

AN EXAMINATION OF THE POWER TO IMPOSE AND THE POWER TO COLLECT TAX UNDER THE NIGERIAN LEGAL SYSTEM*

Abstract

This article aims at conducting a critical evaluation on the power to impose and the power to collect taxes under the Nigerian Legal System. A literal interpretation of the Constitution may lead one to entertain the belief that it is only the Federal government that has the power to impose taxes, under the Constitution of the Federal Republic of Nigeria, while States on the other hand, are merely left with the power to collect taxes and not to impose taxes. However, a thorough examination and comparison of some sections of the Constitution will reveal that whilst the Federal Government has the exclusive power to impose items of taxes stipulated in the Exclusive Legislative List, State governments also have the power to impose tax under what is known as the 'residual list'. Furthermore, the taxing powers of each tier of government, as well as the extent of their powers shall be reviewed.

Keywords: Tax, Imposition, Collection, Nigerian Legal System, Examination

1. Introduction

It is a truism both for developed and developing countries that tax is a very important source of revenue generation to the government. Just like an individual makes money to solve their unlimited needs, the government also generates revenue for the execution of her projects and provision of essential infrastructure. To achieve this, there needs to be in place, an efficacious system of taxation, which will ensure optimum administration of taxes. One way to attain this is to have an efficient and productive allocation of taxing powers in the country. Nigeria operates a federalist system of government and one of the primary features of this system of government is the assignment of functions between the various components of government. This also forms the basis for the determination of the delimitation of tax raising powers which constitutes the genesis of internally generated revenue. Most constitutional arrangement allocates legislative powers amongst the different tiers of government and these powers are classified into the Exclusive and Concurrent Legislative List, under the Constitution.

In Nigeria, the Constitution defines and allocates legislative powers to and as between the National Assembly (for the Federal Government and the Federal Capital Territory) and the respective Houses of Assembly of the Federation¹. The Constitution provides for two distinct legislative lists with different subjects exclusively or concurrently assigned to either or both houses of the National Assembly and House of Assembly. The National Assembly has the exclusive legislative power to make laws with respect to matters provided in the Exclusive List, as well as matters contained in the Concurrent list only to the extent provided for in the Concurrent List². In addition to the powers contained in the Exclusive List and the Concurrent Lists, the National Assembly is equally empowered to exercise legislative powers over matters that are expressly reserved for it by any provision(s) of the Constitution³.

Section 4(7) (b) of the Constitution empowers the House of Assembly of each States to legislate on matters contained in the Concurrent List. Also, a House of Assembly has the power to legislate on any other matter which it is empowered to make laws in accordance with any specific provision of the Constitution⁴. Most importantly, the House of Assembly has power to make laws with respect to any matter not listed in the

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¹*Fasakin foods (Nig.) Limited v Shosanya* (2006) 4 KLR (Pt216) p. 1447.

²Section4(4)(a)CFRN,1999.

³Section4(4)(b)CFRN,1999

⁴Section4(7)(c)CFRN,1999.

Exclusive Legislative List and matters listed in the Concurrent List and in respect of powers which the Constitution has vested legislative powers in the National Assembly and this is regarded as the residual powers of the States to make laws and this power is exclusive to the States⁵. The Constitution also provides for a democratically elected Local Government Council.⁶ It confers functions on the Local Government Councils, which shall include those set out in the 4th Schedule to the Constitution⁷. It confers no legislative powers on the Local Government Councils in relation to taxation. However, the courts have in certain instances appeared to have conferred⁷ tax imposition powers upon the Local Government Councils. For instance, in the case of *Mobil Producing Nigeria Unlimited & Anor v. Tai Local Government Council & Anor*⁸ the court held that; the 1999 Constitution in the Fourth Schedule also listed the functions of the Local Government Council. From the provision of Decree No. 21 [the Act] and the Fourth Schedule of the 1999 Constitution, the Local Government has limited power on areas in which they can levy and impose⁹ taxes...’ Also, in the case of *Knight Frank & Rutley v A.G Kano State*¹⁰ UWAISC.J.N says that ‘It is only Local Government Councils have the power to assess and impose¹¹ rates on privately owned property’¹².

Thus, this article shall critically examines the Constitution with a view to explicitly expose the fact that under the Nigerian Constitution, States Houses of Assembly can impose taxes except those expressly conferred on the National Assembly in the Exclusive Legislative List and subject to the rule of inconsistency and the doctrine of covering the field in relation to concurrent matters. The powers of imposition and powers of collection of taxes of each of the organs of government are also reviewed.

2. Conceptual Analysis of Tax Imposition and Collection

Tax is an indispensable feature of every government and has been around for a very long period of time. In spite of this, there is yet to be a generally acceptable definition. However, several attempts have been made to define it. For instance, the Black’s law Dictionary defines tax as ‘A charge by the government on the income of an individual, corporation or trust as well as the value of an estate or gift’¹³, while the New Webster’s Dictionary, defines tax to mean ‘A charge or burden, usually pecuniary, laid upon persons or properties for public purposes’¹⁴. Tax law on the other hand, may be described as the body of law that governs the liability of persons to pay tax to the government. It covers the rules that establish the incidence of tax and the tax base (i.e. who and what is subject to tax). It also extends to the rules relating to the administration and enforcement of the tax system, including the rules dealing with collection and recovery of tax. It has also been simply defined as a body of rules under which a public authority has a claim on tax payers.¹⁵

In Nigeria, the allocation of powers is based on the principle of fiscal federalism. Federalism has in turn, being defined as an arrangement whereby powers of government within a country are shared between a national, country wide government and a number of regionalized (i.e. territorially localized) governments in such a way that each exists as a government separately and independently from the others operating directly on persons and properties within its territorial area, with a will of its own and its own apparatus for the conduct of its affairs and with an authority in some matter exclusive of all the others.¹⁶ Fiscal federalism has in turn been defined as the allocation

⁵J.J Odinkonigbo & N. Ikeyi, ‘Is the Power of a State to Impose Sales Tax in Nigeria Fettered by the Imposition of Value Added Tax by the Federal Government?’ [2015], *Common wealth Law Bulletin*, (16), p4.

⁶Section 7(1) of the Constitution.

⁷Section 7 (5) of the Constitution.

⁸Emphasis Mine.

⁹2004] I NTLR 182

¹⁰Emphasis Mine.

¹¹(1998) 7 NWLR (Pt. 556) 1-37

¹²Emphasis Mine.

¹³R.A.C.E. Achara, ‘Can Nigerian Local Government Councils Autonomously Impose Rates?’, [2003] *Journal of African Law*, (47) (2), p. 223.

¹⁴B.A. Garner (ed), *Black’s Law Dictionary*, (7thed), (USA: West Group, 1999) p. 159.

¹⁵*The New Webster’s Dictionary of the English Language College Edition*, (India: Surject Publications 1989) p.1574.

¹⁶C. E. McLure, et al, ‘Tax Law’, available at <https://www.britannica.com/topic/tax-law>.

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of tax raising powers and expenditure responsibilities between two or more levels of government. Specifically, Nigerian fiscal federalism structure involves the allocation of expenditure and tax raising powers among the Federal, State and Local Government. It demands that each level of government should have adequate resources to perform its functions without appealing to the other levels of government for financial assistance. Nigerian legal system consists of each totality of laws or the legal rules and machinery which operates within Nigeria as a sovereign and independent African country¹⁷.

3. Distinction between Tax Imposition and Tax Collection

The administration of taxes has two major ambits: Imposition and Collection. According to Sanni, taxing power 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.¹⁸ Taxation suggests a sort of lawmaking. Its collection or administration is a subsequent stage which altogether may be classified in essence as executive in nature. In *Nigerian Agricultural and Co-Operative Bank v Jigawa State Board of Internal Revenue*¹⁹, the court distinguished between the words 'impose' and 'collect'. According to the court, to 'impose' is active and legislative; to 'collect' on the other hand is passive and merely administrative²⁰. The word 'Impose' has been defined to mean 'to place (a tax, fine, task, etc.) on someone or something'²¹. While the word 'Imposition' has been defined as 'the action or process of imposing something or of being imposed'²². Tax imposition is essentially the practice of the government in levying taxes on the Subjects of a State. Other names for imposition relevant to the study are 'levy, charge'²³, etc. On the other hand, the Merriam-Webster Dictionary defines 'collection' as 'the act or process of collecting, e.g. the collection of data, taxes'²⁴. Tax collection has therefore been defined as the process of the government getting money from people and businesses required to pay tax and the amount of tax the government gets from this activity. A necessary extrapolation of these is that while imposition of tax is ontologically a legislative function, tax collection on the other hand is mere executive or administrative function.

4.0 Legal Regime Governing the Tax Imposition Powers of the Organs of Government

Nigerian tax system originates from law and any tax levied on the people must be backed by law. Tax imposition has in the immediately preceding sub-topic, been defined as the practice of the government in levying taxes on the subjects of a State. It is the means by which the government obtains the revenue required for its activities. This is usually by way of a monetary charge imposed by the government on persons, entities, transaction or properties to generate public revenue. The power to tax is conceived as being inherent in sovereignty and essential to the existence of an independent government. The most significant aspect of the tax imposition power is that such power must be constitutionally derived. Therefore, any imposition and collection of tax outside the jurisdiction of tax statutes or that is devoid of the legislative arm approval is a self-ascribed taxing power which is to that extent null and void. Thus, in *Attorney-General v. Wilts Dairies Limited*²⁵ the court stated that;

The rule of law that no pecuniary burden can be imposed upon the Subjects of this country, by whatever name it may be called, whether tax, due, rate or toll, except upon clear and distinct legal authority, established by those who seek to impose the burden, has been so

¹⁷B.O. Nwabueze, *Federalism in Nigeria under Presidential Constitution* (London: Sweet & Maxwell 1983) p.3.

¹⁸O. Olanrewaju, 'Legal System: Meaning and Types', available at <https://www.djetlayer.com/meaning-types-legal-system>.

¹⁹A.O.Sanni, 'Division of taxing powers under the 1999 Constitution' available at www.legalpediaresources.com/node/2933,

²⁰(2000) 1 NRLR 62 @73 and 75.

²¹R.A.C.E.Achara, 'Can Nigerian Local Government Councils Autonomously Impose Rates?' [2011] *Journal Of African Law*, (47)(2) p.222

²²'The Free Dictionary', available at www.thefreedictionary.com/imposition

²³'Oxford Living Dictionary' available at <https://en.oxforddictionaries.com/definition/imposition>

²⁴Section 4 of the Taxes and Levies (Approved List For Collection) Act, CAP T2, LFN 2015 defines a levy to include any fee or charge'.

²⁵Merriam-Webster, available at <https://www.merriam-webster.com/dictionary/collection>

often the subject of legal decisions that it may be deemed a legal axiom and requires no authority to be cited in support of it.

The division of taxing powers in a country invariably depends on the system of government, whether it is federal or unitary. Nigeria runs a Federal system of government and is enjoined by Section 14 (b) of the Constitution to have the security and welfare of the people as its primary purpose. The basis of tax imposition in Nigeria can be found in Section 44(2) (a) of the 1999 Constitution which provides that; ‘Nothing in subsection (1) of this section shall be construed as affecting any of general law for the imposition or enforcement of any tax...’ Thus, the compulsory imposition of tax on a citizen is not derogation from the right of the citizen to his property, but a necessary exercise of governmental powers. The powers of each tier of government to impose tax shall now be considered anon.

The Federal Government

The Constitution clearly defines and allocates legislative powers to and as between the National Assembly and the respective Houses of Assembly.²⁶Section 4(1) vests the legislative powers of the Federal Government in a National Assembly which shall consist of a Senate and a House of Representatives, whilst Section 4(2) succinctly provides that ‘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 Legislative List, setout inPart I of the Second Schedule to this Constitution.’ It went further to provide that;

In addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make laws with respect to the following matters, that is to say-

- a) any matter in the Concurrent Legislative List set out in the first Column of Part I of the Second Schedule to this Constitution, to the extent prescribed in the Second Column opposite thereto; and
- b) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.²⁷

The legislative powers of the National Assembly in regards to the matters contained in the Exclusive Legislative Lists shall be to the Exclusion of the Houses of Assembly of State.²⁸

The relevant items in respect of which the National Assembly has exclusive power to make laws are listed in the 2nd schedule²⁹ as Items;

- 16–Customs and Excise duties
- 25 – Export duties
- 58. Stamp duties
- 59. Taxation of incomes, profits and capital gains.

In furtherance of its powers, the federal legislature enacted the following into law;

1. Personal Income Tax Act³⁰
2. Companies Income Tax Act.³¹
3. Stamp Duties Act³²
4. Value Added Tax Act³³
5. Petroleum Profit Tax Act³⁴

²⁶ (1992) 37 TLR 884

²⁷*Fasakin Foods (Nig) Limited v Shosanya* (2006) 4 KLR (Pt1447), p. 210.

²⁸ Section 4(4) CFRN, 1999.

²⁹ Second Schedule, CFRN, 1999.

³⁰Cap P8, Vol.13 LFN 2011 (as amended).

³¹Cap C 21, Vol3 ,LFN 2004

³²Cap S8, vol 14, LFN, 2004

³³Cap V1, vol. 15, LFN, 2004

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6. Capital Gains Tax Act³⁵
7. Customs Duties and Excise Duties (Special Penal and Other Provisions) Act.³⁶

Item 7D of the Concurrent Legislative List, Second Schedule to the Constitution empowers the National Assembly in the exercise of its powers to impose any tax or duty on;

- a. capital gains, incomes or profits of persons other than companies and
 - b. Documents or transaction by way of stamp duty;
- and to provide that the collection of any such tax, or duty, or the administration of law imposing it, shall be carried out by the Government of a State, or other authority of a State.

It is palpable from the above that the power to legislate or impose a tax may not necessarily be conterminous with the power of collection or administration of the law regulating the tax imposed. Where an enactment of the National Assembly delegates collection of tax or duty on Capital gains, Incomes or profits, it shall regulate liability of persons to such tax in such manner as to ensure that same is not levied on the same person by more than one State.³⁷ It is pertinent to restate that the only tax legislations enacted by the National Assembly and in respect of which States are empowered to collect and administer the tax imposed are Personal Income Tax, Stamp Duties Tax (individuals only) and Capital gains tax (individuals only).

The State Government

A literal interpretation of the provisions of Items 7, 8, 9 and 10 of the Concurrent Legislative List of the Second Schedule to the Constitution will lead one and to entertain the belief that the taxing powers of the State Governments in Nigeria is limited to tax collection only. This is because whilst specific heads of taxes were allotted to the Federal Government to legislate upon as evident in Items 16, 25, 58 and 59 of the Exclusive Legislative List, no such provision was made in relation to the States. As a matter of fact, the Concurrent Legislative List, the Constitutional list upon which the States can legislate upon, confers no authority to impose taxes (it only makes provision on how taxes will be administered). The provisions of Items 7 and 8 of the Concurrent List merely provides a guide for the exercise of the powers of the National Assembly under the provisions of paragraph 58 and 59 of the Exclusive list, whilst the provisions of paragraph of 9 and 10 empowers a House of Assembly to legislate for the collection, by its Local Government Councils, of any tax not reserved to the Federal Government.³⁸ Thus, Items 9 and 10 of the Concurrent Legislative List are to the following effects;

1. A House of Assembly may, subject to such condition as it may prescribe, make provisions for the collection of any tax, fee or rate or for the administration of the law providing for such collection by a local government council.
2. Where a law of a House of Assembly provides for the collection of tax, fee rate or for the administration of such law by a local government council in accordance with the provisions hereof, it shall regulate the liability of persons to the tax, fee or rate in such manner as to ensure that such tax, fee or rate is not levied on the same person in respect of the same liability by more than one Local Government Council.

In an attempt to sift out the legislative competence of the States to impose tax, one may argue that the provisions of Item 7 of the Concurrent Legislative List have vested the States with Concurrent Power to

³⁴Cap P13, vol 13, LFN, 2004

³⁵Cap C1, Vol 2, LFN 2004

³⁶Cap C47, LFN 2004

³⁷Item 8, Concurrent Legislative List, Second Schedule.

³⁸ N. Ikeyi and S. Orji 'How much force is still left in the taxes and levies approved list for collection) Act. [2011-2012], *Nig – J.R.*, (10) p.86

impose personal income tax, inter alia. However, the provisions merely authorize the delegation of the collection of the taxes mentioned therein and not their imposition. Commenting on similar provisions in the 1979 constitution, Okorodudu is quoted as saying;

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 empower (sic) the Federal Governments 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, paragraph 7 and 8 and all that the State government are assigned thereby are the responsibilities for the collection and administration of any tax or duty so imposed by an Act or decree of the Federal Government.³⁹

In view of the fact that tax is an inherent power in any government that can only be derogated from by express constitutional stipulation and the power to impose, being statutory cannot be implied as held in the case of *Attorney General v Wilt Daires*⁴⁰ one may further argue that an incidental power to impose a tax may arise from a general power to regulate the subject matter in respect of which that tax is imposed.⁴¹ However, but that there is no general power assigned to the State to impose tax. Thus, no incidental powers can be drawn. One might also hinge one's argument on the decision of the Supreme Court in the case of *Attorney General, Lagos State v Eko Hotels Ltd and Anor*⁴² which nullified the Sales Tax law of Lagos State on the ground that the Value Added Tax has already covered the field. According to Nigerian Tax Alert, PWC 2015⁴³, 'The judgment of the Court of Appeal in Eko Hotel's case did not address the issue of the imposition of tax and whether or not Lagos state has the constitutional right to impose the tax'.

This presupposes that the right of Lagos State to impose the tax was in issue. However it wasn't as the argument before the court was as to who, as between the Appellant and the Second Respondent should receive remittance of tax already collected by the Appellant, and not about the validity of the Sales Tax Law of Lagos state or for that matter, about the State's taxing powers. In proving the powers of States to impose tax, it is trite to reiterate the fact that the Nigerian tax system originates from law and any tax levied on the people must be backed by law. As earlier stated, taxing power is 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.⁴⁴ The power to tax is conceived as being inherent in sovereignty and essential to the existence of independent government. The most significant aspect of taxing power is that such power must be constitutionally derived. A tax power is not a mere power to collect taxes or levies because such powers are executive or administration, but instead, a statutory ground to impose tax. Any imposition and collection of tax outside the jurisdiction of tax statute or that is devoid of the State legislative arm approval is a self-evident taxing power which is to that extent null.

Indeed unlike the Federal Government, not axis specifically reserved for the State Government under the 1999 Constitution. The only reference in the Constitution to the powers of State Governments in relation to taxation is contained in Item D, 9-10 of the Concurrent Legislative List⁴⁵. The Houses of Assembly are vested with legislative powers of a State of the Federation by Section 4(6). Section 4(7)(a)(b) prescribes that they shall

³⁹M Okorodudu, 'Analysis of Federal and State Taxing Powers'. *Tax Law and Tax Administration in Nigeria* (1991) Ed. By O Akanle, pp61-73

⁴⁰ *Wilt Daires* (n 11) 897

⁴¹ *Peterswald v Barteey* (1904) I CLR 497.

⁴² (2017) LPELR –SC-321/2002

⁴³ www.pwc.com/ng.

⁴⁴ A.O.Sanni, 'DivisionOfTaxingPowersUnderThe1999Constitution', available at www.legalpediaresources.com/node/2933

⁴⁵ A.O. Sanni (2007) 'Division of Taxing Powers' In MT Abdulrazaq (ed), *CITN Nigerian Tax Guide and Statutes*, Lagos, Chartered Institute of Taxation of Nigeria.

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have power to legislate on any matter not included in the Exclusive Legislative List and any matter contained in the Concurrent List to the extent prescribed therein. They may also legislate on any other matter with respect to which they are empowered to make laws in accordance with the provisions of the Constitution⁴⁶.

Finally, they have power to legislate on any matter not included in the Exclusive lists. The power of a House of Assembly to legislate on any matter not included in the Exclusive Legislative List or Concurrent List or reserved to the Federal Government under any other provision of the Constitution is also exclusive. These matters in respect of which a House of Assembly has exclusive power to make laws are otherwise known as residual matters. In *Attorney General of Abia State v Attorney General of the Federation*⁴⁷ Niki Tobi explained the law as follows;

The Constitution of the Federal Republic of Nigeria, like most Constitutions, does not provide for a residual list. And that is what makes it residual. The expression emanates largely from the judiciary i.e. it is largely a coinage of the judiciary to enable it exercise its interpretative jurisdiction as it relates to the Constitution. Etymologically, a residual merely means that which remains. In legislative or parliamentary language, residual matters are those that are neither in the Exclusive nor Concurrent legislative list.

A statement similar to this can be found in *Attorney General Ogun State v Aberuagba*⁴⁸ where the Supreme Court stated that;

A careful perusal and proper construction of section 4 would reveal that the residual and legislative powers of the government were vested in the states. By residual legislative powers within the context of section 4 (of the Constitution), it is meant what was left after the matters in the Exclusive and Concurrent Legislative List and that matter which the Constitution empowers the Federal and the States to legislate upon have been subtracted from the totality of the inherent and unlimited powers of a sovereign legislature.

Thus, where a matter does not fall under the Exclusive or Concurrent Lists, it is regarded as a residual item if no other provision of the Constitution vests legislation powers in respect thereof in the National Assembly or the House of Assembly and only a House of Assembly can legislate on it. The exercise of legislative power by the National Assembly on such matter will violate the Constitution and will consequently, be nullified by the courts. In *Attorney General of Abia State v Attorney General of the Federation*⁴⁹ the Supreme Court nullified an Act of the National Assembly which sought to monitor the distribution of monthly allocations of revenue from the Federation Account to Local Governments on the ground that local Government is a residual matter under the Constitution and the National Assembly thus lacked the competence to legislate on it. Also, in *Attorney General Ogun State v Aberuagba*⁵⁰ the Supreme Court decided that the legislative competence of the National Assembly is limited to those matters on which it is expressly or by implication empowered to make laws by the Constitution. A necessary extrapolation from these is that although the Constitution did not expressly stipulate the items upon which the State Government can impose tax upon, the State Government have the power to impose any tax that is not within the purview of the Exclusive Legislative List, nor incidental to the power of the Federal Government nor stated in item D paragraph 7 of the Concurrent Legislative List. A study of the Constitution would further disclose that the powers of the National Assembly to make laws with regard to taxation are limited to the matters stated in the Exclusive List (item 16; customs and exercise duties, item 25; export duties, item 58, stamp duties, and item 59; taxation of incomes, profits and capital gains), and the Concurrent List (items 7 and 8). The powers of the National Assembly do not extend to the power to impose all manner of taxes

⁴⁶Section 4(7)(1),CFRN,1999.

⁴⁷(2006) 16 NWLR (pt. 1005) 265,380

⁴⁸ (1985) 1 NWR (pt 3) 395, 405

⁴⁹*A.G Abia State*, (n 48) 273

⁵⁰*Aberuagba*, (n 49) 403

which may be imposed by a government on its citizens. It would therefore seem from the decision of the Supreme Court in *Aberuagba's* case that the power of the Federal Government to impose taxes relates to;

1. The taxes expressly reserved to the Federal Government under the Constitution.
2. The taxes that may be incidental to the items listed on the Exclusive List and the Concurrent List (subject nevertheless to the limitation on the exercise of powers by the Federal Government over items on the Concurrent list).
3. Taxes that may be incidental to the matters over which the Federal Government is specifically granted powers under some other provisions of the Constitution. The decision would also seem to have established the principle that States can legislate to impose any other manner of taxes not reserved to the Federal Government under the Constitution either directly or as incidental to any of the items listed in the Exclusive List or the Concurrent List or a matter reserved to the Federal Government under some other provisions of Constitution.

In *Nigeria Soft Drinks Ltd v Attorney General Lagos State*⁵¹ the power of the Lagos State government to enact the Sales Tax Laws, which powers was derived from section 4 of the Constitution as a constitutional matter was affirmed. In *Attorney-General of Lagos v Attorney General of the Federation*⁵², the Lagos State Government challenged the validity of the Nigerian Urban and Regional Planning Act on the ground that Urban Planning is not a matter in the Exclusive or Concurrent List and therefore, can only be legislated upon by a House of Assembly. The Supreme Court upheld the contention of the Plaintiff and held that Urban Planning was a matter on the residual list of a State. Also, in *Attorney General Cross River State v Ojua*⁵³, the court agreed that the promulgation of the Urban Tax Law of Cross River State is an exercise which derives its full life from the Constitution, it went further to add that nonetheless, it must not conflict with the Constitution. It is on this ground, (that is, its inconsistency with Paragraph 1(j) of the 4th Schedule to the Constitution) that was declared null and void.

However, the powers of the State Government to make laws within its State are not without circumscription. In *Aberuagba's* case, the court held that the powers of the State to impose Sales Tax Law does not extend to interstate transactions, rather, that it is limited to intra-state transaction. It is in furtherance of the powers of States to impose tax that such taxes as the Lagos Land Use Charge law⁵⁴, Hotel Occupancy and Restaurant Consumption Law⁵⁵, Wharf Landing Fees Law⁵⁶ Kwara State Land Charge Law of 2009, etc have been imposed by State Governments.

The Local Government

*Black's Law Dictionary*⁵⁷ defines a Local Government as 'the government of a particular locality... a government body at a lower level than the State government'⁵⁸. According to the Author Achara⁵⁹; When the Constitution limits the number of institutions with law- making powers, it appears that in order to impose a tax, it is only those allocated direct legislative power that can claim this as an inherent, autonomous authority. And even for those with direct constitutional grant of legislative competence, it is still the Constitution that we must go to find if this otherwise inherent power has been cancelled or allocated elsewhere'.

Under the Nigerian legal system, Local Governments are created by section 7(1) of the Constitution, which proclaims that the system of local government by democratically elected councils is guaranteed. We must bear

⁵¹ (1987) 2 NWLR (pt 57) pg. 414

⁵² (2003) 12 NWLR (pt.833) 1

⁵³ (2010) LPELR-9014 (CA)

⁵⁴ Cap L79 of the Laws of Lagos state of Nigeria, 2018.

⁵⁵ Cap H8, Laws of Lagos State of Nigeria, 2015

⁵⁶ Cap W3 Laws of Lagos State of Nigeria, 2015.

⁵⁷ B.A. Garner, (ed), *Black's Law Dictionary*, 7th edition, (USA: West Group, 1999) p.759

⁵⁸ *ibid.*

⁵⁹ R.A.C.C Achara, 'Can Nigerian Local Government Councils Autonomously Impose Rates' [2003], *Journal of African Law* (47), (2), pp. 221 -243

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in mind that Section 4 of the 1999 Constitution confers all the legislative powers in Nigeria on two rather than three tiers of government. The section allocates all the federal legislative powers to the National Assembly and leaves all the balance i.e. all State power of law-making, to the Houses of Assembly in each of the 36 Houses of Assembly. This suggests that the Local Government Councils have not been left with any independent law making competence and because imposition to tax is ontologically a legislative function, it would follow that Local Government Councils have no taxation power.⁶⁰ Section 7 (5) of the Constitution provides that; ‘The functions to be conferred by law upon the local government councils shall include those set out in the 4th schedule to this Constitution’.

Amongst the functions enumerated in the said 4th Schedule, the following seem most relevant to the following discourse;⁶¹

- a. The main functions of a local government council are as follows; a.....
- b. Collection of rates, radio and television licenses
- d. Licensing of bicycles, trucks (other than mechanically propelled trucks) canoes, wheel arrows and carts
- h. Registration of all births, deaths and marriages.
- i. Assessment of privately owned houses or tenement for the purpose of levying such rates as may be prescribed by the House of Assembly of a State, and
- j. Control and regulation of---
- i. Licensing, regulation and control of the sale of liquor.

The functions of a local government council shall include participation of such council in the government to fast a teas respect;

- a. Such other functions as may be conferred on a local government council by the House of Assembly, of the State⁶².

By this list, it is possible to infer that the 1999 constitution has assigned some taxing powers to the Local Governments, inter alia, by the levying of rates and the imposition of license fees. The decision of the Supreme Court in *Knight Frank and Rutlev v Attorney-General Kano State*⁶³ appears to buttress this view. In this case, Justice Wali is quoted as saying; The power to assess rates (sic) on privately owned houses or tenements for the purpose of levying such rate is within the exclusive statutory power of each local government as conferred on it by section 7 (5) of the 1979 constitution and paragraphs 1(b) and (y) of the forth schedule...⁶⁴ Delivering the leading judgment, Uwais CJN said that ‘Only local government councils have the power to assess and impose rates on privately owned property’⁶⁵.

Furthermore, in *Eti-Osa Local Government v. Jegede*⁶⁶ one of the issues canvassed was whether Eti-Osa Local government had the capacity to legislate, determine and demand whatever taxes and levies it deems fit from time to time outside the provisions of Part III of the Taxes and Levies (Approved List for Collection) Decree of 1998. The Appellant contended that the power to impose taxes was inherent in every government and as such, the government could make a law to impose any form of tax it desired anytime. That the Eti-Osa Local Government’s power to make a law, to collect tax or levy within it area of jurisdiction, inured to it by the Constitution of the Federal Republic of Nigeria. In addition, that the Taxes and Levies (Approved List for

⁶⁰ibid.

⁶¹ 4th Schedule CFRN.

⁶²ibid.

⁶³(1998) 7 NWLR (pt 556) 1-37

⁶⁴ibid.

⁶⁵ ibid.

⁶⁶(2007)10 NWLR (pt 1043) 537

Collection) Decree 21 of 1998 was not the exclusive source of the power of the Appellant to create and impose taxes and levies. In its decision, the court held that the Appellant has no power to legislate⁶⁷ and demand whatever taxes and levies it deems fit outside the provisions of Taxes and Levies (Approved List for Collection) Decree No.21 1998⁶⁸. The decision appears to lend weight to the contention that Local Governments can impose taxes.

However, Section 4 of the Constitution which distributes the entire legislative power in Nigeria reserves no such lawmaking power to the Local Government either there or in the Schedule to that section in the 1999 Constitution. In addition, Paragraph 9 and 10, 2nd Schedule Concurrent Legislative List merely provides a delegated service for 'collection' of rates. It does no such thing as the conferment of constitutional power on the Local Government Councils to impose any tax whatsoever. In *Shell Petroleum v Burutu Local Government*⁶⁹, the Court of Appeal correctly decided, having regard to Item D9 of the Concurrent Legislative List that the Local Government Council's rating powers were not for imposition but merely for collection of rates. Also, that it was not autonomous but dependent on a prior delegation of that function under a properly restrictive state law. Any bye law the Local Government Council makes may validly extend to provisions as to how it should administer the State or Federal law that radically authorizes the collection of such rates.

Thus, if the Local Government Council exercises taxing powers by way of coercive rates and such other levies, therefore, it is merely acting as agent for the real legislative authority that in the first place, authorized the imposition.

5.0 Legal Regime Governing Tax Collection Powers under the Nigerian Legal System

In a bid to stem the challenges of multiplicity of taxes and levies in Nigeria, the legislature enacted the Taxes and Levies (Approved List for Collection) Act of 1998 whereby taxes, levies and fees collectible by the various tiers of government were spelt out. It was amended in 2014 and subsequently in 2015⁷⁰. Part 1, 11 and 111 of the schedule to the Act i.e. the Taxes and Levies (Approved List for Collection) Act 2015, sets out taxes and levies collected by the Federal Government, State Government and Local Government respectively. They are;

The Federal Government

1. Companies Income Tax
2. Withholding tax on companies, residents of the Federal Capital Territory, Abuja and non-resident individuals
3. Petroleum profits tax
4. Value added tax
5. Education tax
6. Capital gains tax on residents of the Federal Capital Territory, Abuja, bodies corporate and non-resident individuals.
7. Stamp duties on bodies corporate and residents of the Federal Capital Territory, Abuja.
8. Personal income tax in respect of;
 - a. Members of the armed forces of the federation;
 - b. Members of the Nigerian Police Force.
 - c. Residents of the federal capital territory, Abuja; and
 - d. Staff of the Ministry of Foreign Affairs and non-resident individuals.

The State Government

1. Personal income tax in respect of;

⁶⁷Emphasis Mine.

⁶⁸Opinion, (2008) *I.C.C.L.R.*, Issue 2, Sweet and Maxwell Limited.

⁶⁹(2000) 1 *NRLR*, p24.

⁷⁰Taxes and Levies (Approved list for collection) Act, Cap 2 LFN, 2015.

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- a. Pay-As-You-Earn (PAYE);and
- b. Direct taxation (self-assessment).
2. Withholding tax (individuals only).
3. Capital gain tax (individuals only).
4. Stamp duties on instruments executed by individuals.
5. Pools, betting and lotteries, gaming and casino taxes.
6. Road taxes.
7. Business premises registration fee in respect of;
 - a. Urban areas as defined by each State, maximum of
 - i. #10, 000 for registration; and
 - ii. #15,000perannumforrenewalofregistrationand
 - b. Rural areas-
 - i. #2, 000 for registration; and
 - ii. #1,000perannumforrenewalofregistration
8. Development levy (individuals only) not more than #100 per annum on all taxable individuals.
9. Naming of street registration fees in the State Capital.
10. Right of occupancy fees on lands owned by the state government in urban areas of the State.
11. Market taxes and levies where State finance is involved.

The Local Government

1. Shops and kiosks rates.
2. Tenement rates.
3. On and off liquor license fees.
4. Slaughter slab fees.
5. Marriage, birth and death registration fees.
6. Naming of street registration fee, excluding any street in the State Capital.
7. Right of occupancy fees on lands in rural areas, excluding those collectable by the Federal and State governments.
8. Markettaxiesandleviesexcludinganymarketwherestatefinanceisinvolved.
9. Motor park levies
10. Domestic animal license fees.
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. Radio and television license fees (other than radio and television transmitter).
15. Vehicle radio license fees (to be imposed by the Local government of the State in which the car is registered).
16. Wrong parking charges.
17. Public conveniences, sewage and refuse disposal fees.
18. Customary burial ground permit fees.
19. Religious places establishment permit fees.
20. Signboard and advertisement permit fees.

6.0 The Extent/Limit of the Power of Each Tier of Government in Tax Imposition and Collection

Extent of the Federal Government's Taxing Powers

An examination of the Constitution shows that the powers of the National Assembly to legislate over tax matters are confined to matters specified in the Exclusive list. This is because the taxing provisions in the Concurrent List merely prescribed how the taxing powers contained in the Exclusive List would be

exercised.⁷¹ These powers are contained in Items 16 (Customers and Excise Duties), 25 (Export Duties), 58 (Stamp Duties) and 59 (Taxation of Income, Profits and Capital Gains).⁷² Although the taxing powers are equally set out in the Concurrent List, it is noteworthy that the powers set out in the Concurrent List are not in addition to the taxing powers of the National Assembly as set out in the Exclusive List. The list in of taxing powers of the National Assembly in the Concurrent Legislative List⁷³ is intended merely to provide guides or direction on how the substantive taxing powers of the National Assembly as contained in Items 58 and 59 of the Exclusive List may be exercised with regard to the collection of taxes created in the Exclusive List. Thus, the powers of the National Assembly to impose tax pertain only to customs and excise duties, export duties, stamp duties and taxation of incomes, profits and capital gains. Outside these powers, there is no specific or express provision in the constitution authorizing the National Assembly to enact any statute to impose tax. However, the legislative powers of the National Assembly to impose taxes may be stretched under Item 68 of the Exclusive List. Item 68 empowers the National Assembly to legislate on ‘any matter incidental or supplementary to any matter mentioned elsewhere in the list’. The power to legislate on incidental and supplementary matters cannot go outside the specific items within the lists.⁷⁴ Also, the Federal Government cannot exercise legislative powers over matters which are within the purview of the powers of the States over residual matters. These are within the exclusive competence of the State Government. However, the Federal Government can delegate the collection of certain heads of taxes, within its exclusive legislative competence, to the State Government.⁷⁵ In collection of taxes, only the items specifically mentioned in part 1 of the Taxes and Levies (Approved List for Collection) Act, 2015 are collectible by the Federal Government.

Extent of the State Governments Powers

The State Governments have no power to impose taxes over matters within the exclusive competence of the Federal Government.⁷⁶ Also, if an act of the National Assembly imposes a tax by virtue of Item 68 of the Exclusive Legislative List, the State Government cannot legislate over such item. This is in accordance with the rule of inconsistency and covering the field. Thus, in the case of *Airtel Networks Ltd v Kwara State*⁷⁷, the court held that ‘The doctrine of covering the field forbids a State House of Assembly from enacting a law in respect of a Matter which there is already in existence, provisions of the Constitution or an Act of the National Assembly on the same subject.’ In relation to Item 7 of the Concurrent Legislative List, the powers of the State are limited to collection of the taxes therein specified. In *Lagos State Internal Revenue Board v Motorola Nigeria Limited and Anor*⁷⁸, the court held that the collection of income tax mentioned in Item D7 of the Concurrent Legislation List is the constitutional responsibility of the State Government. The paragraph does not in any way envisage the delegation of any form of concurrent legislative function to the State. Furthermore, States have territorial boundaries and cannot make laws or collect taxes on the assets of other States. In the case of *Trustees of Plank Seller Association of Oyo State v Executive Governor, Osun State and Anor*⁷⁹ the court held;

Let me add here that though the Constitution, as held earlier, empowered each State House of Assembly to make laws for the State with respect to industrial, commercial or agricultural development of the State, each of the federating States have territorial boundaries. A State cannot make laws or collect tax on the assets or resources of other States.

⁷¹J-J Odinkonigbo & N. Ikeyi, ‘Is the Power of a State to Impose Sales Tax Fettered by the Imposition of Value Added Tax by the Federal Government’ [2015], *Common wealth Law Bulletin*, (16),p.4

⁷²Emphases mine.

⁷³Item 7 and 8 Concurrent Legislative List.

⁷⁴Linus Osita Okeke, ‘The VAT Decree and the Nigerian Constitution’ [2002], *Tax Planning International Review*, (27) (3),p.7

⁷⁵Item 7, Concurrent Legislative List, CFRN, 1999.

⁷⁶Section 4(7) (a) of the Constitution.

⁷⁷(2014) LPELR-23790 (CA).

⁷⁸(2012) LPELR – CA/L/241/2009

⁷⁹2017 LPELR – CA/AK/234/13.

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Also, in *Aberuagba's* case the court held inter alia that a State Government was constitutionally empowered to impose Sales Tax provided the said Sales Tax was imposed only on intra-state transactions. In addition, taxes collectible by State are those expressly stated in the Taxes and Levies Act as well as in Item D7 of the Second Schedule to the Concurrent Legislative List, and any encroachment on other tiers will be invalidated.

Extent of Local Governments Taxing Powers

Local Governments in Nigeria have no constitutional powers to impose taxes. Their powers in relation to taxation may be found in paragraphs 1 (b, a, i, j and k) of the Fourth Schedule to the 1999 Constitution, as well as part III of the Taxes and Levies (Approved List for Collection) Act 2015. This power relates only to collection of taxes and rates and any encroachment on the taxes collectible by other tiers will be invalidated. However, they have exclusive powers over items over which they are empowered to collect. Therefore, in *Attorney-General Ondo State v Attorney-General of Federation*⁸⁰, the court held that; 'If the Constitution has given the function of assessing and collecting of tax to the local governments, the State House of Assembly cannot validly make any law conferring the assessment and collection of the same tax on the State Government or any agency of the State Government'. Also, in *Bamidele v Commissioner for Local Government and Community Development, (Lagos State) and Anor*⁸¹, the court held that the State's imposition of market stallage fee was a usurpation of allegedly exclusive legislative function. Furthermore, the tax collection powers of the Local Governments have territorial boundaries. It does not extend to other Local Governments even within the same State. In addition, they have exclusive powers over taxes reserved to them for collection. Thus in *Knight, Frank and Rutley v A.G Kano State*⁸² the Supreme Court held inter-alia that it is only the Local Government Councils that have the power to assess and collect property rates on privately owned property.

7. Conclusion

This article examined the power to collect and the power to impose taxes under the Nigerian Legal system with particular emphasis placed on an examination of the power of State to impose as well as collect taxes, thereby resolving the ambiguity in which it is shrouded. In arriving at this, a distinction between the power to impose and the power to collect tax was clearly made. Based on the analysis carried out in the course of the study, the following findings were arrived at;

A community interpretation of section 4(particularly subsection 7) of the Constitution, paragraphs 16, 25, 58, 59 and 69 of the Exclusive Legislative List, paragraphs 7–10 of the Concurrent Legislative List, as well as the definition of residual powers given by the court in the case of *Attorney- General Abia State v Attorney General of the Federation*⁸³, and a host of other cases⁸⁴ shows that States do have power to impose taxes and indeed have exercised this power e.g. the Land Use Charge of Lagos State, 2018. The decision of the court in *Eko Hotels v Attorney-General of Lagos*,⁸⁵ One of the premises upon which the argument that States do not have Power to impose tax might have been based on, invalid dated the Sales Tax Law of Lagos State on the premise that the Value Added Tax (VAT), a Federal legislation has already covered the field, and not because the Lagos State Government do not have the constitutional powers to impose taxes. However, this is limited to the territorial jurisdiction of the State and is subject to the doctrine of inconsistency and covering the field. The taxing powers of the National Assembly are circumscribed by the Constitution and thus, the National Assembly cannot impose taxes outside those listed in the Exclusive Legislative List because their powers in the

⁸⁰(2002) 9 NWLR (Pt. 772) p.222.

⁸¹(1994) 2 NWLR (Pt.328), p.568. In *Attorney-General Cross River State &Anor v. Ojua* (n43), the court held that it is the function assigned to the Local Government Council in Paragraph 1(j) of the 4th Schedule to the Constitution that is being usurped by the State.

⁸²*Knight, Frank and Rutley*, (n 52) 22.

⁸³ *A.G Abia State v A.G Federation* (2006) 16 NWLR (Pt.1005) p. 865 T 380

⁸⁴*Aberuagba's* case, *Nigerian Soft Drinks Ltd V Attorney General Lagos State* (1987) 2 NWLR (pt 57) Pg 414, etc.

⁸⁵(2017) LPELR-SC-321/2017

Concurrent Lists, as it relates to taxation are limited to powers to make laws for the collection of the taxes which they, i.e the National Assembly, have express powers to impose as set out in the Exclusive list. At most, the legislative powers of the National Assembly to impose taxes may best be set out under item 68 of the Exclusive List. Local Government Councils have no power to impose taxes. Their powers in relation to taxation are limited to the collection of tax