LéLaw THOUGHT LEADERSHIP INSIGHTS

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TUSSLES: A REVIEW OF ATTORNEY GENERAL OF LAGOS STATE V. EKO HOTELS & ANOR (2018) 36 TLRN 1

THOUGHT LEADERSHIP BY:

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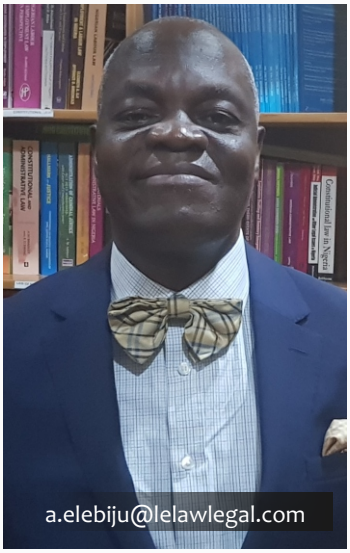

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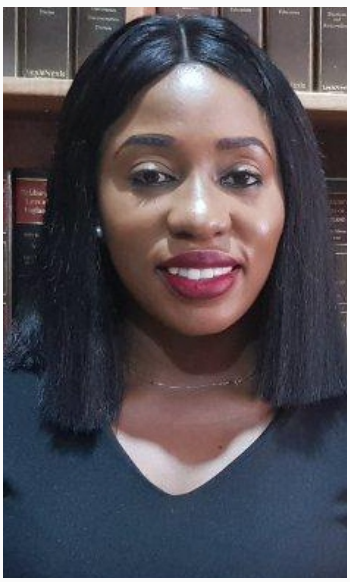


It is no news that Nigeria practices a three-tiered federal system of government: power is shared amongst the Federal, State and Local Governments. Nigeria's grundnorm, the ***1999 Constitution of the Federal Republic of Nigeria as amended (1999 Constitution)***, delineates these powers pursuant to the *Exclusive*, *Concurrent* and *Residual Legislative Lists*.[2] Only the Federal Government (FG) - *vide* the National Assembly (NA) - has legislative competence over matters in the *Exclusive Legislative List (ELL)*.[3]

Both FG and State Governments (SGs) can legislate on matters in the *Concurrent Legislative List (CLL)*, with the proviso that Federal legislation (***Acts***) prevails in case of any conflict. Such Acts may also sometimes "*cover the field*", thereby rendering provisions of State legislation (***Law***), to be surplusage or excess to requirements.[4] The *Residual Legislative List (RLL)* comprises matters over which only the State Houses of Assembly (SHAs) can legislate, including authorisations for the Local Government to make laws (***Bye-Laws***).

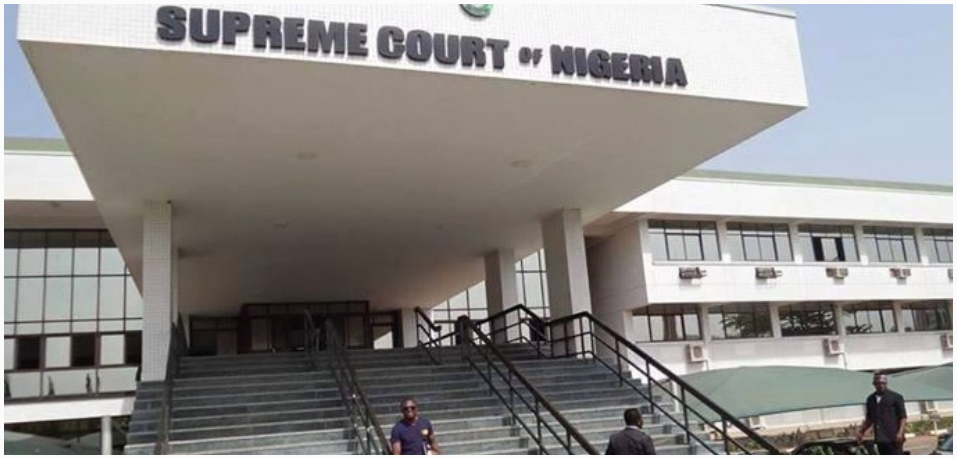
1 Ms. Ayo Fadeyi co-wrote the draft of this article whilst she was an Associate at LeLaw Barristers & Solicitors. The lead author also acknowledges the subsequent research and editorial assistance of his LeLaw colleagues, **Frank Okeke** and **Edward Osike**.

2 ***Second Schedule, 1999 Constitution.***

3 ***Part 1, Second Schedule, 1999 Constitution.***

4 ***Section 4(4)(a), 1999 Constitution*** provides that "*in addition and without prejudice to the Powers conferred by subsection (2) of this section, the National Assembly shall have the 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 II of the Second Schedule to this Constitution to the extend prescribed in the second column opposite thereto.*"

Despite the meticulous attempts to delineate powers amongst the three tiers, conflicts as to exact boundaries of their legislative powers arise, from time to time. Such conflict extends to various issues, including taxation. These has been borne out by recent (and not so recent) litigation - especially between the FG and SGs - as each party sought to jealously guard its sources of revenue.



During the military era, ***The Approved List of Taxes Act***[5] was enacted to further reduce the conflict of the taxing powers. A recent landmark taxation related decision of the Supreme Court (SC) in ***AG Lagos v Eko Hotels & Anor***[6] has brought into bold relief, the jurisprudential underpinnings for resolving conflicts of taxing powers between the two top tiers of government.[7]

The implications of the decision - where the SC affirmed the judgements of the lower Courts in favour of the Respondents - for tax optimisation strategy of different tiers of government, makes the decision worthy of detailed analysis. Such attempt is the purport of this article.

AG Lagos State v. Eko Hotels & Anor (Eko Hotels): The Facts

Lagos State Government (LASG) in a bid to increase its internally generated revenue, introduced the sales tax (ST) by virtue of the ***Sales Tax Law***[8] ***(STLLS)*** and ***Sales Tax (Amendment) Order 2000 (STO)***. However, the provisions of ***STLLS*** is similar to that of ***Value Added Tax Act (VATA)***[9] enacted in 1993. Both legislation required vendors like the 1st Respondent (Eko Hotels) to collect and remit 5% of sales as ST and VAT respectively.

The 1st Respondent had since the introduction of VAT and its capacity as a taxable person/ collecting agent, been remitting VAT to the Federal Inland Revenue Service (FIRS), the operational arm of the 2nd Respondent. However in 2001, LASG through Lagos Internal Revenue Service (LIRS) demanded from the 1st Respondent ST on its sales, pursuant to the ***STLLS*** and ***STO***.

Thus, the 1st Respondent by an Originating Summons dated 5th May 2004 approached the Federal High Court (FHC) to determine whether moneys collected as "sales tax" from its consumers should be remitted to the FIRS or the LSIRS in accordance with the provisions of ***VATA***[10] or of the ***STLLS*** and the ***STO***.

The 1st Respondent also sought the following reliefs from the FHC, ***a declaration*** that the 1st Respondent: (i) can only be a "taxable person" or remitting agent in respect of the amount due as tax on its sales turnover to a single body or agency and not to both State and Federal agencies at the same time; (ii) is not obliged to pay or remit tax on its sales to the Appellant, until the rightful body to collect same is determined; and (iii) should pay the amount due as tax on its sales to a dedicated account, until the rightful body to collect same is determined.

The Appellant on the other hand, filed a preliminary objection (PO) challenging FHC's jurisdiction to entertain the suit. The Appellant argued that by ***section 251(1) 1999 Constitution,*** the FHC's exclusive jurisdiction does not include disputes arising from the application of State Laws. Accordingly, the Lagos State High Court (SHC) and not the FHC had jurisdiction. The FHC dismissed the PO, after considering that the subject matter touches on conflict between an ***Act*** of the NA and a ***Law*** passed by a SHA, *cum* the parties involved, one of which was a FG agency.

On the substantive suit, the FHC held that since the instant taxable goods and services under the ***STLLLS and VATA*** are the same; it would therefore amount to

5 ***Taxes and Levies (Approved List for Collection of Taxes and Levies) Cap. T2, Laws of the Federation of Nigeria (LFN), 2004.***
6 ***(2018) 36 TLRN 1.***
7 Another very recent example was the consent judgment in ***A-G Rivers State & Ors v. A-G Federation SC964/2016*** regarding upstream fiscals review pursuant to the ***Deep Offshore and Inland Basin Production Sharing Contracts Act Cap. D3, LFN 2004 (PSC Act).***
8 ***Cap. 175, Laws of Lagos State 1995.***
9 ***Cap. V1, LFN 2004;*** originally enacted as ***VAT Decree No. 102 of 1993 (VATD).***
10 Now ***VATA Cap. V1, LFN 2004.***

> Both Federal and State Governments can legislate on matters in the Concurrent Legislative List with the proviso that Federal legislation (Acts) prevails in case of any conflict

double taxation to require that the 1st Respondent collect both VAT and ST on them. ***VATA*** has covered the field and prevails over the ***STLLS;*** the 1st Respondent could only be a taxable person or remitting agent in respect of only VAT to the FIRS.

Dissatisfied with the FHC's judgment, the Appellant proceeded to the Court of Appeal (CA) which dismissed the Appellant's appeal.[11] The Appellant further appealed to the SC, which (in our view, correctly) upheld the decisions of the lower Courts.

Analysis of the Issues for Determination in Eko Hotels

The Appellant raised five (5) issues for determination which formed the ground on which the SC based its decision. This article intends to critically analyse these issues as follows:

1.Whether the Court below was right when it held that the cases of:
I. ***Attorney General of Ogun State v. Aberuagba [1985] 1 NWLR (Pt.3), 395 (Aberuagba);*** *and*
ii. ***Nigerian Soft Drinks Ltd v. Attorney General of Lagos State [1987] 2 NWLR (Pt.57), 444 (NSDL),*** *cited to the trial court as stare decisis, is a non-issue and that none of those decisions was authority to say that the 1st Respondent is obliged to remit proceeds of Sales Tax to Lagos State.*

The Court's View
The SC noted that the issue in ***Aberuagba's*** case was the taxing powers of the Federal and State Governments in the context of the provisions of the ***1979 Constitution of the Federal Republic of Nigeria***. The SC in ***Aberuagba*** considered the validity of the exercise of legislative powers by the Ogun SHA in enacting the ***Sales Tax Law No. 2 of 1982 (OGSSTL)*** which imposed a tax on the purchase of specified goods and services and provisions for the collection of same. The SC then held that since the 1st Respondent in ***Eko Hotels*** did not challenge the validity of the ***STLLS, Aberuagba's*** case cannot constitute a *stare decisis*.

In considering if ***NSDL*** constitutes *stare decisis,* the SC noted that the main issue in ***NSDL*** was whether the ***STLLS*** is similar to ***OGSSTL*** which was held in ***Aberuagba*** to be unconstitutional. The SC held that the ***STLLS*** was distinct from the ***OGSSTL*** and also valid because unlike the ***OGSSTL***, it did not impose tax on goods that are subject of inter-state commerce. Also, under the ***STLLS***, the tax was not upon the goods, but upon the consumer unlike the ***OGSSTL*** that charged goods brought into Ogun State.

Our Thoughts
It is trite that the principle of *stare decisis* operates where the issue(s) determined by a higher court in an earlier case is/are similar to the issue(s) a lower court is subsequently approached to determine. Therefore, a decision arrived by the court cannot rule a subsequent case on totally different facts.[12]

Black's Law Dictionary,[13] defines *stare decisis* as "*to stand by things decided, the doctrine of precedent, under which a court must follow earlier judicial decisions when the* ***same points*** *arise again in litigation.*" Whilst the doctrine helps with certainty of the law, nevertheless a lower court is not a zombie that must follow hook, line and sinker, any decision of a higher court, where the case before the lower court is clearly distinguishable.[14]

Stare decisis does not permit courts to apply the *ratio* of a case across board without regard to the facts of the case before them. Cases are meant to be decided on their peculiar facts and in the light of applicable law; and every case is an authority for the facts which it decides. In our view, the SC correctly decided that both ***Aberuagba*** and ***NSDL*** do not constitute *stare decisis* for purposes of determining ***Eko Hotels***.

We agree with the SC that ***Aberuagba*** and ***Eko Hotels*** are discrete cases. In our humble view, the framing of the issues for determination in ***Eko Hotels'*** implicitly (albeit indirectly) challenged the validity or

11 See ***A-G Lagos State v Eko Hotels Ltd & Anor 6 All NTC 333.***
12 ***Thomas v FJSC [2016] 11 NWLR (Pt. 1523), 312 (SC).***
13 Bryan A. Garner (ed.), ***'Black's Law Dictionary'***, (9th ed., 2009), p. 1537.
14 ***Dada v FRN [2016] 5 NWLR (Pt. 1506) 471, at 584.***

constitutionality of the ***STLLS***. For instance, once the SC rules that ***VATA*** has covered the field and its provisions displaces or prevails over the ***STLLS***, does that not render the ***STLLS*** ineffective? Whether ineffective (not invalid), the import is that ***STLLS*** would not be operative.

Accordingly, ***Aberuagba*** could have formed *stare decisis* for ***NSDL*** because similar points were raised in both cases, but not for ***Eko Hotels***. Incidentally, the parties made no reference to ***Mama Cass & Ors v. FBIR & A-G Lagos*** (***Mama Cass***)[15] which bore striking similarity in terms of the issues raised: determining among contending parties who is entitled to consumption tax collected under ***VATA/SSTL*** and whether both taxes could co-exist.

Although ***Mama Cass*** trial decision was later in time (to ***Eko Hotels*** at the FHC), but the decision could still have been cited (obviously for persuasiveness, being a trial court decision) by the Respondents at the CA to further support their argument**.** Clearly ***Mama Cass*** does not support the claims of the Appellant.

2. Whether the lower court was right when it held that the Value Added Tax Act has covered the field of Sales Tax and its provisions over the Sales Tax Law of Lagos State.

The Court's View

The SC in ***Eko Hotels*** held that ***sections 2 VATA*** and ***STLLS*** contains similar provisions. The goods and services covered by ***VATA*** and the ***STLLS*** are the same, it then follows that the ***VATA*** has effectively covered the field in this regard. The provisions of the ***VATA*** therefore prevails over that of the ***STLLS.***

Even if the Lagos SHA has the requisite legislative competence to enact the ***STLLS*** (which was not the case before the SC), once an existing Act of the NA has covered the field, such existing Federal law must prevail.

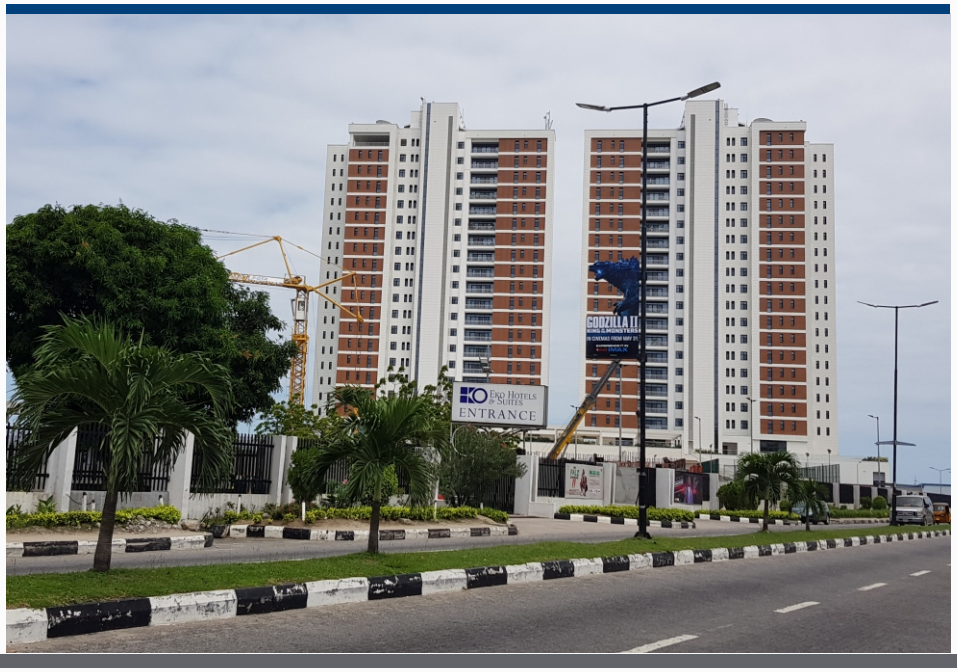
Nonetheless, ***Ejembi Eko, JSC*** opined in ***Eko Hotel*** that: *"an Act of the National Assembly, for purposes of covering the field can only be said to be a 'predominant paramount' legislation if it was validly enacted, or could be deemed to have been validly enacted, with respect to any matter the National Assembly is empowered by the Constitution to make laws."*[16]

Our Thoughts

The doctrine of "covering the field" (called the doctrine of pre-emption in the USA), means that where the Federal constitution or enactment has already made provisions for a particular issue, no subnational legislation can be validly enacted to cover the same field. Where a State enacts a ***Law*** on a subject matter, a latter federal enactment (***Act***) does not invalidate the ***Law*** but suspends or puts it in abeyance until the ***Act*** is repealed. It then automatically comes back into operation.[17]

The key caveat to the foregoing view is that such Act must have been validly enacted. Thus, the NA cannot, in the exercise of its powers to enact some specific laws, take the liberty to confer authority on the FG or any of its agencies to engage in matters reserved for SGs or SGs' agencies. The FG or its agencies cannot be allowed to encroach upon the exclusive constitutional authority conferred on a State under its residual legislative power, pursuant to the ***RLL***.[18]

Section 4(5) 1999 Constitution provides that: *"if any law enacted by the House of Assembly of a State is inconsistent with any law* ***validly*** *made by the National*



15 *(2010) 2 TLRN 99, at 125.*
16 *AG Lagos State v. Eko Hotels & Anor (2018) 36 TLRN 1 at 58.*
17 Kehinde M. Mowoe, *'Constitutional Law in Nigeria'*, *(1st ed. (2008), Malthouse), p. 64.*
18 *[2003] 12 NWLR (Pt.833), 1 at 195.*

Assembly the law made by the National Assembly shall prevail, and that other law shall, to the extent of the inconsistency be void." Where the NA's ***Acts*** covers areas constitutionally reserved for the SHA, the former would become inconsistent and thus null and void.[19] It is a trite rule of federalism that the FG does not exercise superior authority over the SG; each must operate within its sphere.[20]

Fatayi-Williams, CJN in ***A-G Ogun State v. A-General of the Federation & Ors***[21] stated that *"... I would only wish to add that, where identical legislations on the same subject matter are validly passed by virtue of their constitutional powers to make laws by the National Assembly and a State House of Assembly, it would be more appropriate to invalidate the identical law passed by the State House of Assembly on the ground that the law passed by the National Assembly has covered the whole field of that particular subject matter. To say that law is 'inconsistent' in such a situation would not in my view, sufficiently portray clarity on precision of language."*[22]

This principle cannot apply in reverse for incompetent ***Acts***

enacted by the NA for want of constitutional authority, such would be wholly invalid.

Also, in ***Mama Cass,*** the Court held that since the ***VATA*** had already included the service provided in ***Schedule 1 STLLS***, the doctrine of covering the field applies. The ***VATA*** has covered the whole field in respect of ST on the services in question; the tax collected from consumers was thereby regarded as VAT under the ***VATA*** and not ST under ***STLLS***. The FHC finally declared that *"the Plaintiffs, severally can only be 'taxable person' or remitting agent in respect of the amount due as tax on their sales to their consumers to a single body or agency; and that agency is the Federal Government through the 1st Defendant."*[23]

3. Whether the court below was right when it held that imposition of both VAT and Sales Tax will create double taxation.

The Court's View

The SC held that the ***VATA*** and ***STLLS*** do not only cover the same goods and services, they also targeted the same consumers. According to the SC, there is no doubt that it would amount to double taxation for the same tax to be levied on the same goods and services, payable by the same consumers under two different legislations.

Our Thoughts

It is a notorious fact that the ***STTLS*** contains provisions that are similar to ***VATA***'s. ***VAT*** is charged by the FG on VATable goods at 5% and distributed amongst the three tiers of government. LASG gets a share from the VAT generated from ***VATA***[24] and should therefore not charge taxes similar to that of VAT.

The expression *"double taxation"* describes, *inter alia*, situations in which the same income or property is taxed twice by different tax authorities.[25] If

19 ***Section 315(1)(a) and (b) 1999 Constitution.***

20 ***AG Lagos State v. AG Federation (Supra), at 194.*** See also the following examples of Acts that were invalidated vis a vis Laws: ***Nigerian Urban and Regional Planning Decree No. 88 of 1992 (now Act)*** was found to be inconsistent with ***Town and Country Planning Law, Cap. 188 Laws of Lagos State (LLS) 1994 - AG Lagos v. AG Federation [2003] 12 NWLR (Pt.833), 1. Nigerian Tourism Development Act Cap. N137, LFN 2004*** was invalidated by the SC in ***A G Federation v. AG Lagos State [2013] 16 NWLR (Pt. 1380), 249 at 303*** for ***Hotel Licensing Law Cap H6, LLS, Hotel Occupancy and Restaurant Consumption Law No. 30 of 2009,*** and ***Hotel Licensing (Amendment) Law No. 23, of 2010.***

21 ***(1982) 1-2 S.C 13, at 40-41.***

22 See also ***A-G Abia State v. AG Federation [2002] 6 NWLR (Pt. 763), 264 at 369***, *per* ***Kutigi, JSC:*** *"where the provision in the Act is within the legislative powers of the National Assembly but the Constitution is found to have already made the same or similar provision, then the new provision will be regarded as invalid for duplication and or inconsistency and therefore inoperative. The same fate will befall any provision of the Act which seeks to enlarge, curtail or alter any existing provision of the Constitution. The provision or provisions will be treated as unconstitutional and therefore null and void."*

23 ***Mama Cass (supra) at 127. Olomojobi, J at 125*** had previously stated that: *"I have gone through the Value Added Tax Act of 1993 and the Lagos State Sales Tax Law of 1994. So also is the Sales Law (Schedule Amendment) Order 2000. I found that the business in which the Plaintiff are engaged i.e catering and operation of restaurants and other items pertaining to same is listed among the taxable goods which attracts 5% rate under Part 11 of the Sales Tax (Schedule Amendment) Order 2000 of Lagos State. Also, the same services are listed under Schedule 1 to the Value Added Tax Act of 1993 which is stated to attract tax rate of 5%. The aforestated reveals that the same services are liable to be taxed under both enactments."*

24 The VAT revenue sharing ratio is 15%: 50%: 35% to the FG, SGs and LGs respectively: ***Section 40 VATA***.

25 See Ade Ipaye, ***'Nigerian Tax Law and Administration a Critical Review'***, (1st ed., (2014), ASCO), *p.305*. According to the ***National Tax Policy (NTP) 2012***, 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."* See ***NTP 2012, p.78 (Para 6.0)***. According to Prof. Abiola Sanni, a leading tax lawyer, multiplicity of taxes 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) and Hotel Occupancy and Restaurant Consumption Tax simultaneously."* See A.O Sanni, ***'Policy, Legal and Administrative Imperatives in the Quest for Eradicating Multiplicity of Taxes in Lagos State'*** *1st Annual Lecture of Lagos State Professor of Tax and Fiscal Matters*, presented at the University of Lagos, on 28.11.2017.

effect were to be given to ***STLSS Eko Hotels***, customers would have had to pay 5% VAT and 5% ST on the same consumption, which results in double taxation. [26]

To further support the SC's position, ***Item 8, Second Schedule, Part II 1999 Constitution*** provides that where an ***Act*** has provided for the collection of tax or duty on capital gains, incomes or profit or the administration of any law by an authority of a State, it is that ***Act*** that will regulate such tax or duty to ensure that same is not levied on the same person by more than one tax authority. To leave taxation at large at the whim and caprice of the different tiers of government would expose the entire citizenry to undue multiple and overlapping taxes and levies.[27]

Thus, the focus of SGs should be the efficient collection of their authorised taxes within the ambit of law and not going beyond same to create additional tax burdens.[28]

4. Whether the court below misapprehended the object of the Appellant on the jurisdiction of the trial court and erred in law when it held that the trial court had jurisdiction to entertain the Plaintiff's action as constituted.

The Court's Decision

The key determinant on the question of jurisdiction of a Court to entertain a matter is the originating processes filed by the Plaintiff. Having regard to: (a) the subject matter of the suit; (b) the fact that one of the parties is an agency of the FG , the SC upheld the findings of both lower courts (pursuant to ***section 251(1)(b) 1999 Constitution***) that the FHC has the jurisdiction to entertain the suit.

Our Thoughts

Jurisdiction means the authority which a court has to decide matters before it or to take cognisance of matters presented in a formal way for its decision. Being so fundamental, the issue of jurisdiction can be raised at any time, even for the first time on appeal.[29] It is now settled that a court has jurisdiction if: it is properly constituted as regards numbers and qualifications of members of the bench, the subject matter must be within its jurisdiction, the case comes before it initiated by due process and fulfilment of any condition precedent to the exercise of the jurisdiction. [30]

Jurisdiction of the FHC in ***Eko Hotels*** was challenged on the basis that ***STLLS*** was not an ***Act***. However, the dispute arose from both the provisions of ***STLLS,*** and ***VATA***. Consequently, ***Section 251(1)(a) 1999 Constitution*** provision that the FHC shall exercise exclusive jurisdiction in civil cases and matters relating to the revenue of the FG, in which the FG or any of it organs or a person suing or being sued on behalf of the said FG is a party, provided sufficient nexus to the jurisdiction of the FHC in ***Eko Hotels***. [31]

The SC had previously held that the fact that a FG agency is a party to a suit does not necessarily confer jurisdiction on the FHC: ***Onuorah v KPRG Ltd.***[32] This position was however overruled in ***ABIEC v Kanu.***[33] There, it was held that irrespective of the nature of the claim, once any of the parties is an agent of the FG, the FHC will have jurisdiction to adjudicate on such matter. The SC's ***Eko Hotels'*** decision on this issue is therefore in order.

26 This is a similar issue applicable to the ***Consumption Tax Laws (CTLs)*** in Nigeria. Proponents for their repeal argue that complying with same amounts to double taxation. There is a suit currently at the FHC - ***Registered Trustees of the Hotel Owners & Managements Association of Nigeria v. AG Lagos & Federal Inland Revenue Service (FIRS) Suit No: FHC/L/CS/360/2018*** regarding the ***Hotel Occupancy and Restaurant Consumption Law (HORCL) Cap. H8, Laws of Lagos State 2015.*** The matter is currently at the final written address stage. The belief is that the decision of the FHC will follow that of a similar suit in the ***Nigeria Employers Consultative Association (NECA) and Retail Supermarkets Nigeria Limited v. Kano SIRS*** where the FHC sitting in Abuja declared ***sections 96 and 97 Kano State Revenue Administration (Amendment) Law No. 3 of 2017*** null and void because the said law seeks to legislate on a field covered by the ***VATA***. This suit arose after the introduction of the 5% consumption tax on goods and services by the Kano SG in 2017. The FHC ruled in favour of the Plaintiffs, on the following bases: (a) imposition of consumption tax over the goods and services which are already subject to VAT (a Federal legislation on the same scope) amounts to double taxation; and (b) the provisions of the ***Kano State Law No. 3 of 2017*** is inconsistent with the ***Second Schedule, 1999 Constitution***. See Innocent Anaba, ***'Court Stops Kano Government from Collecting Consumption Tax'***, *Vanguard Newspaper*, 23.07.2018:https://www.vanguardngr.com/2018/07/court-stops-kano-govt-from-collecting-consumption-tax / (accessed 28.05.2019). On the other hand, in ***Mas Everest Hotels Limited v. Attorney General of Lagos State (2010) 2TLRN 1***, the Lagos High Court held that the ***HORCL*** is valid because it does not purport to apply to specific matters on ***Item 59, Exclusive Legislative List (2nd Schedule 1999 Constitution***) over which only the National Assembly could legislate but rather affects the spending power of the consumer. This is in contrast to the decision in ***Princely Court Limited v. A-G Lagos State & 2 Ors (2010) 3TLRN 30***, where the FHC was tasked with determining whether the ***HORCL*** was inconsistent with the ***VATA*** and the ***1999 Constitution***. The Court held that the ***HORCL*** was void for inconsistency with constitutional provisions as well as the ***VATA***. The court further held that operators of affected businesses have *locus standi* to challenge the ***HORCL*** because it imposes similar obligations on them as collecting agents as the ***VATA***.

27 ***Eti – Osa LG v Jegede [2007] 10 NWLR (Pt. 1043), 537; (2007) LPELR-8464 (CA).*** There, the CA held that Local Governments have no inherent powers to legislate or create and impose taxes outside the scope of the ***4th Schedule, 1999 Constitution*** (which provides for functions of LG Councils).

28 In ***Nigerian Agip Oil Co. Limited v. Delta State Environmental Protection Agency (2019) LPELR – 46825 (CA)***, the CA reiterated that any inconsistent law made by a SHA vis a vis an Act of the NA, shall be void to the extent of the inconsistency, as the Act shall prevail in such circumstance.

29 ***Egbue v. Araka [1988] 3 NWLR (Pt. 84), 598.***

30 ***Madukolu v. Nkemdilim [1962] 1 ALL NLR 587 at 594.***

31 The court, in determining its jurisdiction, does not only consider the parties, but also the originating process of the plaintiff: ***Amaechi v. INEC [2007] 18 NWLR (Pt. 1065), 42***. However, where the FG or any of its agencies is a party to a suit, it is not necessary to examine the nature of the reliefs or claims sought in order to determine the jurisdiction of the case: ***FGN v. Adams Oshiomole [2004] 3 NWLR (Pt. 860), 305 at 310.***

32 ***[2005] ALL FWLR (Pt. 256) 1356 SC.***

33 ***[2013] 13 NWLR (Pt.1370) 69 at 83.*** See also per ***Ogundare, JSC*** in ***NEPA v Edegbero [2003] 18 NWLR (Pt.798) 79*** that actions in which the FG or any of its agencies is a party, the SHC would no longer have jurisdiction in such matters, notwithstanding the nature of the claim.

5. Whether the Court below misdirected itself on the submissions of the Appellant that it should invoke its power under section 16 of the Court of Appeal Act to determine the merit of the case.

The Court's View

The learned counsel to the Appellant contended that the CA misconstrued the basis of his oral submissions urging that if the CA found its PO on jurisdiction meritorious, the CA should invoke its powers under ***section 16 CA Act (CAA),***[34] rather than striking out the action or remitting same to the SHC. This because the SHC will also lack jurisdiction to determine the issues involving both the ***STLLS*** and ***VAT Act*** simultaneously. Curiously, counsel also submitted that in the exercise of its power under ***section 16,*** the CA was right to have considered the appeal on its merit, which implies that the CA invoked its power under ***section 16 CAA*** in the matter. The SC found this issue to be merely academic.

Our Thoughts

Section 16 CAA contains the general powers of the CA. These powers cannot be invoked where the lower court and the CA lacks jurisdiction. In ***Obi v INEC,***[35] the CA held the following to be the precondition for the invocation of ***section 16 CAA***: the lower court must have jurisdiction to entertain the matter; the real issue disclosed by the claim of the Appellant at the lower court must be distilled from the grounds of appeal, necessary materials must be available to the court for consideration; the interest of justice must tend to be served by eliminating further delay in the proceedings; and the hardship an order of remittance of the suit to the trial court would cause the parties.

Had the CA held that the lower court lacked jurisdiction, it will not have been able to invoke its powers under ***section 16 CAA*** as presumed by the Appellant's legal counsel. ***Section 16 CAA*** does not confer on the CA, the power to make an order which the trial court could not have made, as the purpose of ***section 16*** is to obviate delayed judicial outcomes. We agree with the SC that invoking the powers of the CA under ***section 16 CAA was not essential***, having considered all the issues raised on their merit.

Conclusion

No doubt all SHAs have the power to enact ***STLs***. However it is mandatory that such laws should not be inconsistent with any law **validly** made by the NA as held in ***Aberuagba***.

It is expected that the FHC in ***HORCL's*** case would follow the decision of the court in ***NECA*** declaring compliance with ***HORCL*** as being double taxation. As it stands, the LASG can still assess and collect consumption tax under the ***HORC***L as the interim injunction stopping LASG from collecting consumption tax has been lifted.[36] We await the outcome of the final decision and appeal of this case.[37]

It bears repetition that the SC in ***Eko Hotels*** was not tasked with determining the validity of the ***VATA*** or the ***STLLS***. In its judgment, the SC stated thus: *"I shall limit myself to the issue before this Court. We are neither asked to determine on the validity of Value Added Tax Act nor the Sales Tax laws of Lagos State. The issue for determination is whether the Value Added Tax Act has covered the field such that the Lagos State Sales Tax Law remains in insignificance... Should the two laws be allowed to operate simultaneously, it will amount to double taxation on the same goods and services. The consumer would have to suffer under the weight of the two laws while the two tiers of government smile to the bank. On the whole, I agree*

34 ***Cap. C37 LFN 2004 Section 16 CAA*** provides that: "*The CA may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the CA thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorised to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the CA as court of first instance and may re-hear the case in whole or in part or may remit it to the court below for the purpose of such re-hearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court, or, in the case of an appeal from the court below in that court's appellate jurisdiction, order the case to be re-heard by a court of competent jurisdiction.*"

35 ***[2007] 11 NWLR (Pt. 1046), 436 at 507.***

36 ***'Court Lifts Injunction Restraining Lagos From Enforcing Consumption Tax Law'***, *The Eagle Online, 07.06. 2018:* https://theeagleonline.com.ng/court-lifts-injunction-restraining-lagos-from-enforcing-consumption-tax-law/ (accessed 06.06.2019).

37 In 2014, a commentator had predicted as follows: "*Following the trend in Lagos, there is significant likelihood that operators of affected businesses may challenge the Law in Court, with the FHC likely to be the preferred forum and FIRS a party to the action(s)... The South Western (S/W) States of Oyo, Ogun, Osun, Ekiti (and maybe Ondo) are also likely to enact their own HOCL soon... Litigations are to be anticipated as Governments seek to enforce HOCL collections. We envisage that State legislatures should leverage the expereince and mistakes of other States in enacting their (improved) HOCL.*" See Afolabi Elebiju, ***'Hotel Occupancy and Restaurant Consumption Law'*** in Abiola Sanni and Afolabi Elebiju (eds), ***'Indirect Taxes in Nigeria',*** *(2014, CITN), pp. 161-163 (*"***the HOCL Article***"). At *p. 154,* ***the HOCL Article*** also stated: "*The Indirect Tax Faculty of the CITN also proffered its views on* ***HOCL*** *at that time... For example, 'it is recognised that new taxes should constitute one source of much needed revenue. However, it is our view that adequate consultation and research is required to ensure that such new taxes do not constitute additional taxation on the citizenry or impose hardship on sectors of the economy that also require protection and government action to nurture.'*"

with the Court below that the Value Added Tax Act has fully covered the field and nothing was left for the Sales Tax Law of Lagos State to glean. I also agree that the imposition of both laws would create double taxation." [38]

Postscript

Policy makers need to understand that more taxes would not necessarily translate to increased tax revenues. In March 2019, there were reports that Nigeria planned to increase VAT by 50% as a measure to raise funds for the implementation of the new minimum wage about to be passed into law by the National Assembly.[39] The FIRS had to put out a press release dismissing such reports.[40] It is good to see that emphasis is being put on revenue collection (widening the tax net, a matter of enforcement), rather than revenue generation via statutory instruments. The NTP (both the 2012 and 2016 versions) generally leaned against double taxation/multiplicity of taxes.

A poignant 'neigbouring example' is Ghana's recently declared shift from a tax based economy to a production based economy.[41] The rationale is that where production is encouraged, more taxes will necessarily follow the increased economic activities that results, thereby. Voluntary compliance/lower enforcement costs is also a likely incidence, further reinforcing a virtuous cycle - tax payers would be more willing to contribute their share in consolidating visible economic development.

For progress to be made in taxation, all the bottlenecks hampering effective tax collection needs to be removed. However, the answer is not to create more taxes![42] ***Eko Hotels*** has obviously aligned with that answer.[43]

> "POLICY MAKERS NEED TO UNDERSTAND THAT MORE TAXES WOULD NOT NECESSARILY TRANSLATE TO INCREASED TAX REVENUES"

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Thank you for reading this article. Although we hope you find it informative, please note that same is not legal advice and must not be construed as such. However, if you have any enquiries, please contact the lead author, Afolabi Elebiju, at a.elebiju@lelawlegal.com or email: info@lelawlegal.com.

38 ***Eko Hotels (Supra) at 51-53,*** per Okoro, JSC.

39 Urowayino Warami, ***'FG Plans 50% Increase in VAT, Other Taxes'***, *Vanguard*, 20.03.2019: (accessed 28.05.2019).

40 Chika Ebuzor, ***'FIRS Says There is no Plan to Increase VAT by 50%'***, *Pulse*, 20.03.2019: (accessed 28.05.2019).

41 Magdalene Teiko Larnyoh, ***'We are Moving from Taxation to Production – Nana Addo'***, *Pulse*, 05.11.2017: https://www.pulse.com.gh/ece-frontpage/economy-of-ghana-we-are-moving-from-taxation-to-production-nana-addo/h31vjvc (accessed 28.05.2019).

41 See generally, the following *'Taxspectives by Afolabi Elebiju'* articles: ***'Eating the Frog of Multiplicity of Taxes'***, *ThisDay Lawyer, 21.10.2014, p.15;* ***'Time for Environmental Taxation in Nigeria?'***, *ThisDay Lawyer, 30.10.2012, p.12;* ***'Could NTP be a Competitiveness Tool for Nigeria?'***, *ThisDay Lawyer, 27.-4.2010, p. vi;* ***'Country Competitiveness: Reform or Stagnate!'***, *ThisDay Lawyer, 02. 03. 2010, p. vii.*

43 See discussions in ***the HOCL Article*** *(pp. 164-165): "The overarching need for fiscal 'certainty' as a component of a business friendly investment environment, the negative impact of these disputes on an already sub-optimal hospitality/tourism sector grappling with operating challenges... and the imperative of avoiding that two levels of Government (Federal and State) are working at cross-purposes, with operators being caught in the cross-fire, rather than aligning to enhance Nigeria's competitiveness, make quick resolution a desirable objective. Speedy consideration of the pending cases between LASG and the FG by the [SC] would be a necessary step in that direction; to obviate further uncertainty, one expects respective plaintiffs to take the necessary steps in that regard."*

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