





On the 9<sup>th</sup> of August 2021, the Federal High Court (“**FHC**”) sitting in Port Harcourt, Rivers State, delivered a judgement in a suit instituted by the Attorney General of Rivers State (“**AG of Rivers State**”) against the Federal Inland Revenue Service (“**FIRS**”) and the Attorney General of the Federation, challenging the constitutionality of the Value Added Tax Act Cap V1, LFN, 2004 (as amended) (the “**VAT Act**”), and the powers of Federal Government of Nigeria (“**FGN**”) to impose and collect taxes that are not listed under Items 58 and 59 of Part I of the Second Schedule of the Constitution of the Federal Republic of Nigeria 1999 (as amended) (“**the Constitution**”). The FHC in this case ruled in favour of the AG of Rivers State, that the National Assembly lacked the legislative competence to make laws and in extension impose taxes in relation to consumption of goods and services in Rivers State. The FHC found that because Value Added Tax (“**VAT**”) is neither listed in the Exclusive nor the Concurrent legislative lists, it is, therefore, a residuary matter which falls within the legislative competence of only the State Houses of Assembly. The FHC also held that taxes such as Withholding Tax (WHT), Tertiary Education Tax (TET), the National Information Technology Development Agency (NITDA) Levy, etc., which are not specifically listed under the said Items are outside the legislative jurisdiction of the FGN.

### Key Developments

1. On the strength of the FHC’s decision, the Rivers State government passed the Value Added Tax Law of Rivers State No.4 of 2021. On 10<sup>th</sup> September 2021, the Lagos State Governor also signed the Lagos State Value Added Tax Bill 2021 into law.
2. The FIRS has appealed the FHC decision to the Court of Appeal (“**COA**”) sitting in Abuja. The Lagos State Government has made an application to join the suit as an interested party, and the COA has slated the application to be heard by 16<sup>th</sup> September 2021.
3. The COA has ordered that parties maintain status quo *ante bellum* and has directed that enforcement of the VAT Law of Rivers State be suspended pending the determination of the suit. This implies that the FIRS should continue to administer and collect VAT pending the determination of the appeal.
4. As at the time of this publication, the Rivers State Government has inaugurated the Tax Appeal Commission with a mandate to deal with “complaints arising from those who do not want to pay their taxes, while also prevailing on those who believe that the tax body is doing what it is not supposed to do” (*sic*)<sup>1</sup>.

<sup>1</sup> <https://gazettengr.com/vat-despite-appeal-court-ruling-wike-inaugurates-new-tax-commission/>



### What This Means for Taxpayers

- The Supreme Court in the case of A.G. of Lagos State v Eko Hotels Limited and Federal Board Inland Revenue Service (2017) had upheld the supremacy of the VAT Act over sales/consumption taxes introduced by the State, noting that the VAT Act had covered the field of consumption of goods and services. However, the judgment did not rule on the constitutionality or otherwise of the VAT Act as this was not an issue for determination before the court. The Supreme Court however held that “There was no prayer before the trial court or the Court of Appeal seeking to nullify the Act. Until there is a decision of a court of competent jurisdiction invalidating it, it remains valid and subsisting”.
- It is worthy of note that the FHC in December 2020 had also ruled in Ukala v Federal Inland Revenue Service & Attorney General of the Federation that the VAT Act is unconstitutional, null, and void. The controversy that has resulted from the recent Federal High Court decisions invalidating the VAT Act may only be resolved by a decision of the Supreme Court on the constitutionality of the VAT Act.
- Seeing as the apex court has found the VAT Act to be valid and subsisting (as decided in AG of Lagos v. Eko Hotels), it is only prudent that taxpayers comply with the VAT Act until the final determination of the suits pending before the COA. This is because as long as there is any appeal from the decision of the FHC or the COA on the judgment, the question of the unconstitutionality of the VAT Act would not be considered to have been conclusively determined.
- With the COA’s direction, taxpayers should continue to remit VAT to the FIRS, pending the determination of the case. Taxpayers are unlikely to incur any penalties in doing so as they would be complying with a valid court order.
- However, a taxpayer who receives a demand notice from any of the States that has enacted a VAT Law demanding payment of VAT should consider seeking direction from the court as to which tax authority to pay VAT to pending the resolution of the legal issues surrounding the validity of the VAT and the VAT Laws recently enacted by some States in the country.
- Taxpayers who are unwilling to remit VAT to either the FGN or the state government should consider making provisions for the tax (with penalties and interest) in their books.

*This update is for general information purposes only and does not constitute legal advice. If you have any questions or require any assistance or clarification on how this update could apply to you or your business or require litigation advice on any aspect of the Nigerian laws, please contact [taxteam@uubo.org](mailto:taxteam@uubo.org).*