

## **Abstract**

*Taxes are vital tools for development and governance of any country. By payment of taxes, citizens contribute to building sovereign states and governments use these revenues responsibility to meet their obligations in providing essential public services to all citizens. Taxes are therefore very important to every nation that it cannot be under estimated. The richest countries in the world generate revenue internally mostly through effective tax administration strategy which ensures that citizens, firms and institutions honour their obligation without fear or favour. However, for a given tax regime to actualize the afore-cited objective, such a tax culture shall epitomize simplicity, coherence, clarity and elegance in the drafting of its taxing statutes to aid understanding and comprehensibility. In Nigeria, an extant legislation has partitioned collectible taxes among the three tiers of government to embrace and sustain the enumerated objective. Thus the paper, therefore, examines to what extent these three tiers of government have been able to adhere to the law, as it were. It is demonstrated that the said three different levels of government (especially the states and local government) do not keep themselves within the province of their allotted taxing powers. This, unfortunately, has given rise to duplicity of taxation which seem to compound the problem of tax compliance in Nigeria. The paper has advocated further review of the extant laws on the subject, among others.*

**Keywords:** re-inventing, taxing powers, legislation, encroachment.

## **1. Introduction**

### **1.1 Meaning of a Taxing Legislation**

A tax legislation is considered to be an enacted law, statute, bye-law and even a regulation or any other laws, validly made by a legislative authority imposing compulsory financial contributions or levies on individuals, groups, corporate bodies, and entities recognized as taxable members of the society for the purpose of tax remittance to the State<sup>1</sup>. Indeed, taxing legislation is expected to be clear representations in written words of the taxes imposed on taxpayers by the appropriate authority. They (taxing legislation) are distinguishable from unwritten customs or tradition demanding financial contributions from taxpayers<sup>2</sup>. Thus they are written laws that seem to have adhered to all the requirements of law-making in the jurisdiction in question, so as to confer legitimacy and acceptance to the law<sup>3</sup>.

Having briefly explained what a taxing legislation is expected to represent, it becomes expedient to quantify the expectations of a taxing power.

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<sup>1</sup> Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010 (Act No. 3).

<sup>2</sup> *Matthew v Chicory Marketing Board* (v) 1938) 60 CLR 263 at 276.

<sup>3</sup> *ibid.*

## 1.2 What is a Taxing Power?

Taxing power is the power to impose or levy tax. It is power inherent in the sovereignty and unlimited in the absence of constitutional restrictions but subjects in its exercise to the discretion of the authorities in whom it is reposed. Taxing powers can also be defined as constitutionally-granted power of government to impose and collect taxes, as the means of raising revenue within its jurisdiction<sup>4</sup>. The appropriate arm of the sovereign, reposed with the power to impose taxes is the legislature. The legislative arm of government enacts laws imposing taxes and tax legislation. In other words, unless the legislature makes a law on the payment of a particular tax, such tax should not be demanded by the government<sup>5</sup>.

## 2 Division of Taxing Power in Nigeria

In a federation like Nigeria, the concept of inter-government fiscal power is based on a three-tier tax structure – Federal, State and Local Government, each of which has different tax jurisdiction for the enactment of tax laws, formulation of tax policies, and tax administration. As at 2016, 55 different taxes and levies were shared by all three levels of government. Each of the three tiers of government has its sphere clearly spelt out in the Taxes and Levies (Approved List for Collection) Act 2015 (As

Amended). The most veritable tax handles are under the control of the Federal Government while the lower tiers of government are responsible for the less buoyant sources<sup>6</sup>. The taxing powers of Federal and State Governments, are derived directly from the Nigerian Constitution. The Federal Government is the controlling machinery, determining what kind and quantum of taxes and levies that should be imposed by each tier of government<sup>7</sup>. Basically, the power to tax is one of the plenary powers of the government which need not be formally conferred upon it. In a single tier system, ie. Unitary system of government, there is no problem with the definition of the power. Consequently, such a government can impose any form of tax for any purpose and at whatever rate that pleases its fancy. In effect, such government is not subject to any constitutional limitation. The only limitation one can possibly infer is perhaps practical and that is, it may be restricted by practical considerations like ease of assessment and collection; the effect such tax may have on the political fortune of the government especially if it operates in a bi-party or multi-party democracy where the government has to seek the mandate of the electorate on a periodic basis<sup>8</sup>.

However, in a federal setting, because of the inherent conflict situation always existing between the central and the constituent governments, it is essential that powers are allocated and defined in the fundamental laws (in this case, the Nigerian Constitution) to delimit the extent to which each level of government can go. Beyond this limit, such action is regarded as being *ultra vires* and unconstitutional<sup>9</sup>. Apart from the version of elimination or minimization of conflicts between the central and the constituent governments, the need to define allocation of powers particularly in the

<sup>4</sup> JAA Agbonika, *Problem of Personal Income Tax in Nigeria* (Ibadan, Abia Press Ltd, 2020) 23.

<sup>5</sup> Ibid p.195.

<sup>6</sup> CO Akembor & LO Arugu, "State Government Taxation: Empirical Evidence from Nigeria" (2014) Vol 4, No3, *The Business & Management Review*, 63.

<sup>7</sup> A Uzo-Peters, "Inequalities in the Constitutional Allocation of Taxing Rights in Nigeria." (2017) *Tax Law Review*, 17-19. Via file: // -c:/user/new/downloads/ISSRN-id 2919791. Pdf> Accessed on 17 May 2022 at 5.4pm.

<sup>8</sup> AK Bola, *Tax Laws; Analytical Approach on Double Taxation in Nigeria* (2015) *BTR*, 40-43. Also available at [www.awprojectfameuk.blogspot-nl/2019/09/tax-law-analytical-a\(arocho-on-double.html](http://www.awprojectfameuk.blogspot-nl/2019/09/tax-law-analytical-a(arocho-on-double.html). Accessed 17<sup>th</sup> March, 2023 at 11.55am.

<sup>9</sup> *AG of Cross River State & Anor v Ojua* (2010) <PELR-9014(CA).

field of taxation is underscored by the interest of the taxpayers for it is not in the nature of man to voluntarily part with his money in any form, and more especially, when it is to an abstract entity such as governments. Therefore, there is the need for certainty in the area of who has what powers to tax in any particular circumstance

## **2.1 Division of Taxing Powers between the Federal, State and Local Governments**

### **2.1.1 Federal Taxing Powers**

The powers to make laws for the imposition of tax are continued in section 4(2) of the 1999 Constitution of the Federal Republic of Nigeria (As amended). Thus Section 4(2) provides thus: the National assembly shall have power to make laws for the peace, order and good government of the federation or any part thereof with respect to any matter included in the exclusive legislature list set out in Part 1 of the Second Schedule to this Constitution.

Although there are multifarious taxes in Nigeria only four of them are specifically mentioned by name in the Exclusive duties. The items under the Exclusive legislative list expressly relating to taxation are items 16 relating to customs and excise duties and item 25 relating to export duties. In addition, items 58 of the Exclusive legislation list vests the Federal Government with powers of taxation on Stamp Duties and item 59 vests the Federal Government with powers on taxation of incomes, profits and capital gains.<sup>10</sup> It is important to note that not all these taxes *per se* are collected by the Federal government or even accrue to it. In fact, only custom duties, excise duties, export duties, companies' income tax and petroleum profit tax among others are administered by 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 economic cohesion and uniformity. The power over the exclusive legislative list by the Federal government is however to be exercised to the exclusion of the Houses of Assembly of State<sup>11</sup>.

In addition, the power to legislate on matters on the Exclusive legislative list to the exclusion of the State House of Assembly, the National Assembly also exercises powers to legislate on any matter in the concurrent legislative list set out in the First Column of Part II of the Second Schedule to the Constitution<sup>12</sup>. Unlike in the case of 1999 constitution.

### **2.1.2 State Government Taxing Powers**

To determine the scope of the taxing powers of the State, it could impliedly be derived from the general provision conferring legislative powers on states which provides under S.4(7) of the Constitution as follows:

The House of Assembly of a State shall have powers to make laws for the peace, order and good government of the state or any part thereof with respect to the following matters, that is to say:-

- (a) Any matter not included in the Exclusive Legislative List set out in Part 1 of the Second Schedule to this Constitution;

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<sup>10</sup> Constitution of the Federal Republic of Nigeria (Third Alteration ) Act 2010 Act No. 3) Part 1, Second Schedule.

<sup>11</sup> 1999 Constitution, *ibid*, section 4(3).

<sup>12</sup> *ibid* s. 4(7).

- (b) Any matter included in the Concurrent Legislative List set put 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 any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.

It is observed from the above provision that the state governments have plenary powers to make laws on any subject matter that is not on the exclusive list. That is what is referred to as ‘the residual list’. Their powers in respect of those on the Concurrent Legislative List is however subject to the doctrines of inconsistency and covering field. In other words, in respect of matters on the Concurrent Legislative List, the inconsistency rule stated in Section 4(5) of the Constitution which is to the effect that any law made by the State House of Assembly which is in conflict with the law made by the National House of Assembly shall to the extent of the inconsistency is void equally<sup>13</sup>. One of the implications of the techniques of division of legislative powers between the Federal and State government is that while the taxing power of the Federal government can be specifically enumerated, those of the states are left open – ended<sup>14</sup>.

### 2.1.3 Local Government Taxing Powers

As regards local government, the view held by majority of people is that section 2(2) of the 1999 Constitution excludes Local Governments from partaking in legislative powers. However S.7(1) of the Constitution<sup>15</sup> guarantees a system of local government by democratically elected local government power to participate in the economic planning and development of its area. The states are mandated to confer on the local governments by legislation some functions in addition to those specified under the Fourth Schedule to the Constitution. The functions conferred must be by law and must be matters within the residual list which States have powers to legislate on.

The enhanced status of the Local Government Council has raised an issue on whether she has got on her own independent power to raise its own taxes. As a matter of strict conceptual analysis, Nigeria Federalism is a partnership between the Federal government and the State. Hence Section 2(2) of the Constitution provides that ‘Nigeria shall be a Federation consisting of States and a Federal Capital Territory’. Therefore, the division of legislative powers under section 4 of the Constitution involves only the Federal and State government<sup>16</sup>. Again, matters that the Constitution mandates the state governments to vest in the local government councils are only those within the residual matters of the states. The implication of this is that local government have no legislative power of their own and cannot impose any tax on any subject matter whatsoever<sup>17</sup>.

Also noteworthy is the fact that the provision of Schedule 4 of the Constitution do not directly vest the local government councils with the power to collect taxes rather a state government shall first enact appropriate enabling laws, which will determine the taxable persons, assessment procedures and method of collection, recovery and penalties for delinquency. And where such laws have been

<sup>13</sup> Tax Law, ‘Analytical Approach on Double Taxation in Nigeria’(n 7): *AG Ogun State v Abberuaba* (1985) <PELR-3164 (SC).

<sup>14</sup> K Adaramola, Lagos surpasses FG as Tax Revenue surges (2019) *CITN News*, 24-29. Also available at <www.Venturesafrica.Com/lagos-surpasses-fg-as-tax-surges-to-75-in-revenue at accessed 3<sup>rd</sup> March, 2023 at 8.37am.

<sup>15</sup> SAM Ekwenze, *Contemporary Issues on Taxation based in Nigeria* (Enugu, Samp Press Nigerian Ltd 2014) 29.

<sup>16</sup> 1999 Constitution ( n 1).

<sup>17</sup> *ibid* section.2 (2).

enacted, a local government council will exercise power within the limits prescribed by the state enabling law<sup>18</sup>

In conclusion, it has been seen that the taxing powers of the various tiers of government is spelt out in the Constitution. The states normally get periodic allocation, from the central government in addition to the revenue internally generated through the state board of internal revenue for the administration of the state. From the state, the local government equally gets periodic allocation in addition to the revenue generated locally from the residents, imposed by revenue section of department of finance in the local council for the administration of the people. This system has led to perennial setbacks as it brings about uneven economic development of the country<sup>19</sup>.

Perhaps the inequitable distribution of nature in terms of natural resources makes some states and local governments very backward in the scheme of things since their only hope is on the periodic allocation from either the federal or state government as the case may be. Currently in Nigeria, most state governments are facing financial problems. The senate in 2014<sup>20</sup> considered a motion titled: ‘Looming Danger of Bankruptcy in States: The Need for Fiscal Evaluation’ which drew attention to fiscal challenges and looming dangers of insolvency and bankruptcy confronting states in Nigeria. The senate raised certain fundamental issues which included the call for an urgent review of revenue sharing formula among the three tiers of government, among others. This compelled an argument in favour of taxation at state government level, granting states the jurisdiction to tax certain activities that are sourced from their state, on the basis of economic allegiance. The recent amendment of the Taxes and Levies (Approved List for Collection) Act by the National Assembly<sup>21</sup> thereby enlarging the taxes collectable by the state governments is commendable. However, it is recommended that a critical review be done on the basis of the division of taxing powers in Nigeria under the Constitution as a way that will guarantee the ability of each level of government to raise its independent revenue to meet its peculiar responsibilities<sup>22</sup>

### **3. Persistent Threats to the Extant Laws on Distribution of Taxing Powers in Nigeria**

It is pathetic to say that the Nigerian tax regime seems to be shrouded in complexity and chaos particularly as it concerns taxing powers of different levels of government. Though the Constitution and other enabling tax laws appear to have partitioned and assigned taxing powers to different levels of government, yet there is still controversy on who collects what among the three tiers of government. In some occasions, the different levels of government do enact similar or different tax statutes/bye-laws<sup>23</sup> imposing similar taxes on the same goods and services and/or the same taxpayers. The worst culprits among the three tiers of governments seem to be the Nigerian local governments.<sup>24</sup> Local Governments are guilty of imposing different types of taxes outside their taxing powers on hapless taxpayer. Most often, they (local government) do carry out this nefarious activity by hiring illegal tax consultants not recognized by the Constitution or any other valid law

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<sup>18</sup> *ibid* s 4.

<sup>19</sup> *ibid*: Part 1 Second Schedule; Part II Second Schedule to the 1999 Constitution

<sup>20</sup> *Shell Petroleum Development Company of Nigeria Limited v Burutu Local Government Council* (1989) 9NWLR pt 165, 318.

<sup>21</sup> *ibid* p.330.

<sup>22</sup> *AO Sanni, ‘Current Law and Practice of Value Added Tax in Nigeria’ (2012) 5 British Journal of Arts and Social Sciences*, 186.

<sup>23</sup> *Taxes and Levies Act 2004 (Amendment ) Order 2015, sections 3 and 5,*

<sup>24</sup> *ibid*

in Nigeria who go about imposing different types of levies through printing of different posters and car stickers which they insist every motorist must purchase<sup>25</sup> They also impose all kinds of levies on commercial vehicles.

These other methods adopted by local governments seem to confound the Nigerian tax regime not only by adding to its complexity, but also infusing illegal coloration which befogs the entire tax system. For example, the use of stickers to collect all manner of taxes, rates and levies from the people violates the apportioned taxing powers of local governments and other levels of government<sup>26</sup>. On the use of road blocks, some local governments, and their tax consulting agents often use this method to not only obstruct free movement of people and vehicles but also to, inadvertently cause accidents on highways by throwing spikes on roads to deflate the tyres of un-cooperating vehicles that fail to stop<sup>27</sup>. The notoriety of local government officials and their hired goons has also attracted the attention of the Nigerian Court of Appeal, which decried and denounced the barbarity and depravity of the conducts of local government personnel in the case of *Eti-Ose Local Government v Mr. Rufus Jegede & Anor*<sup>28</sup> in the following words;

In recent time, it has become a social menace to see the local government personnel or officers parading themselves on the highway or making a road block and harassing or embarrassing and intimidating bonafide passers-by.... While legitimate imposition of taxes and levies is the source of funding of every tier of government, the manner should not be allowed to degenerate into a desperate extortion, usurpation and legitimate exploitation<sup>29</sup>....

All these go to show how local governments, more than other levels of government, contribute to the complexity of the Nigerian tax regime. That violates the constitutional order regulating the imposition of taxes, levies, and charges. These unlawful approaches also constitute serious frustrations and unfathomable difficulties to taxpayers who now see governments and their collecting agencies as enemies. Hence, the end result is total non compliance and war with revenue authorities. Occasionally, some tax taxpayers do resort to serious physical combats with some of the tax collectors<sup>30</sup>.

The authors are of the firm view that the prevalent distortions in the mode of levying taxes by the different levels of government is partly attributable to the existence of conflicting taxing statutes imposing different or the same type of taxes on the same goods and services and /or on the same taxpayers<sup>31</sup>. Very often, each level of government does support the legality of tax statutes enacted

<sup>25</sup> Legally speaking, multiple taxation is not unlawful if it is not prohibited by law. It becomes unlawful, especially in a federation like Nigeria when one level of government goes ahead to collect taxes or enact tax laws on subjects reserved for a particular and different level(s) of government.

<sup>26</sup> Also, in *Eti-Osa Local Government v Rufus Jegede & Anor*. (2007) 10 NWLR 537 at 558-559, the Nigerian Court of Appeal, Lagos Division, while dismissing an appeal from the respondent, held that Eti-Osa Local Government (the respondent) cannot impose taxes outside the provisions of the Constitution or ambit of Part II of the Taxes and Levies (Approved List for Collections) Decree No. 21 of 1998 now (Amendment) Order 2015.

<sup>27</sup> A Ayayi and CB Onwuekwe, "Withholding Tax Administration in Nigeria: The Oil and Gas Industry in Perspective (2002) 21 *Tax Notes International* 2607.

<sup>28</sup> A Sani (Yariman Bukura), "Contentious Issues in Tax Administration and Policy in Nigeria: A State Governor's Perspective in Joint Tax Board, ed; *Tax Reform in a Democracy* (Lagos, Nigeria: Department for International Development) (DFID) (2005) p.46.

<sup>29</sup> (2007) 10 NWLR P. 537 at P.560 (n 27)..

<sup>30</sup> *ibid*.

<sup>31</sup> The Study Group on the Nigerian Tax System, *Nigerian Tax Reform in 2003 and Beyond* (2003)

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by it. Thus in the case of *Mama Cass Restaurant Ltd & 2 Ors v FBIR & the AG Lagos*<sup>32</sup>, which arose out of unstructured and uncoordinated taxing statutes, the plaintiffs by originating summons brought an action under interpleader proceeding to determine between the Lagos State and the Federal Government, which one of them had the right to collect sales tax the plaintiffs realized from taxpayers who patronize their products. The Court declared the Lagos State Government sales tax laws illegal and invalid based on the constitutional law on “doctrine of covering the field, among others.

#### **4. Conclusion and Recommendations**

The authors are amazed at the duplicity of taxes being imposed on the taxable public by the three tiers of government who seem to have been competing among one another as to who gets the biggest and juicy part from the existing imposable taxes. The authors are further surprised by the fact that such desperation between the various levels of government still occurs despite the apparent distribution of taxing powers by the 1999 **Constitution** and the subsequent Taxes and Levies Act on who gets what between the three tiers of government. The authors therefore advocate that following the basic principle that taxation is statutory, the envisioned approach to streamline the existing imposable taxes would be to take a census of the number of the specific Federal, State and Local Government laws enacted mainly for taxing purposes. The presumption is that, by following this proposal, the number of the existing imposable taxes shall be smaller. By reducing the number of taxes, we are further of the view that tax compliance and administration shall be simplified and efficiency is thus enhanced.

In pursuit thereto, the author recommends an overhaul of the subsisting tax system and also, a reform of the extant laws on distribution of taxing powers between the three tiers of government in Nigeria. The authors are therefore of the firm view that, if the envisaged advocacy is actualized, the current episode which epitomizes squabbles between the competing levels of government shall be exterminated.

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(unpublished) p 49.

<sup>32</sup> (2010) 2 TLRN p. 99.