# Banes of Multiple Tax Regimes in Nigeria Hospitality Business: A Critical Analysis of Courts' Decisions in Restoring Sanity in Sectorial Tax Administration

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**Abstract**
*This study examines the roles the court systems in Nigeria has played in addressing abnormalities of multiple taxation regimes on the hospitality industry. While relying mostly on secondary data with primary inputs limited to participatory and observations method. The burden of multiple taxes on hospitality businesses in Lagos State is compounded by the administrative burden to comply with these taxes which is higher than other States particularly with the introduction of sales tax and later consumption tax on hospitality related businesses within the State. From the multi-dimensional biases of a hospitality business owner, educator, tax enthusiast and administration law critic, the specific objectives of the study are; to enumerate the scope of the hospitality businesses as affected by relevant tax authorities, exploring the influence of multiple tax burdens on such business performance and to critically analyse the activities of the courts in Nigeria to either restore sanity in tax administration within the hospitality sector or escalation of the confusions created by all the tiers of government within the Country. Although, the study is limited to the administration of VAT, sales tax and consumption tax within the sector and focussing mostly on decided cases affecting Lagos State, the Federal Government and hospitality businesses in Lagos, the applications of the resulting submissions can be adopted anywhere within Nigeria considering the operations of her court system, the provisions of the Constitution as well as the observed copy and paste syndrome of some States in implementing whatever tax systems introduced by other States. The study discovered that there are significant multiple tax burdens on hospitality businesses in Nigeria generally while the courts had been playing its roles in an informed manner in resolving bottlenecks of multiple taxes on the consumers of hospitality businesses.*

**Keywords:** Hospitality tax; Hospitality business; Tax administration; Multiple taxation; Nigerian courts; Sales; consumption Tax.

## Introduction

The term "hospitality business" is a broad category of fields within the service industry that includes lodging, food and drink service, event planning, theme parks, transportation, cruise line, travelling and additional fields within the tourism industry. Hospitality business depends on the availability of leisure time and disposable income. A hospitality unit such as a restaurant, hotel, or an amusement park consists of multiple groups such as facility maintenance and direct operations (servers, housekeepers, porters, kitchen workers, bartenders, management, marketing, and human resources etc.). Globally it is a multi-billion-dollar industry with broad offerings, in Nigeria the best of hospitality development is found in accommodations and restaurants. The hospitality market is booming in Nigeria and with that boom comes new found diversification in a new range of quality and classifications yet there is much more room for growth, diversification and standardization.

Taxation in modern times is said to be an economic development tool that provides the financial base for providing public goods. It is a double-edged sword depending on what is the interest of the government in power. Also, it is a compulsory payment by individuals and organizations to the relevant inland or internal revenue authorities at Federal, State, and/or Local Government levels. Taxes perform fiscal or budgetary functions, economic function and social or redistribute functions. Adeniyi and Adesunloro (2017)[1] view tax as an important avenue for government to raise money in order to finance her projects and program. The fundamental philosophy of taxation is taking from the citizens according to their abilities and giving back to them according to their needs.

According to Decree 28 of 1998, there are categories of taxes and levies to be collected by federal government, state government and local government in Nigeria. The Lagos State Government passed the approved levies for Local Government Area and Local Council Development Area into law on 12 July, 2010. As laudable as the

[1] Adeniyi, S.I. and Adesunloro, B.R. (2017). Electronic taxation and tax evasion in Nigeria: A study of Lagos State. *Journal of academic research in economics*, 9(1).

provision of the law is, it has not addressed the issue of multiplicity of revenue in the state. For example, in Lagos State, the house of assembly has enacted the hotel occupancy and restaurant consumption law that impose 5% tax on consumption of goods and services in hotels, hotel facilities, event centers and restaurants. This can be regarded as sales tax because it excludes value added tax that federal government will collect from the business on the same service rendered. Value Added tax (VAT), sales tax, and hotel occupancy and restaurant consumption tax[2] are forms of consumption taxes whose economic burden rests on the final consumer. The constitutional basis for imposing consumption taxes has been challenged at several times in Nigeria. The controversies surrounding consumption taxes have raged between the Federal and State governments on one hand, and between government authorities and operators of businesses who act as collecting agents, on the other hand.[3]

The burden of multiple taxes on hospitality businesses in Lagos State is compounded by the administrative burden to comply with these taxes which make their product costs higher than their competitors outside the State.

**Multiplicity of Taxes in Hospitality Business in Nigeria**

Multiplicity of taxes is not an established term in the field of taxation as such. Thus, the term seems to be peculiar to Nigerian fiscal lexicography. According to the National Tax Policy Document, multiple taxation occurs "where the tax, fee or rate is levied on the same person in respect of the same liability by more than one State or Local Government Council."[4]

With due respect, this definition is too narrow to the extent that it implies that multiplicity of taxes occurs only with regards to state and local taxes. From the general usages of multiplicity of taxes by stakeholders, it can be said to manifest in at least four ways.[5]

a. It refers to the various unlawful compulsory payments being collected by the local and state governments without appropriate legal backing through intimidation and harassment of the payers.
b. It refers to situations where a taxpayer is faced with demands from two or more different levels of government either for the same or similar taxes. A good example here is the administration of the Value Added Tax (VAT), Sales Tax and Consumption Tax simultaneously.
c. It refers to where the same level of government imposes two or more taxes on the same tax base. A good example is payment of Companies Income Tax, Education Tax and Technology Levy by the same company.
d. It refers to cases whereby various government agencies "impose taxes" in the form of fees or charges.

While efforts shall be discussing extensively on item b above as it is the core of this study, however, considerable efforts shall be made to briefly discuss others where necessary.

In Registered Trustees of Association of the Licensed Telecommunications Operators of Nigeria & Ors v. Lagos State Government & Ors[6] some telecommunication companies challenged certain sections of the Lagos State Infrastructure Maintenance and Regulatory Agency Law, 2004 on the basis that the Law amounted to imposition of tax on their operations. The learned Judge said:

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[2] This tax was introduced in Lagos State by the Hotel Occupancy and Restaurant Consumption Law of Lagos State, 2015

[3] Several suits have been filed by the Lagos State Government challenging the constitutionality of the VAT Act as a federal tax imposed on all qualifying goods and services consumed in all the States of the Federation. For instance, on 12th August 2009 in Attorney General of Lagos State v. The Attorney General of the Federation & Ors (2014) 6 CLRN 1; (2014), the Attorney General of Lagos State filed an originating summons against the Attorney General of the Federation and all the attorneys general of the States of the federation at the Supreme Court seeking a declaration that the VAT Act is unconstitutional because the National Assembly lacked the legislative competence to enact it pursuant to section 4 and Parts I and II of the 2nd Schedule to the Constitution of the Federal Republic of Nigeria, 1999 (the Constitution). The Supreme Court struck out the matter on the basis that it lacked original jurisdiction pursuant to section 232 CFRN (which limits the Supreme Court's original jurisdiction to disputes between the Federation and a State or between States), and thus did not decide the action on its merit. Of recent is the Suit No. FHC/L/CS/360/18 between the Registered Trustees of Hotel Owners and Managers Association vs. the Attorney General of Lagos State & Anor,

[4] See the National Tax Policy Document, p.78 para 6.0.

[5] Sanni A., PhD (2012) "Multiplicity of Taxes in Nigeria: Issues, Problems and Solutions" *International Journal of Business and Social Science*. Vol. 3 No. 17; September 2012 P.229

[6] (Unreported) Suit No. FHC/L/CS/517/06 delivered by Justice Auta of the Federal High Court, Lagos on 25th February, 2007.

> "The IMRA Law, from the name it looks very innocent. .... From the contents of the law, the driving force is just to make money for the State, as the State has numerous laws dealing with the issue of urban planning."[7]

The learned Judge went on to reiterate the revenue objective of the law:

> "What the Lagos State is doing is to create an agency that will get its own share of the booty, as their counsel said that their operators are making billions of Naira."[8]

Viewed from these broad perspectives, it will be seen that none of the three levels of government can be said to be free from blame. Multiplicity of taxes makes investment climate tempestuous as investors are not sure the extent to which their incomes would be taxed.

Notwithstanding the above, it suffices to say however that multiple taxation is not synonymous simply with being taxed at different levels of government. In a federal system of government, it is typical to have federal, state and local government taxes. This truism was lucidly expressed in the National Tax Policy Document thus:

> "Multiple taxation in Nigeria first needs to be defined before it is tackled. The word multiple connotes "numerous", "several", "various" etc. A certain level of multiplicity is unavoidable in a Federal structure as each tier of government may want to charge certain taxes, fees, charges as may be applicable. The only aspect of multiplicity that is avoidable and for which the Constitution itself abhors is that where the tax, fee or rate is levied on the same person in respect of the same liability by more than one State or Local Government Council."

Thus, in recognition of the fundamentals of federalism, the Taxes and Levies (Approved List for Collection) Act[9] (Act No. 21) contains as much as 8, 11 and 20 taxes and levies for federal, states and local governments respectively. There is need for introspection on whether the current thinking is to ensure that taxes, fees and charges do not exceed those listed in the Act or whether to streamline the number of taxes into just a few simple broad-based taxes with elastic revenue potentials as being advocated by protagonist of flat tax.[10]

Multiplicity of taxes infringes the cardinal principles of taxation. Granted that government requires revenue to discharge its responsibilities to the citizens, this cannot be done in a haphazard, arbitrary and capricious manner. A taxpayer is entitled to know and determine in advance how much he is obligated to pay and in what circumstances. This underscores why certainty is the first principle of taxation.[11]
Agbor (2013)[12] discovered in his study that there are incidences of multiple taxes within 21 tax subheads in Calabar, Nigeria. He posits that small-scale business promoter paid for kiosk and or shop rates and forced to pay for operational permit. Multiple taxation also manifests in the signpost/advert tax. The jurisdiction for collection of this tax is the local government, but the state also collect tax on the same heading. Salami (2011)[13] asserted that there are more than 500 taxes and levies imposed by various tiers of government in Nigeria apart from those approved by Taxes and Levies (Approved list of Collection) Act. This issue of multiple taxes leads to increase in cost of

[7] Ibid, t. p22.
[8] See pp 23-24
[9] Act No. 21, Cap T2 Laws of Federation 2004,
[10] A flat tax advocates that instead of having different types of taxes with different rates, one tax rate should be applied to all income at source with no exceptions. It attempts to simplify tax laws which are said to be bedevilled by many loopholes, deductions, and exemptions which render the collection and enforcement of tax law complicated and inefficient. See generally, Daniel Mitchell, "A Brief Guide to the Flat Tax" Available online at http://www.heritage.org/research/reports/2005/07/a-brief-guide-to-the-flat-tax. Site visited on 24th October 2019.
[11] Ian T.G. Lambert, Some Modern Principles of Taxation – Adam Smith Revisited, A paper delivered at the Third Annual Convention of the Congress of Political Economists in Rio de Janeiro, Brazil, in January 1992, as quoted in Sanni A., PhD (2012) "Multiplicity of Taxes in Nigeria: Issues, Problems and Solutions" *International Journal of Business and Social Science*. Vol. 3 No. 17; September 2012 P.231
[12] Agbor, U.I. (2013). Getting the Money and Plummeting Business Development: A study of the Impact of Tax regime on Hospitality Industry in Calabar, Nigeria *Global Journal of Political Science and Administration*, Vol. 1, No. 1, pp. 16-26.
[13] Salami, A. (2011). Taxation. Revenue Allocation and Fiscal Federalism in Nigeria: Issues, Challenges and Policy Options. *Economics Annals*, Volume LVI, No. 189.

doing business without corresponding increase in profit margin. He further stated that multiple taxation is more common in the Local Government than other tiers of governments.

In Abuja for instance, hotels, restaurants and related businesses have to contend with over 35 different levies from the Area council. While in Lagos, apart from numerous taxes and levies, hospitality businesses have to struggle it out in meeting VAT obligations to the FIRS and Consumption Tax obligations to the Lagos State Internal Revenue Service upon the invalidated of the applicability of Sales Tax by the Supreme Court; both taxes computed on same consumption by single guest. There is thus the urgent need for government to implement uniform tax policies that will favour the development and growth of hospitality business in Nigeria. As it stands, Nigeria is bedevilled with multiplicity of taxes imposed and administered by governments

**VAT, Sales Tax, Consumption Tax and Hospitality Business in Nigeria**

As usual, Nigerian have a way with words. The government introduces the Value Added Tax and after some years, some States legislated on Sales Tax before its implementation was stopped by the Court of Appeal in ***Attorney-General of Lagos State v. Eko Hotels Limited & Anor***[14] although the court confirmed its legitimacy. Now, we are faced with the drama of consumption tax as enacted by the Lagos State Government in 2009 and 2015[2]. However, we shall be evaluating the above taxes and its computations.

VAT (Value-Added Tax) is collected by all sellers in each stage of the supply chain. Suppliers, manufacturers, distributors and retailers all collect the value added tax on taxable sales. Suppliers, manufacturers, distributors, retailers and end consumers all pay the VAT on their purchases. Businesses must track and document the VAT they pay on purchases in order to receive a credit for the VAT paid on their tax return. Tax jurisdictions receive the tax revenue throughout the entire supply chain as opposed to at the sale to the final consumer chain.

Sales tax is collected by the retailer when the final sale in the supply chain is reached via a sale to the end consumer. End consumers pay the sales tax on their purchases. Businesses issue resale certificates to their sellers when buying business supplies/inputs that will be resold since sales tax is not due. Tax jurisdictions do not receive the tax revenue until the sale is made to the final consumer.

A consumption tax is a tax on the purchase of a good or service. Consumption taxes can take the form of retail sales taxes, excise taxes, value added taxes, use taxes, taxes on gross business receipts, and import duties. Consumption taxes are applied to the purchase of goods and services. There are different kinds of consumption taxes, depending on the country. They can be a flat rate applied to every transaction, or a percentage of the total value. Each type requires something different from you, the business owner. But one element always stays the same. The end customer pays the tax, because they are who's actually consuming the end product. And it's a tax on consumption. On buying and spending for one's own personal use. Consumption taxes are often levied at different rates on different commodities according to perceptions of whether a commodity is considered a necessity (such as food) or a luxury (such as jewellery). Hence, one can observe from the above analysis that both VAT and Sales Tax are forms of consumption tax. Hence, the issue with our tax administration can be said to be that of nomenclature and coverage which often result in multiple taxation at the long run.

The consumption tax is not a new idea. It was used by the U.S. government for much of our history before being replaced with an income tax. The Bush administration backed a version of this in 2003, although the proposal was defeated. The proposal called for the United States to shift from a mainly progressive income tax system to a national tax system that utilizes consumption taxes exclusively. Ideally, a properly designed consumption tax system would reward savers and penalize spenders. While the U.S. does not have a national consumption tax, many countries in the world have imposed some form of national consumption tax. Japan, for example, added a 3% consumption tax to its income tax in 1989. The Japanese Consumption Tax (JCT) rose to 5% in 1997. In 2012, a two-part tax increase to double the tax raised it first to 8% in April 2014. It was originally scheduled to rise to 10%

[14] (2017) 12 SC (Part 1) 107. The FIRS was the 2nd Respondent in the appeal.

in October 2015, but two delays pushed it to its current launch date, now set for October 2019. According to the Japan Times, the government will introduce an exemption so that food, newspapers and some other daily items will stay at 8%.[15]

It is clear that the tax authority in its desire to achieve different objectives had resorted to the use of different tax handles in its relationship with hospitality businesses in Nigeria. Unless the tax enforcement is quite efficient, increasing the number of taxes on hotels and related businesses may not necessarily result into an increase in tax yield. This therefore brings to the fore the question of appropriate mix of tax handles by government based on the fiscal realities of each environment.

**The Courts and Legal Positions on Multiple Taxes in Hospitality Business in Nigeria**

***VAT vs Sales Tax***

In 2001, the Lagos State Internal Service (LIRS) demanded, from Eko Hotels Limited (Eko Hotels), remittance of money due as tax on sales to its customers. Prior to this time, Eko Hotels used to remit VAT to the Federal Board of Inland Revenue (FBIR); however, the LIRS insisted that Eko Hotels was not exempted from collecting and remitting taxes under the Sales Tax Law. On 5th March 2004, Eko Hotels filed a suit against both the Attorney General of Lagos State and the FBIR and asked the Federal High Court (FHC) to determine which body it ought to remit the tax collected to as Eko Hotels took the view that it would be inappropriate for it to remit the tax to both FBIR[16] and LIRS[17]. On the substance of the suit, the FHC held that the VAT Act as a federal enactment had covered the field (i.e. legislated on the subject matter) which the Sales Tax Law sought to legislate on. Consequently, Eko Hotels was obligated as a taxable person to remit the tax deducted on sales to its customers to only one agency, namely the FBIR. Dissatisfied, the Lagos State Government appealed to the Court of Appeal which dismissed the appeal and upheld the decision of the FHC.

At the Supreme Court, the Lagos State Government raised five issues for determination, three of which are relevant to the topic considered.[18] The first issue challenged the applicability of the decisions of the Supreme Court in ***AG Ogun State v. Aberuagba***[19] (the *Aberuagba case*) and the Court of Appeal in ***Nigerian Soft Drinks Ltd v. Attorney-General of Lagos State***[20] (the *Nigerian Soft Drinks case*) to the instant case. The second issue urged the Supreme Court to determine the propriety of the FHC's decision that the VAT Act had covered the field of the Sales Tax Law. The third issue sought the Supreme Court's determination on whether the imposition of VAT and sales tax on one customer by two different laws in a single transaction, amounted to double taxation.

On the first issue, the Supreme Court held that the lower courts were not bound by the decisions in the Aberuagba and Nigerian Soft Drinks cases because the facts in those cases were distinguishable from the matter being considered. In the Aberuagba case, the issue was whether the 1982 Sales Tax Law of Ogun State, which imposed tax on certain goods brought into Ogun State, was not an item under the Exclusive Legislative List of the defunct 1979 Constitution of Nigeria which empowered the National Assembly to regulate inter-state and international trade and commerce, as well as the prices of certain goods already regulated under the Price Control Act, 1977 and the Price Control Commodities Order 22 of 1979. The Supreme Court in the Aberuagba case declared the Sales Tax Law of Ogun State unconstitutional as it apparently violated the provisions of the 1979 Constitution. In the Nigerian Soft Drinks case, the issue was whether in the light of the Supreme Court's decision in the Aberuagba case, the Sales Tax Law of Lagos State was validly made, considering that it imposed sales tax on inter-state trade and commerce. The Supreme Court noted that the Court of Appeal held in that case that the Sales Tax Law of Lagos State was validly made because it was different from the Ogun State version, for while the Ogun State Law imposed

[15] See Consumption Tax. Available online https://www.investopedia.com/terms/c/consumption-tax.asp retrieved 24th October 2019 19.29
[16] Having regard to sections 1, 2, 10, 11, 12, 13, 14, 15 and 16 of the VAT Act
[17] Having regard to sections 1, 2, 3, 4, 5 and 6 of the Sales Tax Law
[18] The fourth and fifth being a purely jurisdictional/procedural issues.
[19] [1985] 1 NWLR (Pt 3) 395.
[20] [1987] 2 NWLR (Pt 57) 444 CA

tax on goods whose prices were already regulated by the Federal Government, the Lagos State Law did not impose tax on goods whose prices were regulated by the Federal Government.

On the second and third issues, the Supreme Court held that the doctrine of covering the field would apply because the VAT Act is an existing law[21] which had covered the field of the Sales Tax Law, and that it would amount to double taxation to impose VAT and sales tax on one consumer for the same goods and services.[22] Furthermore, the Supreme Court found that because the rates of VAT and sales tax are similar, "it follows that there is unhealthy competition between the two laws, thus throwing the consumer and collection agents into confusion..."[23] The Court decided that in the circumstance, the Sales Tax Law would remain inoperable until such a time when the VAT Act is either repealed by the National Assembly or invalidated by a court of competent jurisdiction. The Supreme Court of Nigeria decided that it would amount to double taxation for two different laws to impose consumption tax twice on a consumer for the same good or service. It thus upheld the decision of the Court of Appeal in ***Attorney-General of Lagos State v. Eko Hotels Limited& Anor***[24] which was to the effect that the VAT Act[25] has covered the field of the Sales Tax Law of Lagos State and therefore takes precedence until such a time when the federal legislature repeals the VAT Act.

Coming from the apex court of the land, this decision ought to have resolved some of the controversies surrounding the VAT Act. However, it appears to have raised a set of issues that should be of concern to relevant stakeholders and tax practitioners. These issues include the effect of the decision on other extant sales and consumption tax laws in force in the States of the Federation; the applicability of the 'doctrine of covering the field' to the case; and the legal basis for the decision that the imposition of VAT and sales tax would amount to 'double taxation'.

Sales tax is imposed on all chargeable commodities and services listed in the first column of the schedule to the Sales Tax Law.[26] Some commentators may assert that the first implication of the Eko Hotels case is that "the VAT Act, having covered the field of sales tax,"[27] all extant laws enacted by State Houses of Assembly imposing sales tax in the same manner as the VAT Act shall remain inoperable until such a time when the VAT Act is either repealed by the National Assembly or invalidated by a court of competent jurisdiction. Secondly, it may be argued that the Supreme Court's decision is to the effect that because the items covered and even the rates of the taxes imposed by both the VAT Act and the Sales Tax Law are similar, imposing VAT and sales tax "on the same goods and services, payable by the same consumers under two different legislations" would create double taxation.[28]

The Supreme Court reasoned that the VAT Act qualifies as an existing law under section 315 of the Constitution, and had therefore covered the field of the Sales Tax Law. For clarity, Section 315(1) (a) of the Constitution provides as follows:

> (1) "Subject to the provisions of this Constitution, an existing law shall have effect with such modification as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be:
> (a)An Act of the National Assembly to the extent that it is a law made with respect to any matter on which the National Assembly is empowered by this Constitution to make laws"[29]

[21] Per Kekere-Ekun, JSC at p. 149, paras. 10-20
[22] Per Kekere-Ekun, JSC at p. 149, paras. 25-30
[23] Per Okoro, JSC at p. 163-164, paras. 30-5; see also Kekere-Ekun, JSC at p. 149, paras. 20-25.
[24] (2017) 12 SC (Part 1) 107. The FIRS was the 2nd Respondent in the appeal.
[25] Formerly Decree No. 102 of 1993.
[26] Section 1 of the Sales Tax Law. Taxable goods include beer; wine, liquor and spirits; cigarettes and tobacco; jewels and jewelleries; etc. Taxable services comprise sales and services in registered hotels, motels, catering establishments, restaurants and other personal services establishments.
[27] Per Kekere-Ekun, JSC at p. 146
[28] Kekere-Ekun, JSC at p. 149, paras. 25-30.
[29] At p. 145; underlining supplied for emphasis

In the words of Kekere-Ekun, JSC[30] while delivering his judgement:

> "...At the time the cause of action arose, the VAT Act was deemed to be an Act of the National Assembly..."

Granted that the VAT Act qualifies as an existing law pursuant to section 315(4) of the Constitution, it does not follow that every existing law enjoys automatic application. This is why section 315(1) states that such laws shall only have effect with such modification as may be necessary to bring them into conformity with the provisions of the Constitution. Accordingly, the VAT Decree will be deemed to be applicable as an Act of the National Assembly only to the extent that it is a law made with respect to any matter on which the National Assembly is empowered by the Constitution to make laws.

The Supreme Court failed to consider that whilst the VAT Decree may have been validly made by the Supreme Military Council in 1993, under the present federal constitutional framework, the National Assembly lacks the legislative competence to impose consumption tax on a country-wide level under the Constitution.[31] A perusal of Parts 1 and 2 of the Second Schedule to the Constitution will show that tax on consumption is not an item on either of the legislative lists. This should thus make VAT a residual matter on which only the respective state governments (not the federal government) are empowered to legislate.[32]

Justice Kekere-Ekun also stated[33] that:

> "...the goods and services covered by both legislations[34] are the same. It follows that the VAT Act has effectively covered the field in that regard. Section 7(1) of the Act provides that the tax shall be administered by the 2nd Respondent.[35] In the circumstances, I am in complete agreement with the court below...that the VAT Act having covered the field on the issue of sales tax, its provisions prevail over the provisions of the Sales Tax Law of Lagos State. Thus, even if the House of Assembly has the requisite legislative competence to enact the Sales Tax Law, which is not an issue before us, once an existing federal law or an Act of the National Assembly has covered the field, the Act of the National Assembly or such existing law must prevail..."

Surprisingly, the position of the Learned Justice in my view is alien because the doctrine of covering the field only applies to those matters in respect of which both the National Assembly and the House of Assembly of a State have concurrent legislative powers.[36] These matters are listed in Part 2 of the Second Schedule to the Constitution. Consequently, where the National Assembly has validly legislated on any of them conclusively[37] there is nothing left for a State Assembly to legislate on in that regard. In **AGF v AG Lagos State,**[38] the Supreme Court held that the doctrine of covering the field does not apply to residual matters, as those are in fact within the exclusive legislative competence of the State Assembly. Similarly, in **AG Ogun State v Aberuagba**, the Supreme Court emphatically made the point that the federation has no powers to make laws on residual matters.[39]

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[30] At p. 146, paras. 15-30.

[31] It is argued that the VAT Act may be validly made by the National Assembly to apply in the Federal Capital Territory (FCT); in respect of transactions with the Federal Government or any of its agencies; etc. A similar explanation was offered by I.T. Muhammad, JSC in AGF v AG Lagos at 351, para. H on the Tourism Act, an existing law which His Lordship held could apply in the FCT but not across the Federation.

[32] According to Ngwuta, JSC: "*Matters included in the Exclusive List are within the exclusive domain of the National Assembly to legislate upon. See s. 4(3). In addition to its power to legislate in matters in the Exclusive List exclusively, the National Assembly is also empowered to legislate, though not exclusively, on matters in the Concurrent Legislative List. Residual Matters which are matters not in either Exclusive or Concurrent Lists are matters within the exclusive competence of the states to legislate upon. See AG Abia State v AG Federation (2006) 16 NWLR (Part 1005) 265 at 380-381, paras. D-C...*"

[33] At p. 146, paras. 15-30

[34] That is, the VAT Act and the Sales Tax Law

[35] That is, the FIRS.

[36] See AG Ogun State v AGF (1982) 1-2 SC (Reprint) 7 at 57-58 paras.35-5

[37] That is, with the intent that the federal statute shall cover the field with no room for any further legislation by States on the matter: see Priggs v Pennsylvania (1842) 16 Pet at 617-618; see also per Dixon, J in *Ex parte* Mchean (1930) 43 CLR 472 at 483.

[38] (Supra) 362, paras. F-H

[39] [1985] 1 NWLR (Part 3) P. 395; interestingly, this case was cited by counsel in the Eko Hotels case. See also *AG Abia State v AG Federation* [2006] 16 NWLR (Part 1005) 265 at 381, para. B

The Supreme Court's decision was also premised on the fact that VAT and Sales Tax ought not to be paid by one consumer because this would amount to double taxation. It should be pointed out that as inequitable as it may seem, a person may validly suffer double or indeed multiple taxation unless excluded by law. This is reflected in how courts by virtue of section 19 of the Companies Income Tax Act (CITA), have subjected dividends, which exceed the profits of a company in the year the dividends were declared, to income tax, regardless of the fact that the dividends were paid from retained earnings that had been taxed previously.[40] Even in the U.S., where federalism is also practised, federal and state taxes are completely separate and each tier of government has its own authority to charge taxes. Within a state, there may be several jurisdictions such as counties or towns who may charge their own school taxes in addition to state taxes.[41]

Consequently, it is opined that nothing in the Constitution prohibits States from imposing levels of taxes on corporate and individuals so long as this does not encroach on the taxing powers of the Federal Government in the Exclusive Legislative List. Thus, the Supreme Court's reasoning that sales tax and VAT amount to double taxation was at best borne out of the sentiments of the learned justices especially as no statutory authority was cited to support this view.

**VAT v Consumption Tax**

Section 2 of the Hotel Occupancy and Restaurant Consumption Law of Lagos State 2009 ("Hotel Consumption Law") imposes a tax of 5% on any person who "pays for the use or possession or for the right to the use or possession of any hotel facility or events centre; or purchases consumable goods or services in any restaurant whether or not located within a hotel in Lagos State."[42]The goods and services covered by the Hotel Consumption Law are already liable to VAT because the VAT Act imposes VAT on all goods and services unless specifically exempted by the VAT Act; and the goods and services covered by the Hotel Consumption Law are not so exempted. Shortly after its enactment, the validity of the Hotel Consumption Law became the subject of litigation in several courts, resulting in conflicting decisions by the State and Federal High Courts.[43] In 2010, the Federal Government (FGN) filed an originating summons at the Supreme Court against the Attorney-General of Lagos State challenging the validity of the Hotel Consumption Law and the Hotel Licensing Law 2003 on the basis that the said laws were inconsistent with the 1999 Constitution and the Nigerian Tourism Development Corporation Act (Tourism Act).[44] Before the hearing of the FGN's suit, the Attorney-General of Lagos State also filed a suit at the Supreme Court challenging the validity of the Tourism Act. In two unanimous decisions,[45] a full panel of the Supreme Court on 19th July 2013 decided in favour of the Lagos State Government on the ground that the licensing and regulation of hotels and

[40] See 19 of the Companies Income Tax Act (CITA) and the Oando v FIRS (2016) 26 TLRN 1.

[41] See https://www.rpi.edu/dept/advising/free_enterprise/us_government/taxation.htm

[42] Section 1(1) (a), (b) of the Hotel Consumption Law 2009. See also sections of the Sections 96 and 97 of the Kano State Revenue Administration (Amendment) Law, No. 3 of 2017.It is reported that the Federal High Court sitting in Abuja recently set aside the said sections of the Kano State Law for resulting in "double taxation". See: https://guardian.ng/news/court-nullifies-kano-state-law-on-consumption-tax/ 23rd July 2018

[43] For instance, in Mas Everest Hotels Ltd & Anor v AG Lagos State (2010) 2 TLRN 1, Justice Oshodi of the High Court of Lagos State upheld the validity of the Hotel Consumption Law in a judgment delivered on 8th August 2009. The Plaintiffs who were hotel owners had sought a declaration that the Hotel Consumption Law was invalid by virtue of section 4(2) and (3) of the Constitution and section 1 of the Taxes and Levies (Approved List for Collection) Act ("Taxes and Levies Act") which, respectively, provide for the legislative powers of the National Assembly, and the responsibility for collecting taxes by the various tiers of government. The Court upheld an objection challenging the Plaintiffs' locus standi on the basis that they were not the ultimate payers of the tax. The Court also held that the Hotel Consumption Law did not encroach on either of the legislative lists in the Constitution. However, in Princel Court Ltd v AG Lagos State and Ors (2010) 3 TLRN 30, the Plaintiffs filed an originating summons at the Federal High Court ("FHC") challenging the validity of the Hotel Consumption Law on the ground that it was inconsistent with the VAT Act and the Taxes and Levies Act. In a judgment delivered by Ajakaiye, J., on 27th May 2010, the FHC held that the Hotel Consumption Law was null and void for being inconsistent with the Constitution, VAT Act and Taxes and Levies Act. The Court reasoned that the Plaintiffs had locus as operators of the affected businesses who would be made to account to two tax authorities.

[44] Cap 137 Vol. 12 LFN 2004 (formerly Decree No. 81 of 1992) See Attorney General of the Federation v Attorney General of Lagos State [2013] 16 NWLR (Part 1380) 249.

[45] AGF v AG Lagos, Suit No. SC 340/2010 [2013] 16 NWLR (Part 1380) 249, and AG Lagos v AGF, Suit No. SC 462/2010 [2013] 16 NWLR (Part 1380) 383

tourism are residual matters in the 1999 Constitution in respect of which the State Houses of Assembly may legislate without interference from the FGN. Although this decision effectively endorsed the power of the Lagos State Government to exclusively regulate hotels and tourism in the State, the validity of the tax imposed by the Hotel Consumption Law was not an issue before the Supreme Court and no pronouncement was made thereon.

Relying on the position on the Supreme Court above, the Federal High Court in Lagos barred the Federal Inland Revenue Services (FIRS), from enforcing VAT provisions on goods and services consumed in hotels, restaurants and event centres in Lagos State.[46] Justice Aikawa gave the order while delivering judgment in the suit seeking to restrain the Attorney General (AG) of Lagos State from enforcing the Hotel Occupancy and Restaurant Consumption (Fiscalisation) Regulations Law (HORC), 2017, in the view that VAT Act has covered the field. In the suit the Registered Trustees of Hotel Owners and Managers Association of Lagos (HOMA) had sued the AG in Lagos State and FIRS. The HOMA had asked the court to declare that by virtue of Section 7, of the VAT Act, the second defendant (FIRS) was the only lawful and constitutional agency charged with the administration and management of consumption tax generally and particularly in Lagos state.

While dismissing the suit, the court held that it was lacking in merit, adding that the plaintiff was obliged to comply with the HORC Law 2009 and the HORC Regulations 2017. The court also raised two issues by herself; whether the Federal High Court had the jurisdiction to pronounce on the constitutionality of VAT. The court resolved that it has jurisdiction. It also held that the issue of the powers of the minister to amend the schedule to the Taxes and Levies (Approved List for Collection) Act was not in dispute before the court and so no pronouncement could be made on it. The court in dismissing the originating summons, as lacking merit and resolving the questions and reliefs sought in favour of the first defendant, held:

a. "That consumption tax is not stated in either the exclusive and concurrent legislative list, in the Constitution of Nigeria, therefore, the absence on the concurrent and exclusive lists, puts consumption tax on the residual list, which is within the legislative competence and powers of state governments.
b. "That VAT Act can't cover the field over what the federal government has no power to legislate upon, under the constitution, therefore the determinant factor in the issue of covering the field, is whether there is power to make the Law.
c. "The provisions of VAT Act relating to consumption tax are inconsistent with the Nigerian constitution.
d. "The Minister of Finance has corrected the anomaly, by including consumption tax in the list of taxes collectible by state government, therefore, the responsibility for collecting consumption tax lies on the state government.
e. "The provisions of Sections 1, 2, 4, 5 and 12 of VAT Act are in breach of the 1999 constitution and the plaintiffs are obliged to comply with the HORC Law 2009 and the HORC Regulations 2017.
f. "FIRS are barred from enforcing VAT provisions as it relates to consumption tax on goods and services consumed in Hotels, Restaurants and Event Centres in Lagos State,"

Hotel consumption tax is payable on the use or possession of a hotel facility or events centre and on consumable goods and services in any restaurant within or outside a hotel in Lagos.[47] Because the goods and services liable to hotel consumption tax are already covered by the Sales Tax Law which excludes the application of sales tax to facilities or transactions covered by the Hotel Consumption Law. VAT is payable on *all* goods and services except those listed in the first schedule to the VAT Act.[48] As a result of the large net of VAT, the goods and services taxable under both the Sales Tax Law and the Hotel Consumption Law are also liable to VAT.[49] In this regard, section 2 of the Hotel Consumption Law provides that VAT shall be excluded in the tax rate imposed by it.

[46] (unreported) Registered Trustees of Hotel Owners and Managers Association of Lagos (HOMA) had sued the AG in Lagos State and FIRS in the suit no. FHC/L/CS/360/2018.
[47] Section 1(1) the Hotel Consumption Law.
[48] Section 2 VAT Act
[49] See Princel Court Ltd v AG Lagos State and Ors (2010) 3 TLRN 30.

In effect, this decision would mean that if a federal law has imposed tax on goods and services, a State law cannot validly impose a similar tax on the same goods and services to be paid by the consumer. Accordingly, because VAT is payable on all goods and services,[50] including but not limited to hotel services and consumables in restaurants, by seeking to impose tax on already "VATable" goods and services, hotel consumption tax like sales tax creates an incidence of double taxation. In my view, however, although the Eko Hotels case is binding on the Lagos State Government as one of the parties, it is doubtful if this would automatically translate to the inoperability of the Hotel Consumption Law, as the validity of the said Law was not one of the issues for the Supreme Court to decide. As earlier opined, the Hotel Consumption Law will remain in operation until such a time when a court of competent jurisdiction declares it inoperable considering the recent judgement of the Federal High Court on same and relying on the precedent set by the Eko Hotels case.[51]

**Conclusions**

It is our view that the application of the doctrine of covering the field in VAT Act over the Sales Tax does not furnish a good precedent on the legality or otherwise of double taxation. Also, although it would have been good for certainty if the Supreme Court had pronounced on the constitutionality of the VAT Act; the Court did not do so understandably, because this was not an issue for determination in the case. However, it is commendable that the Supreme Court with its pronouncements that tourism matters are within the purview of the authority of the State and not the Federal Government had given some directions to the solving of multiplicity of taxes within the hospitality business in Nigeria. The recent Federal High Court judgement barring the FIRS from collecting VAT from hotels and related businesses[52] has set a new legal discourse for addressing the multiplicity of taxes as it affects the sector, although this was in contrast to the 2018 judgement of the Federal High Court Abuja on the validity of the charging of consumption tax by Kano State Government[53]. It is therefore believed that opportunity has presented itself for the Nigeria's apex court to not only rectify the errors identified in its decision in the Eko Hotel case[54], but also finally lay the VAT quandary to rest. While, it may require a multi-disciplinary study to determine and demonstrate the exact extent of the impact of multiplicity of taxes on hospitality businesses in Nigeria, it is difficult for any objective analyst to deny a direct linkage between the two. Multiplicity of taxes serves as a disincentive for compliance. Since no one pays tax with smile, taxpayers will seek either a fair or legal or fowl means to avoid payment of tax especially where there is incidence of multiple taxes. It does not really matter who is being taxed, the fact that such businesses are by law, collection agents, such will have effects on their customers' purchasing power. This is particularly true in an environment such as ours where the tax culture is low. A tax system is supposed to be simple in order to aid compliance. Regrettably, the reverse is usually the case in Nigeria. Where the tax system is unnecessarily complex, it increases the cost of administration for government and cost of compliance for the taxpayers. The charging of Vat and Sales tax or Consumption Tax on hospitality services as observed by existing laws and legislations has in itself created a complex tax system which is neither in the interest of government nor the taxpayers (consumers) nor the tax agents (hospitality businesses). From the previous sections, we observed that the court in Nigeria had been the arbiter on tax matters and issues among all the parties and particularly between the hospitality businesses and government at all tiers. The court had been able to resolve some issues relating to the exact act of parliament and or laws providing for such taxes where conflicts and issues of multiplicity of taxes had been put forward by the hospitality businesses.

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[50] Subject to section 2 of the VAT Act.

[51] This occurred recently in where the Federal Court sitting in Abuja declared sections 96 and 97 of the Kano State Revenue Administration (Amendment) Law, No. 3 of 2017 null and void on the basis that the said law seeks to legislate on a field covered by the VAT Act. See https://guardian.ng/news/court-nullifies-kano-state-law-on-consumption-tax/

[52] (unreported) Registered Trustees of Hotel Owners and Managers Association of Lagos (HOMA) had sued the AG in Lagos State and FIRS in the suit no. FHC/L/CS/360/2018.

[53] Court nullifies Kano State law on consumption tax, available online https://guardian.ng/news/court-nullifies-kano-state-law-on-consumption-tax/ 23rd July 2019. Retrieved 24th October 2019

[54] Gabriel Nwodo, The Constitutional Basis For The Imposition Of Consumption Taxes By Federal And State Governments In Nigeria: A Critical Analysis Of The Supreme Court's Decision In AG Lagos v Eko Hotels Ltd & Anor. Available online http://www.mondaq.com/Nigeria/x/734820/Constitutional+Administrative+Law/The+Constitutional+Basis+For+The+Imposition+Of+Consumption+Taxes+By+Federal+And+State+Governments+In+Nigeria+A+Critical+Analysis+Of+The+Supreme+Courts+Decision+In+AG+Lagos+v+Eko+Hotels+Ltd+Anor 11 September 2018

## Recommendations

Going forward however, there is the need for parties to agree to work within and outside the court system to attain a progressive and productive tax regime for the sector. This will involve an all-inclusive approach where parties shall be involved prior, during and after passage into law of such acts and or law imposing taxes on such businesses or its consumers. Thus, to minimize the practice of multiple taxation and to enhance an effective and efficient tax system within the hospitality players in Nigeria, there should be a harmonization of all the different taxes according to the approved list of taxes collectible by each tier of government. In addition, there should be collaboration among different government agencies and parastatals on tax administration. Furthermore, there is the need to review the current tax laws in order to enhance tax administration and address ambiguity in such tax laws. Thus, a list / schedule detailing approved taxes as it affects the hospitality sector should be made available by the tax authority and known to all industry players. This will encourage required tax payments and influence voluntary compliance.

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