tax Law and Practice*, p.5, J.K. Naiyeju, *The Value Added Tax - The Facts of a Positive Tax in Nigeria*, Kupag Public Affair (1996)p. 3
13. For instance custom duties, excise duties and export duties etc.
14. For instance income and capital gains.
15. For instance the rate.
16. For the instance assessment and recovery

16. For instance Personal Income Tax the 1960 Constitution when the federal government enacted the income tax management Tax, 1961 to secure uniformity in the base and rate of personal income tax throughout the country while the regional governments were vested with powers to decide the rate of the tax and administration.

18. See the Second Schedule, CFRN, 1999.

19. *Ibid*, item 16

20. *Ibid*, item 10

21. *Ibid*, item 22

22. *Ibid*, item 58

23. *Ibid*, item 59

24. Decree 104, 1993 as amended. See also the Nigerian Tax Law, 1995 (FIRS),p.225

25. Cap. 60, Laws of Federation of Nigeria (LFN), 1990. See also the Nigerian Tax Law, 1995 (FIRS),p.43

26. Cap 354 LFN, 1990. See also the Nigerian Tax Law, 1995 (FIRS),p.401

27. Cap 42 LFN, 1990. See also the Nigerian Tax Law, 1995 (FIRS),p. 1

28. 1984 S.C.20

29. See item D-7 Concurrent Legislative List

30. M. T. Okorodudu, "Analysis of State Taxing Powers" ed O. Akanle

31. Section 2(2) PITD

32. Section 43 Capital Gains Tax Act

33. In countries such as Austria, Spain and capital gain is taxed under the regime of Personal Income Tax Law. See A. Ipaye, "A review of Capital Gains Tax in Nigeria",The Nigerian Journal of Contemporary Law, 1994, Vol. 18,p.37

34. Section 4(2) Stamp Duties Act. Emphasis Supplied

35. See sections 120 and 163(a) CFRN 1999

36. See section 2(2) PITD

37. *Ibid*

38. Section 4(1) Stamp Duties Act

39. Section 163(b) CFRN 1999. The Federal Government however entitled to retain the cost of administering the taxes.
40. See items D of the Concurrent Legislative List CFRN 1999
41. See section 4 (7) CFRN 1999
42. M.T. Okorodudu, op. cit p. 71. See also A. Ipaye, 'Revenue Generation, Public Resource and Taxes.' The Guardian, Thursday, January 27 2000,42
43. Set the Schedule to Decree No 21 1998
44. Cap 3 Laws of Lagos State, 1994
45. Cap 125 *Ibid*
46. Cap 20*Ibid*
47. Cap 43*Ibid*
48. Cap 131*Ibid*
49. Cap 175*Ibid*
50. Cap 142*Ibid*
51. Cap 189 *Ibid*
- 52 O. Oyewo, 'The Metamorphosis of the Local Government Systems of Administration in Nigeria.' Current Themes in Nigeria Law, ed. U. Akinseye, p, 119.
53. See section 7 and the Fourth Schedule, CFRN 1999.
54. See Knight, Frank and Rutley (Nig.) Ltd VAG of Kano State [1990] 4 NWLR (pt. 143) 210, Bamidele v. Commissioner for Local Government and Community Development, Lagos State [1994] 2 NWLR 9 (pt. 328) 568 C.A
55. A. O. Popoola. The: Taxing Powers of Local Government under the Nigerian Constitution". Emerging Trends in the Nigerian Local Government, ed. A. O. Adediji1994, p.53
56. See section 2(2) CFRN 1999
57. A.O. Popoola, op. cit. p
58. A.O Sanni, "The Approved List Taxes; A Commentary." 1998 MPJFIL, Vol 2. No 2, P 74
59. (1989) 9 NWLR (pt. 165) 318. C.A.'
60. at p. 325

61. (unreported) see “Firms secured injunctions against Council on vehicle display law,” The Guardian 13th may, 2000 p. 31.

62. M. T. Okorodudu, op. cit., p.83

63 Cap 142

64 *Ibid*

65 Cap -LFN

66 See section 1 PITL.

67 Item 58 Exclusive Legislative List, CFRN 1999.

68 M. T. Okorodudu, op. cit., p.83.

69 For a discursion of the divergence on the Laws of the various states see M. T Okorodudu, op. cit., p.78.

70 See PITD generally.

71 See the Title of the PITL.

72 See section 1(1).

73 See section 11(1) PITL.

74 See section 3 PITD

75. See the forward to the Index to the Laws of Lagos State, 1994, Vol. 10, p. 1 by Mrs. O.M. Akinrele Ayeni, Hon. Attorney General and Commissioner for Justice, Lagos (as she then was)

76. See *LSBIR v First Bank of Nigeria Plc.* Unreported Suit No. LD/Rev/10/97 Judgement delivered on 24th April, 1997. *SBIR v. 7up Bottling Company Plc, (Unreported Suit) No. LD/Rev/39/97.* Judgement delivered on 21 November, 1997.

77. See P. 3

78. See the Stamp Duties Act, Cap LFN, 1990

79. See the Stamp Duties Law. Cap 181, Laws of Lagos State, 1994

80. See section 41 VAT Decree

81. *Supra.* See note 25. See also (1997) N.R.L.R p.51.

82. See (1997)1 N.R.L.R. p.68

83. See section 2 of the VAT Decree

84. See section 36 of the VAT Decree as amended by section 15 of the Finance (Miscellaneous Taxation Provision) Decree No. 30, 1999

85. See note 3

86. *Supra*.

87. Section 315 (1)(b) CFRN, 1999.

88. Decree No 104

89. See sections 81A - 85E PITD.

90. Section 85A

91. Section 85E

92. Section 85B (1)(a) PITD.

93. Decree No 21 1998

94. *Ibid*. Section 2(1)

95. Section 85E (1) PITD

96. See generally section 85A - E PITD

97. Decree No 21, 1998

98. See generally schedule to Decree No. 21, 1998

99. A. O. Sanni, *op. cit.*76

100. Decree No. 7 1993

101. Presently, the distribution formula among the three tiers of governments and the special funds are as follows: federal government (48.50%), state government (24.00%), local government council (20.00%), federal capital territory (1.00%) general ecology (2% of total revenue) statutory stabilization (0.5 % of total revenue), derivation (13% of mineral revenue).

102. *Supra*

103. *Supra*