IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE PORT HARCOURT JUDICIAL DIVISION
HOLDEN AT PORT HARCOURT
ON MONDAY THE 9TH OF AUGUST 2021
BEFORE HIS LORDSHIP
HON. JUSTICE STEPHEN DALYOP PAM (JUDGE)

SUIT NO: FHC/PH/CS/149/2020

BETWEEN

ATTORNEY GENERAL FOR RIVERS STATE == == PLAINTIFF

AND

1. FEDERAL INLAND REVENUE SERVICE
2. ATTORNEY GENERAL OF THE FEDERATION } DEFENDANTS

JUDGMENT

By an Originating Summons dated and filed the 24th September, 2020, the Plaintiff prays this Honourable Court for the determination of the following 4 questions namely:

(i) Whether upon the correct interpretation of the provisions of items 58 and 59, Part I of the Second Schedule of the Constitution, the correct appreciation of the scheme of the Constitution and the residual powers of the States of the Federation to make laws as well as Section 4 (7) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), the Federal Government of Nigeria is entitled to make laws for the purpose of taxation other than for stamp duties, taxation of incomes, profits and capital gains, and if not, whether the 1st Defendant is entitled to enforce and administer laws inconsistent with, or in excess of the powers of the Federal Government of Nigeria to make laws?.

(ii) Whether upon a proper construction and interpretation of the provisions of items 58 and 59 of the Second Schedule Part I (Exclusive Legislative List) of the 1999 Constitution of the Federal Republic of Nigeria 1999 as amended and Item 7 (a) & (b) of Part II (Concurrent Legislative List) of the said Constitution, the legislative competence of the Federal Government of Nigeria through the National Assembly to impose duties and taxes, and to delegate the power of collection of taxes, include the power to levy or impose any form of Sales Tax such as Value Added Tax or any other form of Levy?

(iii) Whether upon a correct interpretation of Items 58 and 59 of Part I and Items 7 and 8 of Part II of the Second Schedule the power of the Federal Republic of Nigeria to delegate the power of collection of taxes can be exercised for the purpose of delegating the duty to any other person other than the government of a State or other authority of a State?

(iv) Whether upon a proper construction of the provisions of Items 58 and 59 of the Second Schedule Part I (Exclusive Legislative List) of the Constitution of the Federal Republic of Nigeria 1999 as amended, items 7 (a) and (b) of Part II (Concurrent Legislative List), of Section 7 (1) and (5) of the Constitution, the Fourth Schedule of the said Constitution, the Taxes and Levies, (Approved List for Collection) Decree No. 21 of 1998 (now Act) is not unconstitutional and void to the extent that it provides for Withholding Tax, Value Added Tax, Education Tax, Capital Gains Tax on non-residents of the Federal Capital Territory Abuja, Pools Betting, Lotteries Gaming and Casino, Road Taxes, Business Premises Registration, Development Levy, Naming of Street Registration, Right of Occupancy Fees, Market Taxes and Levies, Shops and Kiosks Rates, Tenement Rates, On and Off Liquor Licence Fees, Motor Park Levies, Slaughter Slab Fees, Marriage, Birth and Death Registration Fees, Domestic Animal licence Fees, Bicycle, truck, Canoe, Wheelbarrow and Cart Fees other than mechanically propelled truck, Cattle Tax payable by cattle farmers only, Merriment and road closure levy, Radio and television licence fees (other than radio and television transmitter), Vehicle radio licences fees (to be imposed by the Local Government of the State in which the car is registered), Wrongful parking charges, Public Convenience, sewage and refuse disposal fees, Customary burial ground permit fees, and Signboard and Advertisement permit fees?

Upon the determination of the above questions, the Plaintiff seeks from this Honourable Court the following reliefs:

1. A declaration that only the Rivers State Government (represented herein by the Plaintiff on record) or other authority of the State Government is entitled to be bestowed with the powers to collect and to exercise the powers to collect capital gains tax, income or profits tax of persons other than companies within the territory of Rivers State as well as the powers to collect stamp duties on documents or

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transactions within the territory of Rivers State and chargeable under Items 58 and 59 of the Exclusive Legislative List and item 7 of the Concurrent Legislative List of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

2. A declaration that to the extent that any legislation of the Federal Government of Nigeria through the National Assembly, Executive Order or by other means, (including but not limited to, (i) Federal Inland Revenue Service (Establishment) Act, (ii) Personal Income Tax Act, (iii) Value Added Tax Act, (v) Education Tax Act, Taxes and Levies (Approved List for collection) Decree No. 21 of 1998 now Act, among others), purport to delegate the powers to collect the taxes and duties chargeable under items 58 and 59 of the Exclusive Legislative List and item 7 of the Concurrent Legislative List of the Constitution of the Federal Republic of Nigeria 1999 (as amended) within the territory of Rivers State, on individuals or person other than the Rivers State Government, or its authority, the same is unconstitutional, null and void.

3. A declaration that there is no constitutional basis for the imposition of, demand for and collection of Value Added Tax (VAT) Withholding Tax, Education Tax and Technology levy in Rivers State or any other State of the Federation being that the Constitutional powers and competence of the Federal Republic of Nigeria and the Federal Government of Nigeria, represented by the 2nd Defendant, is limited to the taxation of incomes, profits and capital gains which does not include Value Added Tax, Withholding Tax, Education Tax, Technology Levy or any other species of sales tax, or levy other than those specifically mentioned in items 58 and 59 of the Exclusive Legislative List of the Constitution.

4. A declaration that the constitutional powers of the Federal Republic of Nigeria and the Federal Government to impose taxes and duties is limited to the items listed in items 58 and 59 of Part 1 of the Second Schedule of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

5. A declaration that the Taxes and Levies (Approved List for Collection), Decree No. 21 of 1998 now Act, in so far as it purports to legislate in respect of the responsibility for collection of taxes and levies, assessment and collection of taxes other than as provided for under items 58 and 59 of the Exclusive Legislative List of the Constitution of the Federal Republic of Nigeria 1999 (as amended), including the provisions therein in respect of Withholding Tax, Value

Added Tax, Education Tax, Capital Gains Tax on non-residents of the Federal Capital Territory Abuja, Pools Betting, Lotteries Gaming and Casino Tax or Levies, Road Taxes, Business Premises Registration, Development Levy, Naming of Street Registration, Right of Occupancy Fees, Market Taxes and Levies, Shops and Kiosks Rates, Tenement Rates, On and Off Liquor Licence Fees, Motor Park Levies, Slaughter Slab Fees, Marriage, Birth and Death Registration Fees, Domestic Animal Licence Fees, Bicycle, truck, canoe, wheelbarrow and cart fees other than a mechanically propelled truck, Cattle Tax payable by cattle farmer only, Merriment and road closure levy, Radio and television licence fees (other than radio and television transmitter), vehicle radio licence fees (to be imposed by the Local Government of the State in which the car is registered), Wrongful parking charges, Public convenience, sewage and refuse disposal fees, Customary burial ground permit fees, Religious places establishment permit fees, Signboard and Advertisement permit fees, is unconstitutional, null and void.

6. A declaration that only the Rivers State Government is constitutionally entitled to impose taxes enforceable or collectable in the territory of Rivers State of the nature of consumption or sales tax, value added tax, education tax and other taxes or levies other than the taxes and duties specifically reserved for the Federal Government by items 58 and 59 of Part 1 of the Second Schedule of the Constitution of the Federal Republic of Nigeria 1999 (As amended) and as delimited by the provisions of items 7 and 8 of Part II (Concurrent Legislative List) of the Second Schedule of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

7. A declaration that in so far as the Value Added Tax purports to impose, levy or authorize the demand and collection of Value Added Tax by the 1st Defendant or any other agency of the Federal Government represented by the 2nd Defendant, it is unconstitutional, illegal, null and void.

8. A declaration that by virtue of the provisions of items 7 and 8 of the Part II (Concurrent Legislative List) of the Second Schedule of the Constitution of the Federal Republic of Nigeria 1999 (as amended), the power of the Federal Republic of Nigeria and the Federal Government of Nigeria to delegate the collection of taxes can only be exercised for the purpose of delegating the duty of collection of taxes

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to the Government of a State or other authority of a State and no other person.

9. A declaration that all statutory provisions made or purportedly made in the exercise of the legislative powers of the Federal Republic of Nigeria, which contain provisions which are inconsistent with or in excess of the powers to impose tax and duties as prescribed by items 58 and 59 of Part 1 of the Second Schedule of the Constitution or inconsistent or in excess of the power to delegate the duty of collection of taxes as contained in items 7 and 8 of the Part II of the Second Schedule of the Constitution including, but not limited to (i) Federal Inland Revenue Service (Establishment) Act, (ii) Companies Incomes Tax Act (iii) Personal Income Tax Act, (iv) Value Added Tax Act (v) Education Tax Act and National Information Technology Development Agency Act, among others are to the extent of their inconsistency or excessiveness, unconstitutional, null and void.

10. A declaration that the Defendants are not constitutionally entitled to charge or impose levies, charges or rates (under any guise or by whatever name called) on the residents of Rivers State on indeed any State of the Federation.

11. An Order of perpetual injunction restraining the Defendants from demanding, collecting or in manner harassing, threatening and intimidating the residents of Rivers State to pay unconstitutional taxes, levies or charges in the name of purporting to enforce legislations of the Federal Government of Nigeria, including the Federal Inland Revenue Service (Establishment) Act, Companies Income Tax, Value Added Tax Act, Education Tax Act and National Information Technology Development Agency Act among others.

The Plaintiff supported the Originating Summons with an Affidavit Setting out the Facts Relied Upon deposed to by one Isaac O. Kamalu Esq., a Legal Practitioner and the Honourable Commissioner for Finance for Rivers State, Port Harcourt.

The Plaintiff also filed an Affidavit of Non-Multiplicity of Action alongside the Originating Summons. The Originating Summons is accompanied by a Written Address wherein the Plaintiff formulated three issues for determination, thus:

(i) Whether the Federal Republic of Nigeria and the Federal Government of Nigeria are entitled to make laws for the purpose of taxation other than for taxation of incomes, profits and capital gains, and if not, whether the 1st Defendant is entitled to enforce and administer laws inconsistent with, or in excess of the authority of the Federal Republic of Nigeria or the Federal Government of Nigeria to make laws?

(ii) Whether the legislative competence of the National Assembly to impose tax or duties on capital gains, incomes or profits of persons and on documents or transactions by way of stamp duties extends to and includes the power to levy or impose any form of Sales Tax including Value Added Tax or any other form of Levy and if so, whether the power of the Federal Republic of Nigeria to delegate the power of collection of taxes can be exercised for the purpose of delegating the duty to any other person other than the government of a State or other authority of a State?

(iii) Whether the Taxes and Levies (Approved List for Collection) Decree No. 21 of 1998, now Act, in so far as it purports to legislate in respect of the responsibility for collection of taxes and levies, assessment and collection of taxes other than as provided for under items 58 and 59 of the Exclusive Legislative List, (Second Schedule Part 1) and items 7 and 8 of the Concurrent Legislative List (Second Schedule, Part II), is not unconstitutional, null and void?

The Plaintiff also filed a Further Affidavit of 5 paragraphs dated and filed 16th day of July, 2021, in support of the Originating Summons.

In response to the Originating Summons, the 1st Defendant entered an appearance by a Memorandum of Conditional Appearance dated and filed 6thNovember, 2020 and reacted to the substantive suit vide a Counter Affidavit of 17 paragraphs dated and filed 6th November, 2020 and deposed to by one Uchechi (Mrs.), of Plot 456. Alongside the 1st Defendant's Counter Affidavit is a Written Address where in the 1st Defendant adopted the 3 issues for determination formulated by the Plaintiff.

The 1st Defendant's Notice of Preliminary Objection is dated and filed 6thNovember, 2020, it is supported by 13 paragraphs affidavit deposed to by one Brown Uchechi of Plot 465, Mammy Market Road, Off Trans-Amadi Industrial Layout, Port Harcourt. The grounds upon which the application is brought are stated hereunder:

i. That the Plaintiff/Respondent did not issue and serve on the 1st Defendant/Applicant a Pre-action Notice before the commencement of this suit contrary to Section 55 (3-4) of the Federal Inland Revenue Service (Establishment) Act, 2007.

ii. That this suit is an abuse of court process.

iii. That this suit having been commenced by Originating Summons is incompetent.

The Defendant/Applicant's Notice of Preliminary Objection is accompanied by a Written Address wherein the Defendant/Applicant submits the following issues for determination.

a. Whether or not the Plaintiff/Respondent's action as presently constituted is incompetent having regard to the undisputed fact that the Plaintiff/Respondent failed to serve a mandatory pre-action notice on the 1st Defendant/Applicant by virtue of Section 55 (3-4) of the Federal Inland Revenue Service (Establishment) Act, 2007?

b. Whether the Plaintiff/Respondent's Originating Summons in Suit No. FHC/PH/CS/30/2020 and this suit constitute an abuse of court process?

c. Whether this suit is such that should be commenced by Originating Summons?

Furthermore, the 2nd Defendant on its part entered appearance by a Conditional Memorandum of Appearance dated and filed 18th November, 2020 and launched a frontal attack against the Plaintiff's suit vide a Notice of Preliminary Objection dated and filed 18th November, 2020 challenging the competence of the Plaintiff's suit and the jurisdiction of this Honourable Court to hear and entertain this suit as constituted and conceived on the following grounds:

i. That the proper Defendant is not before this Court.

ii. That the subject matter of this suit is not within the jurisdiction of this Honourable Court.

iii. That some of the reliefs sought by the Plaintiff are beyond the jurisdiction of the Federal High Court.

iv. That this court lacks the jurisdiction to hear and determine the Plaintiff's suit as constituted.

The Notice of Preliminary Objection is supported by a Written Address wherein Counsel formulated a lone issue for determination thus:

> Whether the Federal High Court has the jurisdiction to hear and determine this suit as constituted?

The 2nd Defendant filed a Counter Affidavit in opposition to the Plaintiff's Originating Summons of 4 paragraphs deposed to by one Aniekan U. Essiet, of Civil Litigation and Public Law Department, dated and filed 18thNovember, 2020, it is accompanied with a Written Address with 4 questions placed before this Honourable Court for determination to wit:

1. Whether the National Assembly is entitled to make laws for the purpose of taxation other than for taxation of incomes, profits and capital gains as provided for in Items 58 and 59 of the Exclusive Legislative List under Part 1 of the Second Schedule to the Constitution.

2. Whether the Legislative competence of the National Assembly to impose tax or duties on capital gains, incomes or profits of persons and on documents or transactions by way of stamp duties extends to and includes the power to levy or impose any form of Sales Tax including Value Added Tax or any other form of levy.

3. Whether any portion of the Taxes and Levies (Approved List for Collection) Act LFN 2004, is unconstitutional.

4. Whether considering the affidavit evidence placed before this Court by the Plaintiff, the Plaintiff has successfully proved his case to be entitled to the reliefs sought.

The Plaintiff filed a reaction to the 2nd Defendant's Counter Affidavit and Written Address on the Originating Summons, dated 13thNovember, 2020 and filed on 18th November, 2020.

The Plaintiff filed a Counter Affidavit in opposition to the 1st Defendant/Applicant's Notice of Preliminary Objection filed on 6thNovember, 2020, challenging the competence of the Plaintiff's suit of 10 paragraphs deposed to by one Nelson Edet Udoh, a Chief Litigation Officer of No. 1 Okoroma/Njemanze Street, Port Harcourt dated and filed 13th November, 2020 and a Written Address wherein 4 issues for determination of this application thus:

i. Whether the Notice of Preliminary Objection filed by the 1st Defendant/Applicant is competent and cognizable before this Honourable Court?

ii. Whether the requirement of Pre-action Notice in Section 55 (3) of the Federal Inland Revenue Service Act is applicable to the 1st Defendant rather than its Exclusive Chairman, Board Members and other officials specifically named in the sub-section by the statutory provision?

iii. Whether the 1st Defendant/Applicant has made out a proper case and demonstrated that the Plaintiff's suit constitutes an abuse of court process in all the circumstances of this case?

iv. Whether the 1st Defendant/Applicant has demonstrated and shown the existence of substantial or material disputes of facts in this case as to render the Originating Summons procedure unsuitable for the resolution of the issues in this case?

The Plaintiff also filed a reply address in opposition to the 2nd Defendant/Applicant's Notice of Preliminary Objection filed on 18th November, 2020, challenging the jurisdiction of this Honourable Court dated and filed 19th November, 2020 wherein 3 issues arise for determination of this application namely:

i. Whether the Notice of Preliminary Objection filed by the 2nd Defendant/Applicant is competent and cognizable before this Honourable Court?

ii. Whether the subject matter of this suit which borders on constitutional interpretation and taxation, falls within the subject matter jurisdiction of the Federal High Court as to vest the court with the requisite competence and jurisdiction to hear and determine the suit?

iii. Whether the proper parties necessary for the invocation of the jurisdiction of this Honourable Court are before the court and if not, whether the non-joinder or misjoinder of parties is capable of vitiating the suit before this Honourable Court?

The Plaintiff in addition, filed a Reply Address in reaction to the 2nd Defendant's Counter Affidavit and a Written Address on the Originating Summons dated and filed 23rd November, 2020.

The 2nd Defendant filed a Reply on Point of Law to the Plaintiff's response to its Preliminary Objection dated and filed 24th November, 2020.

The 1st Defendant filed Further Counter Affidavit of 18 paragraphs deposed to by one Brown Uchechi dated and filed 25th November, 2020.

The 1st Defendant again filed 1st Defendant's Reply on Points of Law to the Plaintiff's Written Address in opposition to the Notice of Preliminary Objection dated 24th November, 2020 and filed 25th November, 2020.

The 1st Defendant filed a Further Counter Affidavit of 18 paragraphs deposed to by one Brown Uchechi of Plot 465, Trans Amadi Industrial Layout, Port Harcourt dated and filed 25thNovember, 2020 and a Written Address wherein two issues for determination from the three questions placed before this Honourable Court for determination as follows:

1. Whether the National Assembly is entitled to make laws for the purpose of taxation other than the taxation of incomes, profit and capital gains as provided for in Items 58 and 59 of the Exclusive Legislative List under Part 1 of the Second Schedule to the Constitution.

2. Whether the National Assembly is prevented by Item 7 in Part 2 of the Concurrent Legislative List of the Constitution from imposing the duty to collect tax on any other person other than the Government of a State or other authority of a State?

By a Motion on Notice dated and filed on 27thNovember, 2020, the 1st Defendant submitted the under-listed questions:

1. Whether, having regard to the questions for determination raised by the Plaintiff, concerning the validity of the various laws (mentioned by the Plaintiff), which laws were made by the National Assembly and the fact that those laws affect other states in the country, the jurisdiction to entertain the Plaintiff's case is not exclusive to the Supreme Court having regard to the provision of Section 232 (1) of the Constitution of the Federal Republic of Nigeria, 1999 (as altered) and Section 1 (c) of the Supreme Court Additional Original Jurisdiction Act?

2. Whether having regard to Section 4 (1), (2) and (3) of the 1999 Constitution and Items 58, 59, 67 and 68 of the Second Schedule of the 1999 Constitution of the Federal Republic of Nigeria, the powers of the National Assembly to legislate on matters of taxation is limited to Stamp Duties, Taxation of Incomes, profits and Capital Gains Tax as the exclude Value Added Tax from the scope of the legislative competence of the National Assembly?

3. Whether the House of Assembly of a State in the exercise of its legislative powers under Sections 6 and 7 of the 1999 Constitution of the Federal Republic of Nigeria has any constitutional competence to legislate on Value Added Tax, which is a form of Taxation within the scope of items 58, 59, 67 and 68 of the Exclusive Legislative List in the Second Schedule to the 1999 Constitution?

4. Whether having regard to the fact that, Value Added Tax is a Tax element recognized by virtue of Items 58, 59, 67 and 68 of the Second Schedule to the Constitution of the Federal Republic of Nigeria, 1999, the Federal Government of Nigeria in exercise of the legislative powers of the Federation pursuant to Section 4 (1), (2) and (3) and Executive Powers of the Federation pursuant to Section 5 (1) (b) of the 1999 Constitution lacks constitutional competence to impose or levy Value Added Tax and any other similar levies on persons and authorities within Nigeria?

5. Whether having regard to Item 7 (a) and (b) of the concurrent legislative list of the Second Schedule to the Constitution of the Federal Republic of Nigeria, 1999, read in conjunction with the legislative powers of the National Assembly preserved by Section 4 (1), (2) and (3) of the said Constitution, the administration or collection of taxes and duties arising therefrom are to be undertaken only by the Government of a State or other authority of a State and not any other person or authority? and

6. Whether having regard to Section 315 (1) of the 1999 Constitution of the Federal Republic of Nigeria (As Amended), Items 58, 59, 67 and 68 of the Second Schedule Part 1 (Exclusive Legislative List) of the Constitution of the Federal Republic of Nigeria 1999 (As Amended), Items 7 (a) and (b) of Part II (Concurrent Legislative List), Section 7 (1) and (5) of the Constitution and the Fourth Schedule of the Constitution, Provisions of Taxes and Levies (Approved List for Collection) Decree No. 21 of 1998 (now Act) is unconstitutional in so far it provides for Withholding Tax, Value Added Tax, Educational Tax, Capital Gains Tax on non-residents of the Federal Capital Territory Abuja, Pools betting, Lotteries Gaming and Casino, Road Taxes, Business Premises Registration, Development Levy, Naming of Street Registration, Right of Occupancy Fees, Market Taxes and Levies, Shops and Kiosk Rates, Tenement Rates, On and Off Liquor Licence Fees, Motor Park Levies, Slaughter Slab Fees, Marriage, Birth and Death Registration Fees, Domestic Animal Licence Fees, Bicycle, Truck, Canoe, Wheelbarrow and Cart Fees (other than mechanically propelled Truck, Cattle Tax payable by cattle farmers only, Merriment and Road Closure Levy, Road and Television Licence Fees (other than radio and television transmitter), Vehicle

radio licences fees (to be imposed by the Local Government of the State in which the car is registered), Wrongful Parking Charges, Public Convenience, Sawage and Refuse Disposal fees, Customary Burial Ground Permit fees and Signboard and Advertisement Permit fees.

The grounds of the application are:

(i) The issues/questions thrown up in Plaintiff's case relate to the interpretation or application of the provisions of the 1999 Constitution of the Federal Republic of Nigeria (As Amended);

(ii) The question formulated for case stated arose from the core issues in this proceeding;

(iii) The question formulated as case stated involve substantial question of law which admits of more than one interpretation or perception;

(iv) The question stated are fundamental questions which must be resolved in this proceeding;

(v) There is no prior decision of any court on the constitutional validity of Value Added Tax CAP V1, LFN 2004; and

(vi) A resolution of the question formulated as case stated will impact overwhelmingly on the case before this court.

The questions and grounds are supported by 17 paragraphs Affidavit, deposed to by one Uchechi Brown (Mrs.) of Plot 456, Mammy Market Road, Off Trans-Amadi Industrial Layout, Port Harcourt.

The 1st Defendant/Applicant also filed a Written Address wherein the 1st Defendant/Applicant raised a lone question for determination viz:

> Whether this is not an appropriate situation to grant a case stated to the Court of Appeal?

The Plaintiff on its part filed a Counter Affidavit in opposition to 1st Defendant/Applicant's Motion for case stated/reference dated and filed 27th November, 2020. The Plaintiff's Counter Affidavit has 16 paragraphs deposed to by one Dike Udenna of No. 1, Okoroma/Njemanze Street, Port

Harcourt dated and filed 30th November, 2020. The Plaintiff filed a Written Address in opposition to the 1st Defendant/Applicant's Motion on Notice and adopted the lone issue for determination raised by the 1st Defendant/Applicant.

The 1st Defendant filed a Written Address in support of Further Counter Affidavit filed on 30th November, 2020 and raised two issues for determination namely:

1. Whether the National Assembly is entitled to make laws for the purpose of taxation other than the taxation of incomes, profit and capital gains as provided for in items 58 and 59 of the Exclusive Legislative List under Part 1 of the Second Schedule to the Constitution.

2. Whether the National Assembly is prevented by item 7 in Part II of the Concurrent Legislative List of the Constitution from imposing the duty to collect tax on any other person other than the Government of a State or other authority of a State.

The Plaintiff filed a reply to 1st Defendant's Written Address in support of Further Counter Affidavit, dated and filed 27th November, 2020.

The 1st Defendant filed Further Counter Affidavit No. 2 with 9 paragraphs deposed to by one Uchechi Brown (Mrs.) of Plot 456 Mammy Market Road, Off Trans-Amadi Industrial Layout, Port Harcourt dated and filed 27th November, 2020, the 1st Defendant's Further Counter Affidavit No. 2 is accompanied with a Written Address.

The Plaintiff filed a reply address to the 1st Defendant's Written Address in opposition to the 1st Defendant's Further Counter Affidavit No. 2 dated 28th November, 2020 and filed 30th November, 2020.

The Plaintiff filed a Further Counter Affidavit in opposition to the 1st Defendant/Applicant's Motion for case stated/reference dated and filed 27th November, 2020 of 6 paragraphs, a letter marked Exhibit KU1 deposed to by one Jim Brown, JP, Permanent Secretary, Ministry of Finance, Rivers State filed 16th July, 2021, it is accompanied by a Written Address in support of Further Counter Affidavit in opposition to application for referral/case stated.

The 1st Defendant filed a Further Affidavit in support of the application for case stated/reference of 9 paragraphs, deposed to by one Uchechi Brown (Mrs.) of Plot 456, Mammy Market Road, Off Trans-Amadi Industrial Layout, Port Harcourt filed on 22nd July, 2021.

The 1st Defendant filed a Further Counter Affidavit No. 3 in opposition to the Plaintiff's Originating Summons, of 7 paragraphs, deposed to by one Uchechi Brown (Mrs.) of Plot 456, Mammy Market Road, Off Trans-Amadi Industrial Layout, Port Harcourt dated and filed 22nd July, 2021.

The 1st Defendant/Applicant filed a Reply on Points of Law dated and filed 22nd July, 2021.

As I have mentioned earlier, the applications filed in this suit are as follows:

a. Plaintiff's Originating Summons dated and filed the 24th September 2020 (hereinafter referred to as the Originating Summons");

b. 1st Defendant's Notice of Preliminary Objection is dated and filed 6th November 2020.

c. 2nd Defendant's a Notice of Preliminary Objection dated and filed 18th November 2020.

d. 2nd Defendant's Motion on Notice dated and filed on 27th November 2020 for case reference by this Court to the Court of Appeal ("hereinafter referred to as the motion for case reference").

Ideally, this Court ought to hear and determine the motion for case reference first before any other application. However, the respective Defendants' Notices of Preliminary Objection challenge the jurisdiction of this Court to even entertain the matter and it is trite that once an issue of jurisdiction has been raised in a suit, the Court is bound to first determine it before taking any other step in the suit. This is because if a Court does not have jurisdiction to entertain a suit, any proceedings taken by Court in that suit will be a nullity. This position was stated in the case of ***A.G, Kwara State V. Warah* (1995) 7 NWLR (Part 405), pages 126 – 127, paras. B – C**, where the Court held thus:

> ***Jurisdiction forms the very basis of adjudication. It is the fiat, the stamp of authority to adjudicate and if it is***

not there the court's proceedings are nullity. Therefore, once an objection has been raised challenging the jurisdiction of the court to adjudicate over the matter before it, it is mandatory that the court first deals with such objection since it is the outcome of such consideration that will determine whether or not the substantial suit or appeal, as the case maybe, will be considered.

This Court is further emboldened to determine the Notices of Preliminary Objection before the motion for case reference because the Notices of Preliminary Objection were filed before the motion for case reference. While the 1st Defendant's Preliminary Objection was filed on the 6th of November 2020 and the 2nd Defendant's Preliminary Objection on the 18th of November 2020, the motion for case reference was filed on the 27th of November 2020.

It is for this reason that the Court will consider the Defendants' Preliminary Objection before the motion for case reference.

In considering the Defendants' Notices of Preliminary Objection, the Court will consider the 2nd Defendant's Preliminary Objection first before that of the 1st Defendant because while the 2nd Defendant's Preliminary Objection challenges the jurisdiction of this Court to entertain the entire suit, the 1st Defendant's Preliminary Objection primarily challenges the jurisdiction of the Court to entertain the suit against the 1st Defendant even, though, there are traces of challenge to the entire jurisdiction of the Court because the 1st Defendant alleges that the suit is incompetent.

2nd Defendant's Notice of Preliminary Objection

The 2nd Defendant vide its Preliminary Objection challenges the jurisdiction of this Court to entertain the suit on the grounds that the proper defendant is not before the Court and the subject matter falls within the exclusive jurisdiction of the Supreme Court by virtue of Section 1 of the Supreme Court (Additional Jurisdiction) Act.

The 2nd Defendant argued that the National Assembly ought to be the proper defendant in this suit because it is the legislative competence of the

National Assembly to enact some of the tax laws enumerated by the Plaintiff and not the power of the executive arm of government to administer the tax laws. The 2nd Defendant further argued that by reliefs 1 and 2 of the Originating Summons, it is clear that the Plaintiff complaint is against the Federal Republic of Nigeria or Federation and not the Federal Government of Nigeria which is represented by the executive arm of government. The 2nd Defendant relied on the authority of ***A. G. Federation V. A. G. Anambra State* (2018) 6 NWLR (pt. 1615) 314 at 338, paras. G-H**, to buttress its point that the Federal Government of Nigeria and the Federal Republic of Nigeria are not the same. The 2nd Defendant argued that the presence of the question to be determined against the Federal Republic of Nigeria in this suit has removed the suit from the jurisdiction of this Court and ensconced it within the exclusive jurisdiction of the Supreme Court.

Based on the above, the 2nd Defendant urged this Court to decline jurisdiction over the suit and consequently, strike out same.

The Plaintiff filed a Reply Address on the 19th of November 2020 ("the Reply Address") in opposition to the 2nd Defendant's Preliminary Objection.

The Plaintiff submitted 3 (three) issues for the determination of the Preliminary Objection viz:

i. Whether the Notice of Preliminary Objection filed by the 2nd Defendant/Applicant is competent and cognizable before this Honourable Court?
ii. Whether the subject matter of this suit, which borders on constitutional interpretation and taxation, falls within the subject matter jurisdiction of the Federal High Court as to vest the Court with the requisite competence and jurisdiction to hear and determine the suit?
iii. Whether the proper parties necessary for the invocation of the jurisdiction of this Honourable Court are before the Court and if not, whether the non-joinder or misjoinder of parties is capable of vitiating the suit before this Honourable Court?

On issue i, the Plaintiff argued that by Order 26, Rule 2 (1) and 29 Rule 4 of the Federal High Court (Civil Procedure) Rules 2019, the only cognizable way of challenging the jurisdiction of this Court is by way of application which must be made by motion and be supported by an affidavit and written address where the challenge is not based on law alone. The Plaintiff argued that by virtue of the above, a Notice of Preliminary Objection as employed by the 2nd Defendant in challenging the jurisdiction of this Court is not cognizable under the Rules because it is not contemplated by the Rules, thus making the Preliminary Objection incompetent. The Plaintiff further argued that the language of Order 29 is mandatory with the use of the word shall and so the provisions must be obeyed or enforced. The Plaintiff commended several judicial authorities to this Court on this point. The Plaintiff also argued that the provisions of the Rules having expressly provided for application which is by way of motion, the adoption of Notice of Preliminary Objection by the 2nd Defendant is excluded based on the principle of *expressumfacitcessaretacitum*.

On this issue, the Plaintiff also argued that the Preliminary Objection is incompetent because it does not contain any prayer or relief sought by the 2nd Defendant. The Plaintiff argued that it is the law that an application without prayers or reliefs is barren and unworthy of the Court's attention because it is incompetent. The Plaintiff commended the case of ***Okoye & Ors. V. Arueze* (2017) LPELR-42571 (CA) page 4 – 5, paras.** F – D to the Court on this point.

On Issue ii, the Plaintiff argued that the 2nd Defendant has misconstrued the substance of the Plaintiff's case and the nature of the parties and dispute in this case. The Plaintiff argued that its case falls squarely within the subject matter jurisdiction of this Court pursuant to sections 251(1)(a),(b),(p),(q)&(r) of the 1999 Constitution which provides that this Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes or matters in any action or proceeding relating to revenue of the Federation, taxation, and any claim for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal government or any of its agencies and in any matter relating to the operation and interpretation of the constitution in so far as it affects the Federal Government or any of its agencies. The Plaintiff further argued that the cause of action as well as the principal reliefs sought by the Plaintiff are all directed against the Federal Government of Nigeria and its agencies including the 1st Defendant. The Plaintiff argued that the conditions necessary for the invocation of the original jurisdiction of the Supreme Court pursuant to section 232(1) of the 1999 Constitution (as amended) and section 1(c) of the Supreme Court (Additional Originating Jurisdiction) Act are not present in this case because the original jurisdiction of the Supreme Court does not extend to disputes between the Federal and State Governments and agencies of the Federal Government.

On Issue iii, the Plaintiff argued that because the 2nd Defendant is the Chief Law Officer of the of the Federal Government and representative of the Federal Government in this case, the 2nd Defendant is the proper party to sue and there is no need to join the National Assembly to the suit, especially as the 2nd Defendant is also the custodian of the Constitution. The Plaintiff submitted that the subject matter of this suit calls for the interpretation of the provisions of the 1999 Constitution as it relates to the revenue of the federation, taxation, and operation of the tax regime. The Plaintiff argued that being a matter for constitutional and statutory interpretation, the 2nd Defendant who is the Chief Law Officer of the Federation, is the proper party to this suit and not the National Assembly. Finally, the Plaintiff argued that even if the National Assembly is a proper or necessary party to the suit, the non-joinder of the National Assembly cannot vitiate the suit because it is trite that the misjoinder or non-joinder of parties cannot vitiate a suit as the Court is empowered to resolve the issues in controversy as it relates to and affects the parties before it. The Plaintiff commended Order 9, Rule 14 (1) and (2) of the Rules of this Court to the Court on this point.

The 2nd Defendant filed a Reply on Points of Law on 24/11/2020 to the Plaintiff's Response to the Preliminary Objection.

In the Reply, the 2nd Defendant argued that the 2nd Defendant need not file an affidavit in support of the Preliminary Objection because the challenge to the jurisdiction of the Court is based on grounds of law only and not fact. The 2nd Defendant further argued that it would amount to a surplusage for it to state the relief it seeks on the face of the Preliminary Objection because once the court arrives at the conclusion that it lacks the jurisdiction to entertain the suit, the Court can only make one decision which is, striking out the suit. The 2nd Defendant submitted that the absence of an express prayer in the Preliminary Objection that the Court should strike out the matter cannot make the Preliminary Objection incompetent.

The 2nd Defendant also reiterated its position that the only proper defendant to this suit is the National Assembly because the dispute disclosed in the originating summons is between the National Assembly and Rivers State because it is the powers of the National Assembly to enact the laws in question that is being challenged and not the implementation of the laws as passed by the National Assembly. The Plaintiff further argued that there is no way this Court will properly decide this case without making orders against the Federal Republic of Nigeria because the Court is not entitled to choose some issues and decide same and decline jurisdiction to make other pronouncements. The 2nd Defendant urged the Court to discountenance the Plaintiff's entire argument in opposition to the Preliminary Objection and to decline jurisdiction to hear and determine this suit.

Resolution

This Court has taken the pains to reproduce the parties' entire arguments above and I am of the opinion that this Preliminary Objection can be determined with the resolution of the 3 issues raised by the Plaintiff thus:

i. Whether the Notice of Preliminary Objection filed by the 2nd Defendant/Applicant is competent and cognizable before this Honourable Court?
ii. Whether the subject matter of this suit, which borders on constitutional interpretation and taxation, falls within the subject matter jurisdiction of the Federal High Court as to vest the Court with the requisite competence and jurisdiction to hear and determine the suit?
iii. Whether the proper parties necessary for the invocation of the jurisdiction of this Honourable Court are before the Court and if not, whether the non-joinder or misjoinder of parties is capable of vitiating the suit before this Honourable Court?

On Issue i, after a consideration of all the arguments proffered by the parties in respect of this application, the Court is in agreement with the 2nd

Defendant thatsince the Preliminary Objection is founded on issues of law only and not on fact, there is no need for the filing of affidavit in support of the Preliminary Objection. The Preliminary Objection challenges the jurisdiction of the Court to hear the suit primarily on the grounds that the proper defendant is not before the Court and that the subject matter of the suit is within the exclusive original jurisdiction of the Supreme Court. These grounds do not require affidavit evidence to determine because they only require the application of the relevant constitutional or statutory provisions to what is already on record before the Court as disclosed in the originating summons. This Court is of the firm view that a Notice of Preliminary Objection is envisaged by the Rules of this Honourable Court as a mode of making an application before the Court because Order 29, Rule (4) of the Rules specifically provides that an application shall be supported by affidavit and written address where the application is not based on ground of law alone. This presupposes that where the application is based on ground of law alone, it need not be supported by affidavit. It is the law that the mode of making an application to a court where the grounds for the application are on law alone is by way of a Notice of Preliminary Objection which mode the 2nd Defendant has rightly adopted in this case. This Court therefore regards the Plaintiff's argument as to the propriety of the use of a Notice of Preliminary Objection by the 2nd Defendant in bringing this application as misconceived and will disregard same.

Even if a Notice of Preliminary Objection is not cognizable under the Rules of this Court, this Court is of this view that it will not vitiate this application because the Courts have been admonished to as much as possible do away with relying on technicalities at the expense of substantial justice in the adjudication of disputes. Thus, the era of using technicalities to defeat substantial justice has long gone. See the case of **Omisore V. Aregbesola (2015) 15 NWLR (Pt. 1482), page 205**. In all, this Court holds that this application is competentand the Court will consider same on the merits. This issue is therefore resolvedagainst the Plaintiff and in favour of the 2nd Defendant.

On Issue ii, the Court is of the firm view that this suit falls within the subject matter jurisdiction of this Court pursuant to section251(1)(a),(b),(p),(q)&(r) of the 1999 Constitution which provides that this Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes or matters in any action or proceeding relating to revenue of the Federation, taxation, and any claim for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal government or any of its agencies and in any matter relating to the operation and interpretation of the constitution in so far as it affects the Federal Government or any of its agencies. Furthermore, the Court is in agreement with the Plaintiff that the cause of action as well as the principal reliefs sought by the Plaintiff are all directed against the Federal Government of Nigeria and its agencies including the 1st Defendant and all these bring this suit within the jurisdiction of this Court. This Court, thus, resolves this issue against the 2nd Defendant and in favour of the Plaintiff.

On Issue iii, the Court is of the view that this suit is not a challenge to the legislative competence of the National Assembly to enact the statutes subject matters of this suit as alleged by the 2nd Defendant to warrant the joinder of the National Assembly as the proper defendant to this suit. A careful and dispassionate consideration of the Plaintiff's case shows that thesubject matter of this suit is for the interpretation of the provisions of the 1999 Constitution as it relates to the revenue of the federation, taxation, and operation of the tax regime simpliciter and the 1st Defendant which is empowered to administer the referenced tax laws and the 2nd Defendant who is the Chief Law Officer of the Federation are the proper defendants to this suit. The joinder of the National Assembly to this suit as a defendant is uncalled for because this suit does not in any way challenge the competence of the National Assembly to make laws for the Federation. Moreover, even if the National Assembly is a proper or necessary party to this suit, the non-joinder of the National Assembly to this suit will not vitiate the suit because this Court can still determine the suit as it concerns the parties before it as this Court is empowered by law to do. Based on the above, this Court resolves this issue against the 2nd Defendant and in favour of the Plaintiff.

In all, this application is dismissed in its entirety for lacking in merit.

<u>1stDefendant's Notice of Preliminary Objection.</u>

The 2nd Defendant filed a Notice of Preliminary Objection on 6/11/2020. In support of the Preliminary Objection is a 13-paragraph affidavit and a written address.

The gravamen of the Preliminary Objection as disclosed in the affidavit and the written address are that the Court lacks the jurisdiction to entertain the suit because;

a. the Plaintiff failed to serve the 1st Defendant with a pre-action notice as required by Section 55 (3) – (4) of the Federal Inland Revenue Service (Establishment) Act, 2007.
b. The suit is an abuse of court process .
c. The suit is improperly commenced by originating summons considering the allegation and misrepresentation of facts disclosed in the Plaintiff's process.

Attached to the affidavit is a document marked Exhibit FIRS 1.

The 1st Defendant in its written address in support of the Preliminary Objection argued that by section 55 (3) – (4) of the FIRS Act, it is mandatory for the Plaintiff to issue the 1st Defendant with a pre-action notice before commencing this suit against it and that the failure of the Plaintiff to so do renders this suit incompetent and liable to be struck out. The 1st Defendant argued that the FIRS Act provides that the 1st Defendant must be served with a pre-action notice for a suit commenced against the Executive Chairman, a member of the Board, or other officer or employee of the 1st Defendant. The 1st Defendant submitted rather shockingly that the contemplation of section 55 (3) –(4) is that service of originating processes must be effected on the 1st Defendant through the Executive Chairman before any suit commenced against the 1st Defendant can be competent. The 1st Defendant commended the decisions in the cases of ***FHC/ASB/CS/75/19: Dr. Lucky Okparayonte (Trading under the name and style Capitol Hill Clinic/Hospital v Zenith Bank & FIRS*** and ***FHC/IB/CS/85/2019: Michael F. Lana v Federal Inland Revenue Service*** on this point to the Court.

The 1st Defendant also argued that this suit is an abuse of court process because it is a rehash of ***Suit No. FHC/PH/CS/30/2020: Emmanuel Chukwuka Ukala, SAN V. Federal Inland Revenue Service & Anor.***which is still pending before the Federal High Court and awaiting judgment. The 1st Defendant submitted that the Defendants in that suit and the issues therein are the same with those of this suit. The 1st Defendant attached Exhibit FIRS 1, which is a copy of the originating process in ***Suit***

No. FHC/PH/CS/30/2020, to its affidavit to buttress this point. The 1st Defendant argued that the Plaintiff's counsel filed this suit which is similar with of ***Suit No. FHC/PH/CS/30/2020*** ostensibly on the instructions of the Plaintiff and maintained the same defendants and claim. The 1st Defendant submitted that there is a multiplicity of actions on the same subject matter and that the abuse lies in this multiplicity and the manner of the exercise of the Plaintiff's right of action which in this case is aimed at harassing, irritating, and annoying the 1st Defendant and to interfere with the administration of justice. The 1st Defendant urged this Court to dismiss the suit for being an abuse of court process.

The 1st Defendant submitted that originating summons is suitable for initiating actions that involve the interpretation of contract, documents, constitution, and other statutes where matters of facts are not in dispute. The 1st Defendant further argued that originating summons is used for only non-contentious matters and thus where the proceedings are hostile because there are serious disputes or likelihood of a dispute of facts, originating summons is not an appropriate procedure for commencing such actions. The 1st Defendant referred the Court to paragraphs 8, 12, 13, and 15 of the affidavit in support of the originating summons and submitted that those paragraphs contain serious allegations of facts or leave room for conjecture which can only be clarified by calling of oral evidence and cross examination. Finally, the 1st Defendant urged the Court to strike out the suit for being incompetent.

The Plaintiff in opposition to the 1st Defendant's Preliminary Objection filed a counter-affidavit and a written address on 13/11/2020.

The cruxes of the Plaintiff's response to the Preliminary Objection are that:

a. The requirement of service of pre-action notice in section 55 (3)-(4) of the FIRS Act is applicable only in respect of suits commenced against Executive Chairman, a member of the Board, or other officer or employee of the 1st Defendant.

b. This suit is not an abuse of court process because it is not a rehash of ***Suit No. FHC/PH/CS/30/2020.***

c. The Preliminary Objection is defective and incompetent because the affidavit and written address in support of it are defective the 1st Defendant re-constituted or mis-constituted the parties to this suit in the heading of the affidavit and written address by joining the Attorney General of the Federation as the Plaintiff and also as the 2nd Defendant to this suit without the leave of this Court.

The Plaintiff formulated 4 (four) issues for the determination of the Preliminary Objection in its written address, viz:

i. Whether the Notice of Preliminary Objection filed by the 1st Defendant/Applicant is competent and cognizable before this Honourable Court?
ii. Whether the requirement of pre-action notice in section 55(3) of the Federal Inland Revenue Service Act is applicable to the 1st Defendant rather than its Executive Chairman, Board Members and other officials specifically named in the sub-section by the statutory provision?
iii. Whether the 1st Defendant/ Applicant has made out a proper case and demonstrated that the Plaintiff's suit constitutes an abuse of court process, in all the circumstances of this case?
iv. Whether the 1st Defendant/ Applicant has demonstrated and shown the existence of substantial or material disputes of facts in this case as to render the Originating Summons procedure unsuitable for the resolution of the issues in this case?

On Issue i, the Plaintiff argued that by Order 26, Rule 2 (1) and 29 Rule 4 of the Federal High Court (Civil Procedure) Rules 2019, the only cognizable way of challenging the jurisdiction of this Court is by way of application which must be made by motion and be supported by an affidavit and written address where the challenge is not based on law alone. The Plaintiff argued that by virtue of the above, a Notice of Preliminary Objection as employed by the 2nd Defendant in challenging the jurisdiction of this Court is not cognizable under the Rules because it is not contemplated by the Rules, thus making the Preliminary Objection incompetent. The Plaintiff further argued that the language of Order 29 is mandatory with the use of the word shall and so the provisions must be obeyed or enforced. The

Plaintiff commended several judicial authorities to this Court on this point. The Plaintiff also argued that the provisions of the Rules having expressly provided for application which is by way of motion, the adoption of Notice of Preliminary Objection by the 2nd Defendant is excluded based on the principle of *expressumfacitcessaretacitum*.

On this issue, the Plaintiff further argued that the re-constitution or mis-constitution of the parties in the affidavit and written address in support of the Preliminary Objection by the 1st Defendant without the leave of this Court renders the affidavit and written address incompetent. The Plaintiff argued that the unilateral inclusion of the Attorney General of the Federation as the Plaintiff rather than the Attorney General of Rivers State in the affidavit and written address is fatal to the competence of the processes. The Plaintiff submitted that the law is settled that a party is not entitled to unilaterally re-constitute the parties to a case in any of the processes and where a party does so, the process is vitiated and is rendered incompetent. The Plaintiff commended the case of ***C. B. N. v Linas International Ltd.* (2018) LPELR-44819 (CA) pages 20 – 23, paras. B –** Eto the Court on this point. The Plaintiff further argued that a party cannot be both a plaintiff and a defendant in the suit or process and where this occurs, the process is vitiated for mis-constitution of parties. The Plaintiff commended the case of **John V. Terna & Anor. (2018) LPELR-46396 (CA), page 13, paras. D – F**, to the Court on this point. The Plaintiff also submitted that defectiveness of the affidavit and written address means that the PO is bereft of an affidavit and written address in support and that this renders the PO incompetent, incurably bad, and unarguable.

On Issue ii, the Plaintiff argued that by the wordings of section 55 (3) of the FIRS Act, it is clear that the provisions of that section are not applicable to suits filed against the 1st Defendant in its corporate name or as an institution but rather to suits or claims filed against the Executive Chairman, Board Members and other officials or employees of the 1st Defendant. The Plaintiff argued that the provisions of section 55(3) of the FIRS Act are clear and easy to comprehend and so there is no need for esoteric construction or resort to external aid for its interpretation. In order words, the Plaintiff urged the Court to give the provisions theirordinary and literal meaning. The Plaintiff provided several statutes in its written address where the lawmakers specifically provided for issuance of pre-action notice against the statutory bodies before the filing of suits against those bodies for comparison with the provisions of the FIRS Act.

On Issue iii, the Plaintiff argued that this suit is not an abuse of court process the 1st Defendant has failed to show that the Plaintiff filed the suit in bad faith. The Plaintiff argued that the mere pendency of two separate suits between the same parties over the same or similar subject matters, without more, will not give rise to an abuse of court process in the absence of bad faith. The Plaintiff submitted that the Plaintiff has filed this suit in the exercise of its right under section 6(6)(b) of the 1999 Constitution for the determination of its civil rights and obligations and that the exercise of this right cannot be classified as an abuse of court process unless and until bad faith is established which the 1st Defendant has failed to establish. The Plaintiff argued that the Plaintiff is not a party to ***Suit No. FHC/PH/CS/30/2020*** and that the facts, issues, and subject matter of the two suits are clearly not the same.

On Issue iv, the Plaintiff argued that there are no material dispute of facts between the parties in this suit because the suit calls for the interpretation of constitutional and statutory provisions only. The Plaintiff further argued that even if there is a factual dispute, it still will not derogate from the use of the originating summons procedure because the dispute is not material or substantial. Finally, the Plaintiff argued that the consequence of disputed facts in an originating summons is not invalidation of the suit or divestment of the jurisdiction of the Court to hear the suitbut it is for the Court to order pleadings to be filed by the parties. In all, the Plaintiff urged the Court to dismiss the PO for incompetence and lacking in merit.

Resolution

Without much ado, this Court will adopt the issues formulated by the Plaintiff which in the Court's opinion are apt for the determination of the Preliminary Objection.

On issue i, It is without doubt that the 1st Defendant has unilaterally included or imposed the Attorney General of the Federation as the Plaintiff in the affidavit and written address in support of the Preliminary Objection without the leave of the Court, thus, re-constituting or mis-constituting the parties in this suit. As rightly submitted by the Plaintiff's counsel, the law is trite that a party is not entitled to unilaterally effect a change in the names of the parties who are on record in the proceedings before a court. The consequence of effecting such a change is to render the affected process incompetent and liable to be struck out as held by the Court of Appeal in the case of ***C. B. N. V. Linas International Ltd. (supra).***

In this case, the affected processes are the affidavit and written address in support of the Preliminary Objection and pacing reliance on the authority of ***C. B. N. V. Linas International Ltd. (supra),*** I hold that the processes are liable to be struck out and are hereby struck out. The Court must state at this point that if it was only the affidavit that was affected by the unilateral reconstitution or mis-constitution of parties, it would not have been fatal to the Preliminary Objectionbecause a Notice of Preliminary Objection does not require an affidavit in support to be competent. Unfortunately, in this case, the written address is also affected and has been struck out above, thus, rendering the Preliminary Objection bereft of a written address. The Preliminary Objection is bare and has nothing to lean on by way of legal arguments and thus, must also be struck out for being incompetent and incurably defective. I, therefore, also strike out the Preliminary Objection in its entirety for being incompetent and incurably defective.

However, this Court will proceed to consider the other issues raised by the Plaintiff for the determination of this application.

On Issue ii, the wordings of section 55 (3) of the Federal Inland Revenue (Establishment) Act 2007 ("FIRS Act") are clear and unambiguous as to the fact that it is only when the Executive Chairman, a member of the Board, or any other officer or employee of the Service is to be sued that a Pre-Action Notice should be served on the Service. There is nowhere in that section or any other provision of the FIRS Act where it is stated or can be insinuated that a Pre-Action Notice should be served on the Service where a person intends to sue the Service.

The law is clear that words should be given their ordinary and literal meaning.

It should also be noted that this Court is not bound to follow the decisions of the Courts in ***FHC/ASB/CS/75/19: Dr. Lucky Okparayonte (Trading under the name and style Capitol Hill Clinic/Hospital V. Zenith Bank &***

FIRS and ***FHC/IB/CS/85/2019: Michael F. Lana V. Federal Inland Revenue Service*** cited by the 1st Defendant in its written address in support of the PO where the courts stated that a Plaintiff is bound to serve the Service with PN before the Plaintiff can sue the Service. The Court is also not bound to follow the decision in ***Suit No. FHC/PH/CS/30/2020: Emmanuel Chukwuka Ukala, SAN V. Federal Inland Revenue Service & Anor.*** where the Court held that a Plaintiff is not required to serve the Service with PN before the Plaintiff can sue the Service.

The Court is not bound to follow the above-mentioned decisions because they are decisions of Courts of coordinate jurisdiction, thus, making the decisions merely persuasive on this Court. However, this Court is persuaded by the decision in the ***FHC/PH/CS/30/2020*** because it accords more with the provisions of 55 (3) of the FIRS Act.

On Issue iii, it is the Court's view that this suit is not an abuse of court process for multiplicity of suits because the conditions for abuse of court process for multiplicity are lacking.

In ***Ikechukwu V. Nwoye & Anor.*** **(2013) LPELR-20349 (CA) pages 40 – 42, paras. D – C**, the Court of Appeal per Agim JCA held that:

> ***An abuse of the process of court by multiple suits can be said to exist, only if, the parties, the subject matters and the issues or questions in the two suits are the same, the first suit is still pending and yet to be conclusively determined, and the second suit is brought in bad faith and is vexatious and oppressive....***

It is clear that the Plaintiff (Emmanuel Chukwuka Ukala, SAN) in ***Suit No. FHC/PH/CS/30/2020*** and the Plaintiff in this suit (Attorney General for Rivers State) are not the same, though, the Defendants are the same. Thus, the first condition of "*same parties*" has not been fulfilled.

Also, while the subject matter in FHC/PH/CS/30/2020 is primarily a challenge to the power of the Service to conduct a tax audit on the Plaintiff in that suit in an attempt to collect VAT and other named levies from his law firm, the subject matter in this present action is primarily a challenge to the powers of the Federal Government of Nigeria to impose, demand, and collect taxes outside the limits of the powers granted to it under the 1999 Constitution. So, the second condition of "*same subject matter*" is also absent.

Though, some of the issues in the present suit are similar to the issues in FHC/PH/CS/30/2020, there are still issues present in this suit that were not in FHC/PH/CS/30/2020 and vice versa.

From the foregoing, it is clear that the conditions for abuse of court process for multiplicity of actions is not present in this suit and, thus, the suit is not an abuse of court process. Moreover, judgment has been delivered in FHC/PH/CS/30/2020 and so, it is no longer pending.

On Issue iv, this Court is of the firm view that this suit is competent because the issues in the suit involve the interpretation or application of the provisions of the 1999 Constitution and other tax statutes. The issues canvassed by the parties are primarily issues of law and no substantial issue of fact has arisen in this suit to make the suit incompetent to be heard by originating summons. However, if there are issues of facts that require clarification, the Court can call the deponents to the affidavits and counter affidavits filed to appear before it to be cross-examined on those facts.

Even if this suit cannot be heard by originating summons, it does not make it incompetent warranting a striking out of the suit as prayed by the 1st Defendant. The court can only ask that parties file pleadings and the court can hear the suit like a suit commenced by writ of summons.

In all, this Court strikes out this Preliminary Objection for being incompetent and lacking in merit.

Motion for case reference

The 1st Defendant filed a motion on notice on 27/11/2020 asking the Court to state certain questions to the Court of Appeal pursuant to section 295 (2) of the 1999 Constitution. In support of the motion is an affidavit of 17 paragraphs and a written address.The 1st Defendant also filed a further affidavit on 22/7/2021 in support of the motion.

The 1st Defendant argued in its written address that the questions formulated for reference to the Court of Appeal involve substantial issues of law just as they relate to the interpretation or application of the constitution and that the questions arose in the proceedings before this Court. The

Plaintiff further argued that the resolution of the questions sought to be referred to the Court of Appeal will impact on the fortune of the Plaintiff's case in this suit and that, the reference, if granted and the questions answered by the Court of Appeal, will expedite the determination of this suit. The Plaintiff also submitted that there is no judicial precedence on the constitutional validity of the Value Added Tax Act, Cap. V1, LFN 2004 and the jurisdiction of this Court where the validity of several laws are being canvassed, hence, the need to make a reference to the Court of Appeal to answer the questions being sought to be referred.

The Plaintiff, in response, to the motion for case reference filed a counter-affidavit of 16 paragraphs and a written address. The Plaintiff also filed a further counter-affidavit and a written address in support of the further counter-affidavit in opposition to the motion for case reference on 16/7/2021. Attached to the further counter-affidavit is a document marked Exhibit "KU1". The gravamen of the Plaintiff's response to the motion is that:

a. The questions formulated by the 1st Defendant for reference to the Court of Appeal cover the entirety of the Plaintiff's case in this suit and are the same as the subject matter of this suit;
b. None of the questions formulated by the 1st Defendant for reference arose in the course of the proceedings in this suit or *ex tempore/ex improviso* to warrant a reference to the Court of Appeal;
c. In the event that this application is granted, and the Court of Appeal answers the questions formulated for reference, there would be nothing left for this Court to determine thereafter; and
d. This application is an attempt by the 1st Defendant to transfer this suit in its entirety to the Court of Appeal for adjudication.

The Plaintiff is in agreement with the 1st Defendant that by section 295 (2) of the 1999 Constitution, this Court is empowered to state a case or refer a question to the Court of Appeal for determination. However, It is the Plaintiff's contention that the conditions for the grant of an application for case reference have not been fulfilled. These conditions are that the reference must:

(i) involve a substantial question of law;
(ii) relate to or concerns the interpretation or application of the Constitution; and
(iii) must have arisen in the proceedings before the court.

The Plaintiff urged the Court to take judicial notice of the state of the case as the time the 1st Defendant filed this application. The Plaintiff submitted that parties were yet to conclude filing their respective processes in this suit when the 1st Defendant filed the application because the Plaintiff was yet to respond to the processes filed by the 1st Defendant in opposition to the originating summons. The Plaintiff further argued that the provisions of section 295 (2) of the 1999 Constitution do not allow for reference where:

a. It would result in the higher court taking over and determining the questions which call for determination in a suit and leaving the lower court from which the reference emanated with nothing to decide any longer;

b. The same questions in the suit are the same questions sought to be referred or submitted as case stated; and/or

c. The question(s) for case stated has/have not arisen in the course of proceedings, *ex tempore/ ex improviso*.

The Plaintiff commended the cases of **Gamioba V. Esezi II & Ors. (1961) I All NLR 584** and **Alhaji Atiku Abubakar V. A-G, Federation &Ors. 3 PLR/2007/23 (SC)** to this Court to buttress its arguments.

The Plaintiff argued that the questions formulated for reference have not arisen in the course of the proceedings in this suit *ex tempore/ ex improvise* and that what the 1st Defendant seeks to achieve by this application is to transfer the entire suit to the Court of Appeal for adjudication. The Plaintiff further argued that if the reference is made to the Court of Appeal, by the time the Court of Appeal is done answering the questions referred, there would be nothing left for this Court to determine thereafter and this is not the intendment of section 295 (2) of the 1999 Constitution. In all, the Plaintiff urged the Court to dismiss this application with substantial cost.

<u>Resolution</u>

As earlier stated in this judgment, ideally, this Court ought to hear and determine this motion for case reference first before any other application. However, the respective Defendants' Notices of Preliminary Objection challenge the jurisdiction of this Court to even entertain the matter and it is trite that once an issue of jurisdiction has been raised in a suit, the Court is bound to first determine it before taking any other step in the suit. This is because if a Court does not have jurisdiction to entertain a suit, any proceedings taken by the Court in that suit will be a nullity. It is for this reason that this Court is considering the application now, the Court having arrived at the decision that it has the jurisdiction to hear this suit.

In the determination of this application, the Court will adopt the lone issue formulated by the parties in their respective written addresses, viz:

> ***Whether this is not an appropriate situation to grant a case stated to the Court of Appeal.***

The Court having considered all the affidavit evidence and legal submissions proffered by the parties in respect of this application is of the firm view that the conditions for case stating or case reference to the Court of Appeal have not been fulfilled to warrant the grant of this application. It is not in doubt that the questions formulated by the 1st Defendant for reference to the Court of Appeal did not arise in the course of the proceedings in this suit before this Court because the parties were yet to conclude filing their respective processes in respect of this application before this application was filed. This application was filed on 27/11/2020, parties were still filing processes in respect of the originating summons up till the 22/7/2021. This presupposes that all the issues to be decided by this Court in respect of the originating summons had not crystallised as at the time this application was filed on 27/11/2020. Thus, it was premature for the 1st Defendant to file this application.

A careful look at the questions sought to be referred will show that the questions cover almost the entirety of the case before this Court so that one wonders what would be left for this Court to determine if this application is granted and the Court of Appeal answers the referred questions. It is not in doubt that the aim of this application is to transfer this suit to the Court of Appeal for adjudication which this Court will not allow. Relying on the authority of ***Alhaji Atiku Abubakar V. A-G, Federation & Ors (supra)*** where the Supreme Court estopped the Court of Appeal from transferring the subject matter of the suit before it by way of reference to the Supreme Court for adjudication.

Also, this Court has not heard or determined any of the issues arising in this proceedings as to determine if the questions formulated for reference are such that cannot be determined by this Court and will thus, require them to be referred to the Court of Appeal for determination. The question that would have been worthy of reference to the Court of Appeal among the questions formulated for reference by the 1st Defendant is question No. 1 which borders on the jurisdiction of this Court to entertain this suit. However, that question has already been answered by this Court in the determination of the 2nd Defendant's Preliminary Objection above.

In all, this Court resolves this issue against the 1st Defendant and in favour of the Plaintiff. Consequently, this Court dismisses this application in its entirety for lacking in merit.

Originating Summons

As earlier stated, the Plaintiff brought this suit vide an originating summons filed on 24/09/2020 praying the Court for the determination of the 4 questions and for the grant of 11 (eleven) reliefs. The originating summons is supported by a 16-paragraph affidavit and a written address.The Plaintiff also filed a further affidavit dated 16/7/2021 in support of the originating summons and a Reply Address to the 1st Defendant's Written Address in Support of the 1st Defendant's Further Counter Affidavit N. 2 on 30/11/2021. In response to the 1st Defendant's counter-affidavit and written address, the Plaintiff filed a Reply Address on 13/11/2020 and also filed a Reply to the 1st Defendant's Written Address in Support of the 1st Defendant's Further Counter-Affidavit.

The Plaintiff's case as can be gleaned from the entirety of the Plaintiff's filed processes is that by virtue of Items 58 and 59 of the Second Schedule, Part I of the 1999 Constitution, the Federal Government of Nigeria lacks the powers to impose and collect taxes outside stamp duties and taxation of incomes, profits, and capital gains. The Plaintiff argued that the Federal Government can only make law on, demand, and collect duties and taxes in relation to the incomes, profits and capital gains and that the powers of agencies of the Federal Government like the 1st Defendant is limited to the administration of these taxes only. It is also the Plaintiff's case that the imposition of taxes such as Value Added Tax (VAT), withholding tax, education tax, and technology taxby the Federal Government are ultra vires the constitutional powers of the Federal Government and therefore null and void. The Plaintiff further argued that even in the exercise of its powers to impose any tax or duty on capital gains, incomes or profits of persons other than companies, and on documents or transactions by way of stamp duties, the Federal Government is not permitted to delegate its power to collect such tax or duty on any other person except the Government of a State or any other State authority.The Plaintiff further submitted that any exercise of power by the Federal Government to impose duties or tax beyond the scope delimited to it by the 1999 Constitution is unconstitutional, null and void. The Plaintiff also stated that the 1stDefendant is aware that the Federal Government is not empowered to collect VAT and that is why the wrote a letter dated the 1st of July 2020 (Exhibit "KU1") to the National Assembly to allow the 1st Defendant sponsor a Bill to amend the 1999 Constitution to insert VAT as an additional item in Item 58 of the Exclusive Legislative List.

The Plaintiff relied on a plethora of authorities in its arguments. Some of the authorities relied on by the Plaintiff are:

A. G. Abia State V. A. G. Federation (2006) All FWLR (Pt. 338) 604.

A. G. Lagos V. A. G. Federation (2003) FWLR (Pt. 168) 909.

S. A. Authority V. Regional Tax Board (1970) LPELR-2967 (SC) 15.

FBIR V. Integrated Data Service Ltd (2009) LPELR-8191 (CA) 18.

N. D. P. V. INEC (2012) 14 NWLR (Pt. 1319) 176 at 193.

Orakul Resources Ltd V. Nigerian Communications Commission (2007) All FWLR (Pt. 390)

Udoh V. Orthopaedic Hospitals Management Board (1993) 7 NWLR (Pt. 304) 139

A. G. Ogun State V. Aberuagba (1985) I NWLR (Pt. 3) 395

Adisa V. Oyinwola (2000) LPELR-186(SC) at 74 – 75

Ugboji V. State (2017) LPELR-43427 (SC) 23.

The 1st Defendant's case

The 1st Defendant in response to the originating summons filed a counter-affidavit and written address on 6/11/2020, a further-affidavit on 25/11/2021 and written address both on the 30/11/2020, a further counter-affidavit No. 2 and a written address both on 27/11/2020.

The 1st Defendant's case as can be gleaned from all the 1st Defendant's filed process is that from a community reading of Sections 4(1)-(4) (a) & (b), 315(1) (a), 318 (1), and Items 62, 67, and 68 of the Second Schedule, Part I of the 1999 Constitution, and Sections 1, 2(a) of Part 3 (Supplemental and Interpretation) of the 1999 Constitution, the National Assembly has expansive powers to enact legislations to cover all the referenced taxes in the originating summons. The 1st Defendant argued that the provisions of Items 58 and 59 of the Second Schedule of the 1999 Constitution cannot override the provisions of sections of the 1999 Constitution and submitted that where there is a conflict or contradiction between the schedule and a section of an enactment, section prevails. The 1st Defendant argued that the Court is duty-bound to interpret the 1999 Constitution is such a manner that the obvious ends of the Constitution will not be defeated and that the Court should construe the provisions of the Constitution with the intention of promoting good governance and welfare of all persons in Nigeria on the principle of freedom, equality and justice.

The 1st Defendant further argued that withholding tax, technology tax and education tax are taxes on the incomes of the taxable persons and so are fall within the purview of Item 59 of the Second Schedule. The 1st Defendant also submitted that the Federal Government is constitutionally empowered to delegate persons other that State Governments and State Government authorities like individuals, enterprises, incorporated and unincorporated entities to be tax collecting and remitting agents. The 1st Defendant further argued that VAT is centrally administered by the Federal Government through the FIRS in collaboration with the Nigerian Customs Service and the various states' Inland Revenue Services with about 50% of the accrued tax given to the states, 35% to the local governments, and a meagre 15% to the Federal Government. The 1st Defendant argued that the Plaintiff is a major beneficiary of the net VAT proceeds and should not be allowed by the Court to be approbating and reprobating at the same time.

The 1st Defendant further argued that the Taxes and Levies Act, though promulgated by the military government, is an existing law by virtue of section 315 (4) (b) of the 1999 Constitution and remains valid. The 1st Defendant argued that the Plaintiff's grouse with the Taxes and Levies

Act is that it was promulgated by the military government and that the Plaintiff has not pointed out the particular provisions of the Act that are inconsistent with the 1999 Constitution. The 1st Defendant urged the Court to dismiss the suit with heavy costs against the Plaintiff.

The 1st Defendant relied on the following authorities for its submissions:

A. G. Lagos State V. A. G. Federation (2014) 9 NWLR (Part 1412), page 217.

Attorney General of Lagos State V. Eko Hotels Ltd . (2018) NWLR, (Part 1619), page 518.

Mcfoy v UAC (1961) 3 WLR 1405.

A. G. Anambra State & 13 Ors. V. A. G. Federation & 16 Ors. (1993) 6 NWLR (Part 302), page 692.

Musa V. INEC (2002) 11 NWLR, (Part 778), page 223.

Adesanya V. The President, Federal Republic of Nigeria (1981) 2 NCLR, page 358.

Akintokun V. LPDC (2014) 13 NWLR, page 1

Attorney General of Kaduna State V. Hassan (1985), 2 NWLR, page 483

Olafisoye V. FRN (2004), 4 NWLR, (Part 864), page 580

Almaseer Law Firm V. FIRS (2019) 12 NWLR, (Part 1687), page 555

Osadebey V. A. G. Bendel State (1991) 1 NWLR (Part 169), page 525.

<u>The 2nd Defendant's case</u>

In opposition to the originating summons, the 2nd Defendant filed a counter-affidavit and written address on 18/11/2020.

The 2nd Defendant's case as gathered from its processes is that the powers of the Federal Government as regards taxation is not limited to Items 58 and 59 of the 2nd Schedule and that the National Assembly is constitutionally empowered to enact laws. Imposes taxes, duties and rates other than on corporate bodies within Rivers State. The 2nd Defendant argued that the Federal Government has not imposed any tax, levy, or beyond its constitutional powers and that VAT, withholding tax, education tax, and technology tax are within the legislative competence of the National Assembly. The 2nd Defendant further submitted that the Plaintiff lacks the powers to VAT, withholding tax, education tax, and technology tax.

The 2nd Defendant argued that by Items 58, 59, 67, and 69 of the Second Schedule, the National Assembly is given very wide powers to enact laws on taxation. The 2nd Defendant further argued that by Items 67 and 68 of the Second Schedule, the National Assembly has the powers to impose any tax connected to all the items in the Exclusive Legislative List and that these taxes include VAT, withholding tax, education tax, and technology tax. The 2nd Defendant argued that these taxes were rightly imposed by the National Assembly and are validly administered by the 1st Defendant.

The 2nd Defendant submitted that by Item 8 of the Second Schedule, the National Assembly has the power to delegate administer the referenced taxes even if it delegates such power to the State Government or any other agency. The 2nd Defendant further submitted that by the doctrine of covering the field, if any law made by the National Assembly is inconsistent any law validly made by the National Assembly, the latter will prevail, and the former shall, to its inconsistency, be void.

The 2nd Defendant argued that the Plaintiff cannot make laws that is inconsistent with a law enacted by the National Assembly which relates to taxation provided for in the Concurrent Legislative List, Part II, Second Schedule of the 1999 Constitution. The 2nd Defendant further argued that except for taxes and levies provided for in Item 9, Part II, Second Schedule of the 1999 Constitution, the Plaintiff or its House of Assembly cannot validly challenge the powers of the National Assembly which is exercised in consonance with Items 7 and 8, Part II, Second Schedule of the 1999 Constitution. The 2nd Defendant also contended that there is no provision of the Taxes and Levies Act that is unconstitutional. The 2nd Defendant further submitted that the superior courts having upheld the constitutionality of the Taxes and Levies Act, this Court is duty-bound not to decide otherwise by the doctrine of judicial precedent. In all, the 2nd Defendant urged the Court to dismiss this suit and award punitive and aggravated cost against the Plaintiff.

The 2nd Defendant relied on the following cases in support of its legal submissions:

A. G. Bendel V. AGF (1998) 4 S. C. N. J. 167

A. G. Lagos State V. A. G. Federation &Ors. (2003) LPELR-620 (SC)

Attorney General of Ogun State V. Alhaja Ayinke Aberuagba & Ors. (1985) LPELR-3164(SC)

MTV V. Abia State Govt. &Ors (2019) LPELR-46652(CA), pages 25 – 37

Peace Mass Transit Ltd. V. FCT &Ors. (2014) LPELR-23740(CA)

Eti-Osa LG V. Jegede & Anor. (2007) LPELR-8464(CA), pages 13 – 17

Nigerian Agip Oil, Co, Ltd. V. Delta State Environmental Protection Agency (2019) LPELR-46825(CA)

F. U. T. Minna V. Olutayo (2018) 7 NWLR (Pt. 1617) 176

Nwaogu V. Atuma (2013) Vol. 221 LRCN (Pt. 2)

Resolution

As a preliminary point, the Court has observed that the Plaintiff and 1st Defendant have engaged in a war of affidavit and counter-affidavits in this suit. The 1st Defendant filed a counter-affidavit and 2 (two) other further counter-affidavits in opposition to the originating summons. The Plaintiff apart from its affidavit in support of the originating summons, also filed a further affidavit in support of the originating summons. The Plaintiff and the 1st Defendant have also raised objections to certain paragraphs of their respective affidavits and counter-affidavits asking this Court to strike them out for being offensive to section 115 of the Evidence Act.

It is pertinent to note at this juncture that this issues in this suit are very straightforward and require minimal affidavit evidence because the suit primarily calls for the interpretation of certain provisions of the 1999 Constitution and other referenced statutes. The issues in contention are mainly of law and not of facts, therefore, this Court will not belabour itself dealing with the objections to the objections to the affidavits when the depositions in those affidavits and counter-affidavits have little or no relevance to the determination of this suit.

However, if in the course of this judgment, there is need for the Court to comment on the competence of the affidavits and counter-affidavits or some paragraphs thereof, this Court will not hesitate to do so.

The Court will adopt the issues set out by the Plaintiff in the determination of this suit, viz:

(i) Whether the Federal Republic of Nigeria and the Federal Government of Nigeria are entitled to make laws for the purpose of taxation other than for taxation of incomes, profits and capital gains, and if not, whether the 1st Defendant is entitled to enforce and administer laws inconsistent with, or in excess of the authority of the Federal Republic of Nigeria or the Federal Government of Nigeria to make laws?

(ii) Whether the legislative competence of the National Assembly to impose tax or duties on capital gains, incomes or profits of persons and on documents or transactions by way of stamp duties extends to and includes the power to levy or impose any form of Sales Tax including Value Added Tax or any other form of Levy and if so, whether the power of the Federal Republic of Nigeria to delegate the power of collection of taxes can be exercised for the purpose of delegating the duty to any other person other than the government of a State or other authority of a State?

(iii) Whether the Taxes and Levies (Approved List for Collection) Decree No. 21 of 1998, now Act, in so far as it purports to legislate in respect of the responsibility for collection of taxes and levies, assessment and collection of taxes other than as provided for under items 58 and 59 of the Exclusive Legislative List, (Second Schedule Part 1) and items 7 and 8 of the Concurrent Legislative List (Second Schedule, Part II), is not unconstitutional, null and void?

On Issue (i),a careful look at the case of the Plaintiff will show that by this suit, the Plaintiff is challenging the power of the Federal Government of

Nigeria to impose and collect taxes outside Items 58 and 59 of Part I, Second Schedule of the 1999 Constitution. Items 58 and 59 provide thus:

> *58. Stamp duties.*
>
> *59. Taxation of incomes, profits and capital gains, except as otherwise prescribed by this Constitution.*

The Plaintiff argued that the power of the Federal Government to impose and collect tax is limited to the specie of taxes provided in Items 58 and 59 reproduced above and any exercise of taxation powers by the Federal Government beyond the taxes and levies listed in Items 58 and 59 of Part I of the Second Schedule is unconstitutional, ultra vires, null and void. Based on this contention, the Plaintiff further argued that taxes like VAT, withholding tax, education tax, and technology tax are beyond the scope of Items 58 and 59 of Part I of the Second Schedule and are, therefore, unconstitutional. The Defendants have argued otherwise.

The 1st Defendant has forcefully argued that by a conflation of Sections 4(1) – (4) (a) & (b), 315 (1) (a), 318 (1), and Items 62, 67, and 68 of the Second Schedule, Part I of the 1999 Constitution, and Sections 1, 2(a) of Part 3 (Supplemental and Interpretation) of the 1999 Constitution, the National Assembly has expansive powers to enact legislations to cover all the referenced taxes in the originating summons. The 2nd Defendant who appears not to appreciate the case of the Plaintiff has argued that the National Assembly having enacted laws on which relates to taxation provided for in the Concurrent Legislative List, Part II, Second Schedule of the 1999 Constitution, the Plaintiff cannot make laws that is inconsistent with a law enacted by the National Assembly. With due respect to the 2nd Defendant, the Plaintiff has not purported to make any law on the referenced heads of taxes so the question of the inconsistency of such law with the federal enactment does not arise in this case. The Plaintiff has merely challenged the powers of the Federal Government to impose and collect taxes outside the scope of Items 58 and 59 of Part I of the Second Schedule.

Coming to the 1st Defendant's argument, the Court has carefully looked through Sections 4(1)–(4) (a) & (b), 315 (1) (a), 318 (1), and Items 62, 67, and 68 of the Second Schedule, Part I of the 1999 Constitution, and Sections 1, 2 (a) of Part 3 Supplemental and Interpretation of the 1999 Constitution to see where the Federal Government is given wide powers to make tax laws beyond the limits of Items 58 and 59 of Part I of the Second Schedule as argued by the 1st Defendant, but the Court can find none.

The law is trite that words should be given their ordinary and literal meaning. Where the words of a statute are clear and easy to comprehend, there is no need for esoteric construction or resort to external aid for its interpretation. This position of the law was clearly stated by the Supreme Court in the case of **F.C. *Udoh & Ors. V. Othopaedic Hospitals Management Board & Ors.* (1993) 7 NWLR (Part 304), page 147, para. E; 148, paras. C – D**, thus:

> *It is both elementary and also a fundamental principle of the interpretation of statutes that where the words of a statute are clear and not ambiguous, effect should be given to them in their natural meaning except where to do so will result in absurdity.*

Likewise, in ***Dr. Olubukola Saraki V. Federal Republic of Nigeria* (2016) 3 NWLR (Part 1500), page 589 -590, paras. B-D**, the Supreme Court held that:

> *When interpreting constitutional and statutoryprovisions, clear and unambiguous words used mustbe given their plain and ordinary meaning exceptwhere such interpretation would lead to manifestabsurdity or inconsistency with the rest of thestatute, or where the context requires some specialor particular meaning should be given to the words.*

In this case, the provisions of Items 58 and 59 of Part I of the Second Schedule are clear and unambiguous and this Court is duty-bound to give the provisions their literal and ordinary meaning which is that the Federal Government is only empowered to enact law in relation to stamp duties, taxation of incomes, profits, and capital gains only. This interpretation does not lead to absurdity in any form or manner and it is not inconsistent with any other part of the 1999 Constitution because as the Court as stated earlier, the Court has searched other parts of the Constitution to see if there is any provision that allows the Federal Government to impose and collect taxes outside the scope of Items 58 and 59 of Part I of the Second Schedule and the Court can find none.

Furthermore, tax laws are interpreted strictly. There is no presumption and there is no room for intendment. There is also no equity about a tax. This much was held by the Court of Appeal in ***Federal Board of Inland Revenue V. Integrated Data Services Limited*** **(2009) 8 NWLR (Part 1144), pages 637 – 638, paras. H – C,** thus:

> *A law which imposes pecuniary burden is under the rules of interpretation subject to the rule of strict construction. All charges upon the subject must be imposed by clear and unambiguous language because in some degrees they operate as penalties. Therefore, the subject is not to be taxed unless the language of the statute clearly imposes the obligation. The language must not be strained in order to tax a transaction which, had the legislature thought of it, would have been covered by the appropriate words.*There is no presumption about a tax. Nothingis to be read in and nothing is to implied. Onecan only look fairly at the language used. Butthe strictness of interpretation may not always enure to the subject's benefit, for "if the personsought to be taxed comes within the letter of thelaw, he must be taxed, however great the hardshipmay appear to the judicial mind"

It is also trite that where a statute mentions a specific thing among other alternatives, it is deemed that those not mentioned are excluded. This was held by the Supreme Court in ***Udoh & Ors. V. Othopaedic Hospitals Management Board & Ors. (supra),*** **page 145, paras. F-G** thus:

> **It is a well settled principle of construction of statutes that where a section names specific things among many other possible alternatives, the intention is that those not named are not intended to be included. *Expressiouniuseslexclusioalterius. See A-G. of Bendel State V. Aideyan* (1989) 4 NWLR (Pt.118) 646. This is that the express mention of one thing in a statutory provision automatically excludes any other**

which otherwise would have applied by implication, with regard to the same issue.

The 1999 Constitution has specifically designated the taxes that the Federal Government is empowered to impose and collect in Items 58 and 59 of Part I of the Second Schedule thereof and this must be read to exclude other species of taxes like VAT, withholding tax, education tax, and technology tax. If the framers of the 1999 Constitution intended allow the Federal Government to impose and collect these taxes, they would have specifically mentioned them in the Constitution. Since this was not done, this Court lacks the power to do otherwise.

Based on the reasons enumerated above, this Court resolves this issue in favour of the Plaintiff and against the Defendants.

On Issue (ii); the provisions of Item 7 (a) & (b) of Part II, Second Schedule of the 1999 Constitution are clear and unambiguous are ought to be given their ordinary meaning. Item 7 (a) & (b) of Part II, Second Schedule of the 1999 Constitution provide as follows:

> *7. In the exercise of its powers to impose any taxes or duty on-*
>
> *(a) capital gains, incomes or profits of persons other than companies; and*
>
> *(b) documents or transaction by way of stamp duties; the National ASSEMBLY may, subject to such conditions as it may prescribe, provide that the collection of any such tax or duty or the administration of the law imposing it shall be carried out by the Government of a State or other authority of a State.*

The above-reproduced constitutional provisions do not require any ingenuity or craftsmanship to interpret because the wordings are very clear and unequivocal. The provisions are clear that it is in the exercise of the National Assembly's powers to impose any taxes or duty on capital gains, incomes or profits of persons other than companies; and documents or transaction by way of stamp duties, that the National Assembly may provide that collection or administration of the tax law shall be carried out by the Government of a State or other State authority, subject to such conditions as the National Assembly may prescribe.

The provisions of Item 7 (a) & (b) of Part II, Second Schedule do not by any stretch of the imagination extend the legislative competence of the National Assembly to the imposition of any form of tax outside capital gains, incomes or profits of persons other than companies; and documents or transaction by way of stamp duties. It does not empower the National Assembly to enact any law to impose any form of sales tax, including VAT and any other tax outside those specifically mentioned in Item 7 (a) & (b) of Part II, Second Schedule.

Item 7 (a) & (b) of Part II, Second Schedule is also unequivocal in limiting the entities to whom the National Assembly can delegate the power to collect such tax or administer the tax law to State Government or a State Government authority. Any delegation to any other person or entity apart from State Government or a State Government authority shall be null and void. This Court so holds.

Consequently, this Court resolves this issue in the Plaintiff's favour and against the Defendants.

On Issue (iii), I am aware of therecent decision of the Court of Appeal in ***Uyo Local Government Council V. Akwa Ibom State Government & Anor.* (2020) LPELR-49691 (CA)** where the Court nullified the Taxes and Levied Act for being inconsistent with the provisions of the 1999 Constitution. Thus, based on the doctrine of judicial precedent, I do not hesitate to hold that the Taxes and Levies Act is unconstitutional. The law is trite that one cannot place something upon nothing and expect it so stand. See ***Mcfoy V. UAC* (1961) 3 WLR 1405.**

The Taxes and Levies Act being unconstitutional, any tax or levy provided for in the Act is automatically unconstitutional, null and void, except such tax is provided for by the 1999 Constitution or any other law validly made by a competent legislature.

I also resolve this issue in favour of the Plaintiff and against the Defendants.

In conclusion, after a solemn consideration of all the parties' affidavit and documentary evidence and written submissions with respect to the originating summons which have all been painstakingly reproduced above, this Court holds that this suit has merit and that the Plaintiff as shown it is entitled to all the reliefs sought in this originating summons.

Consequently, this Court has no reservation in granting all the reliefs sought in the originating summons and accordingly grants same.

There is no order as to cost.

Before the Judgment was read, the Court reminded all counsel that they had agreed that the Judgment be read during the court's annual vacation as provided for in Order 46 Rule 5 (1) of the Federal High Court (Civil Procedure) Rules, 2019.

This is the Judgment of this Honourable Court dated this **9th August 2021.**

Judgment read and delivered in the open Court.

SDPam

HON. JUSTICE STEPHEN DALYOP PAM
JUDGE
09/08/2021

Parties: Parties were absent in Court.

Appearances: D.C. Den-Wigwe, SAN.

K.C.O. Njemanze, SAN.

M.S. Agwu, Esq.,

D. Udenna Esq., and

O. Omeodu, Esq., all for the Plaintiff.

O.C. Eyiba, Esq. for the 1st Defendant.

D.L. Inko-Tariah, Esq. (Assistant Chief Counsel Federal Ministry of Justice) for the 2nd Defendant.