

Issues in Local Government

Taxation in Nigeria *

Introduction

Consideration of the subject of local government taxation should, necessarily, require some study of the existing structure of the local government system, including duties, responsibilities and general finance framework of the local government. However, I intend to limit my introductory remarks, only, to a few matters that are directly related to the subject of this paper.

The subject of taxation is very crucial to most local governments in Nigeria, today, particularly against the realities of *meagre or "zero"* allocation of finances from the Federation Account of the country and the Joint Local Government Accounts of States¹. The main thrust of this paper is to discuss the extent of the taxing power of the local government, if any, under *the Constitution of the Federal Republic of Nigeria, 1992*² and certain related issues. The local government taxation is, surprisingly, a broad and fairly complex subject-matter. As we already indicated, in this paper a brief overview of the main legal and ancillary issues involved in the subject-matter is provided. We begin by examining the concept of taxation or taxing power.

Taxing Power Defined

From time immemorial, taxing power has always been the sensitive nerve of any government in the words of *Justice Latham* of the United States' Supreme Court in the case of *Nichols v. Ames*,³ "taxation" is said to be:

"... the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as the air he breathes to the natural man. It is not only the power to destroy, it is also the power to keep alive."

If taxation is, indeed, as essential as it is projected in the above statement, then, it presupposes that a measure of it is required by every government to "*keep alive*". Since governmental

* A. O. Sanni, LL.B. (Hons.), LL.M., A.C.T. I., Lecturer. Department of Commercial and Industrial Law, Faculty of Law, University of Lagos. Nigeria

¹ Sections 7(6), 162(3) and 162(6) and (7) of the *Constitution of the Federal Republic of Nigeria, 1999* provide for the funding of the local government Federal and State Governments from the Federation Account and States' Joint Local Governments Accounts. Strictly, the concept of "*zero allocation*". refers to a situation whereby a local government is not entitled to any grant from Federation Account because of deduction of salaries of primary schools' teachers and debts of a local government Which may be charged to its allocation at source from a local government's allocation.

² Hereinafter referred to as "*the 1999 Constitution*" or "*CFRN, 1999*".

³ (1989) 173 U.S. 505, 509.

powers in a federal system are usually divided among the different levels of government, the main focus of this paper is to examine the extent of the taxing power of the local government in Nigeria.

"Taxing power", in a strict sense, could mean "*the power of a level of government to impose a tax by its own law and prescribe conditions for the administration of the tax, either by its own agency or by the agency of another level of government*".⁴ In this sense, the term "*local government taxes*" would refer, only, to taxes imposed and administered by a local government authority under its own law and for its exclusive use or benefit, independent of any control from any other level of government. This definition, in many ways, suggests that a local government tax must be free from state or federal control in the imposition and administration of the taxes; otherwise, they will not qualify as local taxes. As it will soon become clear, all the so-called local government taxes and levies in Nigeria were imposed or charged pursuant to federal or state laws while the mere administrative function of collection has been delegated to local governments. Hence, the adoption of the strict meaning of the word, "taxation will not be helpful here. The word, "*taxation*" or "*local government taxation*" is, therefore, used in the context of this paper to include the power of the local government to collect sundry taxes and levies which may be imposed either by state or federal laws.

Taxing Powers and Regulatory Powers Distinguished

Local governments may not have taxing powers strictly so called;⁵ they are, undoubtedly, vested with a measure of regulatory powers. This is crystal clear from the provisions of *Schedule Four of the 1999 Constitution*, which mandate each state to vest local governments in within the state with the following functions, among others:

- (a) the consideration and the making of recommendations to a Commission on economic planning or any similar Body established for the state on:
 - (i) the economic development of the state, particularly in so far as the areas of authority of the council and of the state are affected, and
 - (ii) proposals made by the said Commission or Body.
- (b) Collection of rates, radio and television licences;
- (c) Establishment and maintenance of cemeteries, burial grounds and homes for the destitute or infirm;

⁴ Rowland, L., "*Is an Independent Source of Revenue Essential for Local Government Finance in Nigeria*", Adedeji, A. and Rowland, L. (ed.) (University of Ife Press, 1972) 72.

⁵ The extent of the taxing powers of local governments is discussed, *infra*.

- (d) Licensing of bicycles, trucks (other than mechanically propelled trucks) canoes, wheel barrows and carts;
- (e) Establishment, maintenance and regulation of slaughter houses slaughter slabs, markets, motor parks and public conveniences;
- (f) Construction and maintenance of roads, streets, street lightings, drains and other public highways, parks, gardens, open spaces or such public facilities as may be prescribed, from time to time, by the House Assembly of the state;
- (g) Naming of roads and numbering of houses;
- (h) Provision and maintenance of public conveniences, sewage and re disposal;
- (i) Registration of all births, deaths and marriages;
- V) Assessment of privately owned houses or tenements for the purpose of levying such rates as may be prescribed by the House of Assembly of the state; and
- (k) Control and regulation of:
 - (i) Out-door advertising and hoarding,
 - (ii) Movement and keeping of pets of all description,
 - (iii) Shops and kiosks,
 - (iv) Restaurants, bakeries and other places for sale of food to the public,
 - (v) Laundries, and
 - (vi) Licensing, regulation and control of the sale of liquor.

In Item 2, Fourth Schedule, it is further provided that:

- (2) The functions of a local government council shall include participation of such council in the government of a state with regards to the following matters:
 - (l) The provision and maintenance of primary, adult and vocation education;
 - (m) The development of agriculture and natural resources, other than the exploitation of minerals;
 - (n) The provision and maintenance of health services and such other functions as may be concerned on a local government council by the House of Assembly of the state.

The power of government to regulate a particular subject-matter should not be confused with its power to impose a tax on that subject-matter. While taxing power is, principally, concerned with the generation of revenue, regulatory power, on the other hand, is, principally, concerned with planning purposes and the ordering of people's behavior. The government might, indirectly, encourage or discourage certain activities or conducts through proper exercise of regulatory power. A typical example is the charging of fee or naming of roads or road blocking. Regulation could take the form of licensing, rating, charging of fees, standard setting or even price regulation depending on the type of activities being regulated.⁶ While it is conceded that, virtually, every tax indirectly, has some regulatory effect,⁷ the same cannot be said of regulatory power. *Professor Lane*, speaking on the regulatory effect of excise duties, said:

"both the taxing and regulatory law brought in revenue, but the latter (regulatory) was rather concerned with the conduct of the subject than with obtaining of funds. Conversely, those very duties of excise imposed by the taxing law, although a source of revenue, were also a medium through which activities of the dutiable producers could be regulated".⁸

This point is particularly important in relation to the local government in Nigeria where the power of that level of government to regulate trade and commerce has been confused with the power to impose taxes. This problem is however, not peculiar to local governments. Discussion on abuses of regulatory powers by the local government, in particular, shall be considered later in this paper.

Tax and Fee or Charge Distinguished

Tax is an imposition made for public purpose without reference to any specific benefits to be conferred on the taxpayer. Thus, a taxpayer cannot insist, for instance, that the road to his house must first be tarred or that water must be supplied to his area as a condition for paying his tax. However by contrast, those who directly consume a particular service or services pay fee and charges. Hence, there is an element of *quid pro quo* in fees and charges.⁹ Another distinction is that while the revenue derivable from taxes, usually, forms part the

⁶ Akanle, O., *The Power to Tax and Federalism in Nigeria, Legal and Constitutional Perspectives on the Sources of Government Revenue* (Centre for Business and Investment Studies, 1987)4-5.

⁷ For instance, appropriate doses of tax incentives can be used to attract business to rural areas or designated

"enterprises zones." Also, the raising or lowering tax rate by a comparatively small amount can be used to encourage or discourage a particular type of behavior such as drinking of alcohol or smoking.

⁸ Quoted in Akanle, O., *supra*, 4 -5.

⁹ However, a key feature of fees and charges is that they are not always, indeed not often, equal to the cost of providing the good or service. Hence, they, usually, have some elements of hidden subsidy; see, Bello, I.B. and Eronimi, R.O., "Fee and Charges". Bello-Imam, I.B. (ed.), *Local Government Finance in Nigeria*, .51.

general revenue of the state,¹⁰ those from fees and charges are used for defraying (either fully or partly), the expenses incurred (by the Authority or Agency) in providing the service. For instance, certain fees payable to the Town Planning Unit or the Public Works Department ("PWD") of a local government authority may, invariably, be independently spent by them.

Division of Taxing Powers Under the 1999 Constitution

Federal Taxing Powers

Although there are multifarious taxes in Nigeria,¹¹ only four of them are, specifically, mentioned by name in *the Exclusive Legislative List*.¹² These are:

- Customs Duties;¹³
- Excise Duties;¹⁴
- Export Duties;¹⁵ and
- Stamp Duties.¹⁶

In addition, Item 59 of *the Exclusive Legislative List* vests the federal government with powers on "taxation of incomes, profits and capital gains",¹⁷ pursuant to which the following five taxes have been imposed:

- Personal Income Tax;¹⁸
- Companies Income Tax;¹⁹
- Petroleum Profits Tax;²⁰
- Education Tax;²¹ and
- Capital Gains Tax.²²

It is instructive to note that the federal government is not responsible for the collection of all these taxes;²³ neither does the revenue from the taxes for the exclusive use of the federal

¹⁰ See, sections 80 and 162(1). CFRN. 1999.

¹¹ See. Schedule to *the Taxes and Levies (Approved Lists of Collection) Decree No. 102, 1993*.

¹² See, *Second Schedule, CFRN, 1999*.

¹³ *Supra*, Item 16.

¹⁴ *Supra*, Item 16.

¹⁵ *Supra*, Item 22.

¹⁶ *Supra*, Item 58.

¹⁷ *Supra*, Item 59.

¹⁸ Decree 104, 1993 (as amended); see also, F.I.R.S., *the Nigerian Tax Law* (1995) 225.

¹⁹ Cap. 60, Laws of Federation of Nigeria, 1990 ("LFN"); see also, *the Nigerian Tax Law* (1995), *supra*, 43.

²⁰ Cap. 354 LFN, 1990; see also, *the Nigerian Tax Law* (1995), *supra*, 401.

²¹ Decree No.7 of 1993.

²² Cap. 42, LFN, 1990; see also, *the Nigerian Tax Law*, (F.I.R.S.), *the Nigerian Tax Law* (1995) 1.

²³ *The Constitution* authorises the federal government to delegate the collection of three federal taxes, that

government. Rather, the revenue from some of the taxes are paid into the Federation Account and shared among the three tiers of government, including local governments, while some are collected by the states and spent by them.²⁴

The exclusive control of the federal government over these taxes is, without doubt, premised on the need to secure uniformity in the rates and administration of these taxes. As it were, a company based in Damaturu in Yobe State pays the same rate of Companies Income Tax and excise duties as its counterpart in Ikeja, Lagos State. While this view is not without some force, it is equally, arguable that companies should be made to pay taxes and levies, directly, to the states or local governments where they are situated and carry on their activities. This is based on the logic that those states or local governments have provided the companies with some of the amenities that enable the companies to carry out their activities unmolested and also directly bear the burden of the activities of the companies, such as pollution. In the interim, it might be expedient to factor in indices such as location of industries in the distribution of revenue derived from taxes such as Companies Income Tax and Stamp Duties, *inter alia*.

Taxing Powers of States

Unlike in the case of the federal government, no tax is, specifically, reserved for state governments under *the 1999 Constitution*.²⁵ Therefore, in order to determine the scope of the taxing powers of the states, we must turn to the extent of their legislative powers under section 4(7) of *the 1999 Constitution*. The implication of this for our discussion is that states may impose any taxes and levies that are not specifically reserved for the federal government. For instance, states cannot, legally, impose customs duties, excise duties, export duties, stamp duties, income taxes, capital gains tax. The taxing power of the states. Therefore, appears to be open-ended. It is only a study of the statute books of a particular state that can reveal the exact extent, which the taxing power, has been exercised by the states. In Lagos State, for instance,

is, Personal Income Tax, Capital Gains Tax and Stamp Duties to states' governments, subject to the conditions that may be prescribed by the federal government.

²⁴ The revenue in the Federation Account is shared in accordance with the formula prescribed in *the Allocation of Revenue (Federation Accounts) Act*.

²⁵ See, Section 4(7) CFRN, 1999.

tax has been imposed on Betting,²⁶ Casino,²⁷ Entertainment,²⁸ Merriment,²⁹ Sales,³⁰ Personal income,³¹ tenement rates,³² *inter alia*.

Taxing Powers of Local Governments

In considering the present status of local governments in Nigeria, we are going to behave like historians who "*look forward with their eyes backward*". The British Colonial Government established the Native Authority Systems of local administration whereby the local governments, following the Anglo-Saxon tradition was given the status of a body corporate. Local government system of administration has since witnessed various reforms and re-organisation and metamorphosed from a body corporate into a department of state governments and now into a constitutional establishment. The 1976 local government reform constitutes the watershed of the formal and unequivocal recognition of the local government as a distinct *tier* of government with defined boundaries, clearly stated functions and provisions for ensuring a measure of human and financial resources.

The *1999 Constitution*, following *that of 1979*, guarantees a system of local government by democratically elected local government council, thus:

"7 (1) The system of local government by democratically elected government councils is under this constitution guaranteed; and accordingly, the Government of every state shall subject to section 8 of the this constitution, ensure their existence under a law which provides for the establishment, structure, and composition, finance and functions of such councils".

It is noteworthy that the Constitution does not set out how a local government shall perform and discharge its functions. It is left for the state government to enact legislation for the establishment, structures, composition, finance, and confer functions including those set out in *the Fourth Schedule to the Constitution* on the local government councils. To this extent, any federal statute such as the recently promulgated Electoral Act. 2001 that purports to regulate the administration of local government is null and void to the extent of its inconsistency with the Constitution.

The enhanced status of local government councils has raised the question whether or not they have independent power to raise taxes.³³

²⁶ Cap. 125, Laws of Lagos State.

²⁷ Cap. 20, Laws of Lagos State.

²⁸ Cap. 43, Laws of Lagos State.

²⁹ Cap. 131, Laws of Lagos State.

³⁰ Cap. 175, Laws of Lagos State.

³¹ Cap. 142 Laws of Lagos State.

³² Cap. 186, Laws of Lagos State.

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 states and a federal capital territory".³⁴

Consequently, the division of legislative power under section 4 of the Constitution involves only the federal and state governments. The legislative power of the local government to make by-laws is an exercise of a delegated legislative power. The implication of this is that local governments cannot, their own by-law, impose any tax on any subject matter whatsoever.³⁵ 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.³⁶ Where such a law has been enacted, a local government council must exercise its power to collect the tax or rate due under the law within the limits prescribed. Any exercise of power beyond the limits allowed by the Constitution or the enabling law will be *ultra vires, null and void*.³⁷

A recent attempt by some local governments to impose a mobile advertisement tax for display of corporate names on vehicles was successfully challenged in *S.D. V Nigeria Limited and Others v. Apapa Local Government Council*³⁸ and *Cornerstone Insurance Plc. V .Surulere Local Government and Mushin Local Government*.³⁹ In the latter case, the Court held that:

"Having resolved that the Defendants do not have the constitutional power to impose the Mobile tax or rates on the Plaintiffs cars bearing its logo, those four questions posed in A,B, C and D endorsed on the summons are resolved positively. Consequently, I hold that the Defendants lack the taxing powers to impose and collect Mobile Advertisement Tax Rates on the Plaintiff's car which have been duly registered and licensed to ply all routes in the Federal Republic of Nigeria."

Having resolved that local governments do not have power to impose taxes, it will be appropriate to turn to the taxes and levies collectible by them.

³³ Popoola, A.O., "The Taxing Powers of Local Governments under the Nigerian Constitution", Adediji, A.O. (ed.), *Emerging Trends in the Nigerian Government* (1994) 53.

³⁴ See, section 2 (2) CFRN, 1999.

³⁵ Popoola, A.O., *supra*, 74.

³⁶ Sanni, A. O., "The Approved List of Taxes: A Commentary", 1998 *MPJFIL*, Vol.2, No 2, 74.

³⁷ See, *Shell Petroleum Development Company of Nigeria Limited v. Burutu Local Government Council* (1989] 9 N.W.L.R. (pt. 165) 318.

³⁸ (Unreported); see, "Firms Secured Injunctions Against Council on Vehicle Display Law", *The Guardian*, 13th May, 2000 31.

³⁹ Delivered by Akinsanya, D.F., J., of the Lagos High Court; see. (Unreported) suit No. M/64/2001.

Taxes and Levies Collectible by Local Governments

In an attempt to 'sanitise' the Nigerian fiscal landscape and stem the problem of multiplicity of taxes, the Federal Government, promulgated in 1998, the *Taxes and Levies (Approved List for Collection) Decree*⁴⁰. *Part III of the Schedule to the Decree* listed 20 subject-matters on which local governments could collect taxes and levies thus:

(1) shops and kiosk rates; (2) tenement rates; (3) on and off liquor licence fees; (4) slaughter slab fees; (5) marriage, birth and death registration fee; (6) naming of street registration fee, excluding any street in the capital city; (7) right of occupancy fees on land in rural areas, excluding those collectible by the federal and state governments; (8) market taxes and levies excluding any market where state finance is involved; (9) motor parks levies; (10) domestic animal licence fee; (11) bicycle, truck, canoe, wheelbarrow and cart fees, other than a mechanically propelled truck; (12) cattle tax payable by cattle farmers only; (13) merriment and road closure levy; (14) road and television licence fees (other than radio and television transmitter); (15) vehicle radio licence fee (to be imposed by the local government of the state in which the car is registered); (16) wrong packing charges; (17) public convenience, sewage and refuse disposal fees; (18) customary burial grounds permit fees; (19) religious places establishment permit fees; and (20) signboard and advertisement permit fees.

Our comments on the *Taxes and Levies (Approved Lists for Collection) Decree* will be deferred.

Federal and States' Taxes Collectible by Local Governments

Apart from the above fees and levies, there are some federal and states taxes that are being collected by local governments as agents of the Federal Board of Inland Revenue or States Boards of Internal Revenue (as the case maybe). For instance, *section 8A of the Value Added Decree*⁴¹ imposes an obligation on all government ministries, statutory bodies and agencies at the federal, state and local government levels to act as VAT collecting agents.⁴² Local governments are also obliged to withhold taxes from certain payments due from them to their employees and contractors under the Pay-As-You-Earn ("PAYE")

Scheme and Withholding Tax scheme pursuant to the *PITA* and *CITA* provisions and remit them to relevant state or federal agencies.

⁴⁰ No. 21, 1998

⁴¹ No. 102, 1993.

⁴² *Section 8A*. There is a directive that government agencies and parastatals should not award contracts to companies or firms that are not registered for VAT.

Having discussed the extent of the local government's powers to collect sundry taxes and levies, it will be appropriate to now consider the appropriate machinery prescribed by the law for the collection.

Local Government Tax Collection Machinery

At federal and state levels, we have the Federal Board of Inland Revenue ("FBIR") and States Boards of Internal Revenue ("SBIRs"), respectively, as established structures for tax administration. An attempt was made during the regime of *General Sanni Abacha* to create a permanent structure for tax administration at the local level throughout the federation in form of a Local Government Revenue Committee. Towards this end, *section 85 D PITA* as amended⁴³ provides that:

"850- (1) There shall be established for each Local Government Area of a State a Committee to be known as the Local Government Revenue Committee (in this Decree referred to as "the Revenue Committee").

(2) The Revenue Committee shall comprise -

- (a) The Supervisor of Finance as the Chairman;
- (b) There Local Government Councillors as members; and
- (c) Two other persons experienced in revenue matters to be nominated by the Chairman of the Local Government on their personal merits.

85- (1) The Revenue Committee shall be responsible for the assessment of and collection of all taxes, fines and rates under its jurisdiction and shall account for all amounts so collected in a manner to be prescribed by the Chairman of the Local Government.

(2) The Revenue Committee shall be autonomous of the Local Government Treasury and shall be responsible for the day to day administration of the Department which forms its operational arm."

A later attempt was also made to co-ordinate and harmonise the activities of each Local Government Finance Committee by establishing for each State a Joint State Revenue Committee comprising:

"85F-

⁴³ See, *section 6, Finance (Miscellaneous Taxation Provisions) (No.2) Decree No. 31 1996.*

- (a) The Chairman of the State Internal Revenue Service as the Chairman;
- (b) The Chairman of the Local Government Revenue Committee;
- (c) A representative of the Bureau on Local Government Affairs not below the rank of a Director;
- (d) A representative of the Revenue Mobilisation Allocation and Fiscal Commission, as an observer;
- (e) The State Sector Commander of the Federal Road Safety Commission, as an observer;
- (f) The Legal Adviser of the State's Internal Revenue Service;
- (g) The Secretary of the Committee who shall be a staff of the State's Internal Revenue Service.

The functions of the Joint Revenue Committee as stated in section 85G *PITA* are to:

- (a) implement decisions of the Joint Tax Board;
- (b) advise the Joint Tax Board and the State and Governments on revenue matters;
- (c) harmonise tax administration in the State;
- (d) enlighten members of the public generally on state and I government revenue matters, and
- (e) carry out such other functions as may be assigned to it by Joint Tax Board.⁴⁴

Furthermore, *section 2(1) of Taxes and Levies Decree* prohibits person other than the appropriate tax authority from assessing and collecting on behalf of the government. The sub-section prohibits the mounting of a roadblock in any part of the federation for the purpose of collecting any tax or levy.

Emerging Issues

This part of the paper will be devoted to a brief examination of a few of the issues arising from the foregoing discussion. We begin by probing whether the local government should, indeed, not be vested with a measure of power to impose taxes and levies.

Case For Local Government Taxing Powers

As governments at both the federal and state levels gradually inch towards a market-driven economy and embrace privatization, they would have to review and reposition themselves in

⁴⁴ See generally, *section 85F and G, PITA* (as amended by *Section 8 Fin (Miscellaneous Taxation Provisions) Decree (No.2) 1998*).

their role of regulating and taxing the players. Hence, there is a new tax consciousness among the tiers of government.

This is discernible in relation to local governments in cases such as *S.D.V. Nigeria Limited and others v. Apapa Local Government Council*⁴⁵ and *Cornerstone Insurance Plc. v. Surulere Local Government & Mushin Local Government*⁴⁶ considered above.

We have seen that section 7(5) and *Schedule 4 of the Constitution* do not, directly, vest the local government councils with the power to collect taxes in the absence of enabling state's law, which will determine the taxable persons, assessment procedure, and method of collection, recovery and penalties for tax delinquency. The question now is to what extent is the above arrangement compatible with the present clamour for devolution of power in the polity? It is our submission that local government should be given a measure of power to raise a few local taxes, subject to the legislative and judicial control of the state. It is laughable, for instance; that our local government cannot raise a development levy of mere N50 per head. If our traditional institutions, which were supplanted by the local governments, could enjoy executive, legislative and judicial powers, there is no reason why modern local governments should be vested with certain measures of these powers. We are not unmindful of the current agitation by the local governments to derive their existence and powers directly from the Constitution as a third tier of government properly so-called, or in the alternative, secure an increase in their allocation under the present arrangement. This is dictated by the desire to be free from the tyranny and oppression of the state as much as greed to share part of the oil revenue at the centre. If the bubble at the centre should burst and each level of government is compelled to generate its revenue for its sustenance, then, the illogicality of the centre financing virtually everything will become manifest. The states are, therefore, enjoined to establish an equitable fiscal arrangement that will assuage the genuine fear of fiscal oppression by the states, preferably, in a state's constitution.

Encroachment on Jurisdiction Of Local Government by States

Although local governments do not have power to impose taxes, *the Constitution*, which is the *grund norm* has mandated that states should vest the local governments with irreducible functions listed in *the Fourth Schedule* including:

- (i) Assessment of privately owned houses or tenements for purpose of levying such rates as may be prescribed by the House of Assembly.⁴⁷

⁴⁵ *Supra.*

⁴⁶ *Supra.*

⁴⁷ See, the Fourth Schedule 1999 Constitution.

Tenement rate is, specifically, reserved for the Local Government by the *Constitution* because it is, essentially, a local government tax in most countries and constitutes the bulk of their revenue. Regrettably, the tax has not achieved any measure of success in Nigeria. As a matter of fact, except in a few urban local governments most of the states have not revised their tenement rates law made since the Regional era.

Apparently due to the unimpressive revenue yield from tenements, states are poised to surreptitiously take over the administration of tenements from their local governments. For instance, Lagos State recently promulgated the *Land Use Charges Law*⁴⁸ whereby the local governments delegated their power to collect tenements to the state via a *Memorandum of Understanding*. In respect, *section 1 (2) and (3)* of the new law provides thus:

- “(2) For the purpose of this Law, each Local Government in the State Shall be the collecting authority and it shall be the only body empowered to levy and collect Land Use Charge for its area of jurisdiction.
- (3) Each collecting authority may delegate to the State, by written agreement, its functions with respect to the collection of rates and the assessment of privately owned houses or tenement for the purpose of levying such rate as may be prescribed under this Law”.

It will be helpful to consider the case of *Knight, Frank and Rutley (Nigeria) Limited v. Attorney-General of Kano State*,⁴⁹ the relevant constitutional issue here was whether it was proper for Kano State to enter into contract with the appellant for the valuation of ratable properties in the State. In answering the question Mohammed, J. C.A. (as he then was) said:

“I believe that once the state passes a legislation assigning the function of valuation of tenement rates to the local government as the constitution has directed, only the local government council will have the power to deal with that subject. The state has no power to deal with the matter and local government councils cannot, even if it wants us to, divest itself of those powers”.

There is no doubt that the Courts will protect the jurisdictional sphere of the local government when necessary. This point was emphatically stated by the Court of Appeal in *Bamidele and Others. v. Commissioner for Local Government and Community Development*.⁵⁰ In that case, a declaration was made that the Defendants was destitute of powers under *the Constitution of the Federal Republic of Nigeria*, to establish, maintain and regulate markets and interfere with

⁴⁸ No. 11 of 2001

⁴⁹ (1990) 4 N.W.L.R. (Pt. 143) 210.

⁵⁰ [1994] 2 N.W.L.R. (Pt. 143) 210.

the day to day running of the Alayabiagba Market in Lagos Island Local Government. *Uwaifo, J.C.A.* (as he then was) delivering the lead judgement held inter alia:

"By the Local Government Edict No. 16 of 1976 of Lagos State. Section 63(a) thereof Local Government were given exclusive responsibility, and power to make bye-laws, for markets and motor vehicle parks. Incidentally. Section 7(5) of the 1979 Constitution provides for the functions of Local Government Councils in the 4th Schedule of the Constitution, among which as stated in paragraph 1(e) thereof, is the: establishment, maintenance and regulation of markets, motor parks and public toilets. It will be unconstitutional for any person or authority to purport to exercise that function on the state of the Law. The function has been given to the Local Government. That that usurpation of function was done by an elected State Government to an elected Local Government tells a lot about our respect for democratic principles".

The local governments have must been persuaded to surrender their constitutional powers based on the assurance that far more revenue than they are presently realising would accrue to them under the new arrangement in a similar fashion that the federal government persuaded the states to hands off Value Added Tax. While the appraisal of the particular law is beyond the scope of this paper, we make bold to say that the procedure adopted by Lagos State though ingenuous and altruistic is legally questionable. It takes one dissentient local government to upset the arrangement under the *MOU*. The states could and should have assisted the local governments to establish a firm framework for the administration of the tax instead of 'hijacking' a tax, which is traditionally on of the main sources of local government revenue in most countries of the world After all, more revenue for the local governments would, in some ways, reducethe financial pressure on the states. States should take a queue from the arrangement under the *Personal Income Tax Act* and *section 163 of the 1999 Constitution* whereby *FBIR* collects personal income taxes of certain individualsand remits the revenue back to the states after deducting costs of collection.

Tax Collection Machinery

It is regrettable that most of the states have failed, woefully, to establisha framework for a sustainable administration of taxes and levies at the local government level. It is arguable that it is the vacuum left by the statesthat created seeming boundless '*opportunities*' for most local governments to introduce an array of taxes and levies that are unknown to law and a measure of unorthodoxy and crudity in their revenue generation drive. It is doubtful if any local or state government has established a Local Government Finance Committee or a Joint Local Government Finance Committee as mandated in the *Taxes and Levies Decree*.

While the lukewarm attitude of states and local governments to the provisions of the *Taxes and Levies Decree* may be based on the fact that the federal government could no longer dictate or foist on them the administrative structure with which to collect their taxes and levies, it can, at least, not be denied that the federal government could do so in respect of federal taxes collectible by state and local governments.

An attempt to by Osun State to delegate the functions of the State's Board of Internal Revenue to collect personal income tax to a new agency was successfully challenged in the *International Breweries Plc. v MILAD. Osun State*.⁵¹ In that case, the Plaintiff who had been served with a tax assessment notice by Osun State Accelerated Revenue Generation Collection and Accounting Agency challenged the legality of the agency to demand taxes from it. The Osun State High Court upheld the Plaintiff's argument that the collection of taxes was vested on the Board created under *section 85A. PITD* and that the functions cannot be delegated to any person or agency. According to the Judge, any delegation at all, can only be validly made by to the staff of the State's Internal Revenue Services, which is the operational arm of the Board.

Although the Federal Government cannot dictate to the state how to collect purely state taxes, it is our humble opinion that the arrangement for tax administration under *the Taxes and Levies Decree* is to be preferred to the present *ad hoc* arrangement in most local governments. At the moment, where collection of taxes through military task forces have been discontinued at the local government level, they have been replaced by 'area boys'. Hence, unorthodox and crude methods are still being employed in most local government areas to 'extort' money from the citizenry in a manner than smacks of day light robbery. Such crude and uncivilized methods simply cannot and must not continue in a democratic setting.

Liability of Corporate Bodies to Pay Local Governments' Taxes and Levies

Corporate bodies are liable to pay taxes on different facets of their business unless specifically exempted by statutes. Some of these taxes are payable to the federal, states and local governments, respectively.

There has been agitation by corporate bodies in Nigeria against the, "incidence of multiplicity of taxes".⁵² It has been contended that corporate bodies should not be subjected to the tax jurisdiction of state and local governments. The contention was predicated, among other things, on the fact that *Item 32 of the Exclusive Legislative List* vests matters pertaining to

⁵¹(2000) 1 N.R.L.R.86.

⁵² This protest was particularly strident during the era of the consultants.

corporate bodies on the Federal Government.⁵³ Commenting on this issue, a writer has this to say on Business Premises Levy:

This is one of the levies imposed by states to shore up their income. It is usually companies that have business premises, thus this levy can only be paid by such companies. Why should companies pay this tax to the States Government when companies and companies matters are under the exclusive legislative List? The payment of this levy has generated so much controversy and it is affecting trade and commerce. As a corollary to this, local government also demands levy from companies for the signboard placed at their offices. Does this not amount to double taxation? It is expected that once a company pays a levy for business premises, does it not stand to reason that any board indicating the business premises is already taken care of? Looking at it from another perspective, what business would a local government council have with companies? Clearly, States and Local Governments cannot and should not impose any form of tax on companies under any guise whatsoever. Any such tax is clearly illegal, null and void.⁵⁴

While it is true that imposition of huge taxes and levies on companies at state and local government levels will, invariably, increase production cost and prices of goods and services, it is doubtful if the reasons contained in the above statement are legally tenable. First, it is erroneous to contend that *Item 32 of the Exclusive Legislative List* confers jurisdiction on the Federal Government on all the aspects of the companies' affairs. The provision of *Item 32* clearly restricts the federal power to "*incorporation, regulation and winding up*". Hence, the federal power in this respect relates to the incorporation, registration, floatation, management, meetings, winding up of companies, rights, duties, liabilities of companies and other sundry issues that are regulated by *Companies and Allied Matters Act*.

Second, the view that there is double taxation simply because a company is subject to more than one taxes from different levels of government is misconceived. There is double taxation where a taxable person is subject to tax twice or more in respect of the same subject matter during the same year of assessment. Thus, it is not double taxation. if either the same or different levels of government tax (es) different activities of a company.

More specifically, it is not double taxation for a company to pay companies income tax to the federal government and at the same time pay, for instance, parking charges or tenement rates to the local government and businesspremises levy to the state government. This is because the circumstances giving rise to each obligation are quite different.

⁵³ See, *Item 32, Exclusive Legislative List, 1999 Constitution*.

⁵⁴ Kehinde, T., "*Taxing Powers in Nigeria - Time for a New Approach* ", 1999, *M.P.J.F.J.L.*, Vol.3 No., 227.

Our position should not be interpreted as supporting an unbridled exercise of taxing and regulatory powers by states and local governments over corporate bodies in Nigeria. It will be shortsighted for a state or local government council to attempt to subject corporate bodies within their jurisdiction to arbitrary levies and rates that may hamper their growth. It may be tantamount to killing the goose that lays the golden eggs of job creation and economic development of their area.

Harmonisation of Local Government Taxes and Levies

Harmonisation, in this context, is the process of having uniform taxes, levies and rates throughout all local governments in the federation. The obvious advantages of such a project are that it will make the local government tax laws simpler and easily ascertainable. These advantages, among others, must have motivated the Joint Tax Board ("JTB") to issue a Circular titled *"Approved Range of Taxes and Rates Collectable by Local Governments Throughout Nigeria"* with effect from 2001 (See Appendix A).⁵⁵ Whatever might be the intention of JTB, it is submitted, with respect, that the object of the Circular is *ultra vires* the Board. Going by the powers of the Board as spelt out in Section 85(9)(a)-(e) PITD, there is no gainsaying the fact that the Board was created principally to ensure uniformity in the administration of income taxes in Nigeria and avoid the incidences of double taxation. This is, undoubtedly, why each of the representatives of the states and the Federal Civil Service Commission on the Board is required to have cognate experience in income tax matters.⁵⁶ More particularly, 85(9)(d) PITA provides that: - 85(9)(d) The Board shall:

"(d) use its best endeavours to promote uniformity both in the application of this Decree and in the incidence of tax on individuals throughout Nigeria"

The phrase, *"this Decree"*, in the above provision, clearly shows that the uniformity referred to is uniformity in the administration of the personal income tax under the *Personal Income Tax Decree*.

Furthermore, since the word *"tax"* is expressed in the singular, it can only, logically, refer to the personal income tax. It is, therefore, my humble submission that the power of JTB is limited to the personal income tax unless JTB has been expressly authorised by the Federal Board of Inland Revenue to perform certain duties in respect of the Companies Income Tax under section 2(4)(h) of CITA.

⁵⁵See, *The Guardian*, Tuesday April 3, 2001.

⁵⁶See, section 85(2)(b) and (3) PITD.

From the foregoing observation, it is crystal clear that the power of JTB is, at best, limited to taxes and does not extend to levies. Since levies and fees are more or less payments for services rendered, there is no doubt that they may vary widely from one locality to the other. For instance, the fees chargeable for road closure in Eti Osa Local Government may be different from the one chargeable in Mbaise Local Government in Owerri. Therefore, *JTB* cannot, validly, dictate to the states and local governments the mode of collecting their taxes and levies and the *quantum* of such taxes and levies as it purported to do recently. Little wonder that the affected states and local governments have, simply, ignored the Circular of JTB in question and continued business as usual.

Although, the motive of *JTB* could be altruistic, it is trite in law that good or pious intention cannot legalise an unlawful or *ultra vires* action.

Non-Remittance of States' and Local Governments' Taxes

The taxes collected by local governments on behalf of states and federal governments under the withholding taxes scheme and VAT are must be remitted to the relevant tax authority within maximum of one month after the tax is due or collected. Severe penalties are prescribed for failure to strictly comply with this requirement, including the deduction of the revenue of the defaulting local government from its federal or state allocation. It is doubtful if this sanction can be enforced without first determining the liability of a local government through proper audit investigation of its accounts. Perhaps due to this implied condition, it is difficult to say if the penalty has been invoked in practice. This however, is not an excuse for local governments to evade their obligations under the law. It might come in future when either the federal or state governments or both may take bolder steps to, strictly, enforce the law and wreck *zero allocation* on local governments, once again.

Conclusion and Suggestions

From the foregoing discussion, we have seen that the federal government has the exclusive power to impose custom duties, excise duties, stamp duties, Personal Income Tax, Companies' Income Tax, Petroleum Profits Tax, Education Tax and Capital Gains Tax. 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 not contained in the *Exclusive Legislative List*. While the taxing power 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 power has been exercised, in practice, only in respect of taxes of lesser economic significance such as betting duties, casino tax, and entertainment tax, among others.

The point has also been made that 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, null and void*. Consequently, there is constitutional arrangement to make states and local governments partake in sharing of the federal revenue in the Federation Account pursuant to *section 162(2), 1999 Constitution*. Also, we have ventured to comment on some of emerging issues relating to local government taxation.

I shall end this discussion with a highlight of a few suggestions thus:

- (i) States should provide the necessary legal framework for local governments to collect the traditional 'local government taxes' such as tenement rates, advertisement levy, and so on, also help establish a permanent local government agency revenue collection;
- (ii) Rates of the various levies chargeable may, where necessary, be reviewed to reflect the current value of the Naira. Cautions should however be taken not to confuse the exercise of a power with regulatory power;
- (iii) '*Taxing powers*' of the local government should be enlarged ridiculous that a local government cannot presently raise tax of its own howbeit so little. Taxes such as development or parking charges should be left to the local governments;
- (iv) States and Local Governments should exercise restraint in the exercise of their powers to collect taxes and levies from companies. In this regard, the exercise of regulatory power should not be confused with the revenue generating power (taxation). A situation where a sum of N500, 000 is being demanded from a company on premises with lesser rental value can be nothing but daylight robbery. Any such indiscriminate exercise of power will only stifle economic growth and add to the country's social and economic problems;
- (iv) *JTB* should keep within the limits of its power under the law in its altruistic bid to harmonise the taxes and levies throughout the federation. If the August body continues to issue directive on matters beyond its powers, which are disregarded with impunity, then the altruistic effort of the body, would have been in vain. If

the body desires more power this should be done through statutory amendment of the law;

- (v) The existing leakages in the revenue generating efforts of local governments should be blocked. If this is done, the current revenue of the various local governments should increase significantly;
- (vi) Local governments should not trade away their constitutional power over tenement rates for what might presently look like a "*pot of porridge*"; and
- (vii) Revenue from taxes and other sources should be prudently applied. One of the canons of a good tax system is that taxes should not be used for princely estates. As much as possible, there should be transparency and accountability in the ways and manner that local government revenue is applied.