



The new VAT law in Rivers State - how it all started and practical challenges



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Introduction

Value Added Tax (VAT) is a key source of revenue for the Nigerian government. In 2020, the government generated about N1.53tr in VAT revenue, with VAT on local transactions accounting for about 50% of this amount.¹

Considering this revenue-earning potential, the Federal Government (FG) has been involved in legal tussles with different states over which tier of government has taxing powers relating to VAT and consumption taxes in general, and these have been subject to various conflicting decisions. We have summarised the history of consumption taxes in Nigeria and outlined a time chart of some of the key disputes and the judgments issued by the courts.

History of VAT administration in Nigeria

1986: Nigeria operated a Sales tax regime under the **Federal Government Decree No. 7 of 1986**, which was administered by the states and the Federal Capital Territory. This was narrow in scope and targeted only locally manufactured goods.²

1993: VAT was introduced under the **Value Added Tax Act No. 102 of 1993**. This tax was set up to be administered by the FG, and the revenue derived was allocable among the FG (15%), States (50%) and the Local Governments (35%). The enactment did not repeal the Sales Tax even though the intention was to replace the sales tax regime. The extensive scope allowed for proper capture of interstate transactions and international transactions which the States could not benefit from under the Sales Tax regime.

While the 1993 Federal VAT Act has substantially remained, some amendments were introduced in 2007 and more recently by the Finance Acts of 2019 and 2020.

History of sales taxes/consumption taxes/VAT disputes in Nigeria

1985 AG Ogun State v. Aberuagba³: In this case, the Supreme Court (SC) considered the constitutionality of the Sales Tax Law of 1982 imposed by the Ogun State House of Assembly on goods brought into the state. In reaching its decision, the SC referred to the Exclusive List (of the 1979 Constitution) which includes “*Trade and commerce, and in particular – (a) trade and commerce between Nigeria and other countries..., and trade and commerce between the states*”. The SC thus concluded that the National Assembly was empowered to regulate interstate commerce, and that the sales tax law was therefore *ultra vires*.

1987: Nigerian Soft Drinks Ltd. Vs Attorney General of Lagos State⁴ The Court of Appeal held that the sales tax law in Lagos imposed on persons was valid. The court distinguished this case from the **Aberuagba** case, stating that while the Ogun State Law was concerned with interstate trade and commerce, the Lagos State Sales Tax Law dealt with goods purchased within Lagos state. Also, the incidence of tax in the Lagos law was upon persons and not goods brought into the state as in the Ogun State Law.

2017: Eko Hotels Limited v. Federal Board of Inland Revenue⁵ In this case, the SC held that the VAT Act had effectively “covered the field” and prevailed over the Lagos State Sales Tax Law, and levying the same tax on the same goods and services would amount to double taxation. However, the SC did not consider the legislative competence of the Lagos State Government to pass the Sales Tax Law, as this was not an issue before the court.

2019: HOMAL v. AG Lagos State & FIRS⁶ The Federal High Court (FHC) held that any provision of the VAT Act which deals with services consumed in Hotels, Restaurants and Event Centres in Lagos is inconsistent with the constitution, and is void. The Hotel Occupancy and Restaurant Consumption Law of Lagos State (Hotel Consumption Law) 2009 caters to these activities, and they are residual matters which are within the preserve of the State. The Court also relied on the provisions of the Tax and Levies (approved list for collection) Order 2015, which was subsequently declared null and void by the Court of Appeal in **Uyo LG v. Akwa Ibom State**⁷

2021: Ukala v. FIRS⁸ The FHC held that the constitution expressly prohibits the National Assembly from enacting a law on any other head of revenue or taxation except for capital gains, incomes or profits, and payment of stamp duties. Thus, where the National Assembly veers into making laws for any other item outside those provided under the constitution (such as VAT), those laws become a nullity and are voided by inconsistency.

AG Rivers State v. FIRS & AG Federation⁹ The FHC on 9 August 2021 held (among other things) that the FG is not entitled to make laws for the purpose of taxation other than the taxation of incomes, profits, and capital gains. By necessary implication, the FG is not entitled to make laws for the purpose of VAT, WHT, Education Tax and Technology Tax. Thus, the powers are “residual” for the states.

The recent judgments reached a tipping point when the Rivers State Government enacted the state’s Value Added Tax Law No. 4 of 2021 on 19 August 2021.



The Value Added Tax Law of Rivers State

Highlights

- The VAT Law is similar in content to the VAT Act before the Finance Act 2019. However, references to the FIRS and the Minister of Finance have been replaced with the Rivers State Internal Revenue Service (RIRS) and the Governor, respectively.
- The tax rate is 7.5% and the tax is to be administered by the RIRS. The Governor is empowered to amend the rate subject to the approval of the State House of Assembly.
- Taxable persons are required to register for the tax within 6 months of commencement of business, or of the state VAT Law, whichever is earlier. This means that already existing businesses in the state are to register immediately, while new businesses set up after 19 August 2021, have up to 18 February 2022 to register.
- The state VAT Law requires an importer of taxable goods to pay the tax on the goods to the state before clearing the goods. Import is defined under the law as “bringing in goods and services from another country or from an export processing zone”.
- Non-resident companies (NRCs) are to register for the tax if they carry on business in the state and include the tax on their invoices. The person to whom the supplies are made is required to withhold and remit the tax to the RIRS.
- Monthly remittance and return is due by the 21st of the succeeding month in a manner specified by the RIRS. This means the first return under the law will become due by 21st of September 2021
- The VAT revenue is to be shared 70% to the State and 30% to the Local Governments.
- The list of exempt items is like the Federal VAT Act, and includes basic food items, medical services, and educational materials, among others. The Governor is empowered to amend the schedule subject to the ratification of the State House of Assembly
- The state VAT Law also includes non-compliance penalties which are largely like the penalties in the VAT Act.

Some practical challenges with the law

The law does not define “Non-Resident Companies”, and it is unclear how the RIRS will interpret this provision. Will this be any company outside the geographical jurisdiction of the Rivers State Government, or outside Nigeria?

Also, the law exempts exported goods and services from VAT, but does not define what constitutes an “export”. This may lead to ambiguity as export may either be considered as where goods/services are supplied to customers outside Rivers State, or the opposite of “import” as defined under the law which would cover supplies to persons outside Nigeria. In addition, the law does not address the practical difficulties with the claim/offset of input/output VAT across different states.

The challenges on interstate and international matters raise questions on the jurisdictional and geographical competence of the State House of Assembly to legislate on the subject.

Item 62 in the Exclusive list of the Constitution also places trade between Nigeria and other countries and commerce between states, under the purview of the FG. This was considered and upheld in the Supreme Court’s judgment in the **Aberuagba** case.

While 2 seaports and an international airport are situated in Rivers State, matters relating to such facilities, including Customs and so on, fall under the Exclusive list, and therefore should be legislated on by the National Assembly.

Other important points to consider

RIRS has already started writing to businesses that have operations in the State to immediately comply with the state VAT law. However, there are so many practical issues that it would have been best for the state to organise stakeholder engagement in this regard. This would assist both the RIRS and taxpayers with dealing with the practical challenges, and would give taxpayers time to adjust (update their systems, advise their customers on pricing, assess grey areas, and so on).

Nigeria has about 6 seaports, and the most active ones are in Lagos. The enforcement of Rivers State VAT at the Onne and Port Harcourt ports may lead to (i) double incidence of VAT (ii) additional administration from dealing with the Nigeria Customs Service and the RIRS. This may lead to importers moving any residual business away from those seaports.

Press reports suggest that the FIRS has appealed the **AG Rivers State** decision and has sought a “stay of execution”, requesting taxpayers to continue to comply with the Federal VAT Act, to avoid non-compliance penalties. However, the state VAT Law is already in operation. In the event that the injunction pending appeal is granted, it is unclear which law will stand, as in the **Eko Hotels** Case, the Federal VAT Act was said to have “covered the field” and thus prevailed over the Sales tax law of Lagos state. In the **HOMAL** case on the other hand, the Court clearly distinguished the scope of the Hotel Consumption Law from that of the Value Added Tax Act. It is left to be seen how these will be applied in this instance.

Complications may arise for businesses (including SMEs) within the state, who may have to deal with multiple tax authorities for VAT purposes, and this may result in a decline in Nigeria’s ease of paying taxes and doing business ranking. The court in the **Eko Hotels** case concluded that it would amount to double taxation to levy the same tax on the same goods and services. Thus, taxpayers may need to seek advice on possible next steps, including whether to file an “interpleader” case, which is a suit to help determine the rightful claimant to a property (VAT payments in this case).

A nationally administered VAT Act may have its advantages, especially considering the country’s peculiarities. Therefore, some thought may need to be put into amending the constitution for this purpose. Where different states go ahead to enact separate state VAT laws, a practical approach may be for each state to ensure similarity in the legal framework of the laws and to appoint the Joint Tax Board to administer the tax nationally, and distribute the revenue proportionately.

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