STATE POWERS TO IMPOSE AND COLLECT TELECOMMUNICATIONS TAX-IMPLICATIONS OF THE DECISION IN EMERGING MARKETS v ANAMBRA STATE RUTSU CASE.*[1]

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Abstract

The Constitution distributed the taxing powers to the federal, state and local governments in Nigeria. In the distribution, it does appear that the constitution has not done much to improve the plight or lot of the states in terms of allocation of financial sovereignty with the attendant consequences that federal and state governments have remained in opposition. This latent war between the federal government and the state governments on which of the two has power to impose tax particularly on telecommunications has continued to rage. The constitution provided for tax on telecommunication and where any law is made that is inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria 1999 as amended same is null and void. This essay will appraise relevant provisions of the Constitution of the Federal Republic of Nigeria, 1999 as amended, statutes and case laws with particular reference to the decision in Emerging Markets Telecommunication Services Ltd v Anambra State Rural and Urban Transmission Supervisory Unit & 3 Ors to determine the government that has the powers to impose the telecommunications tax.

1. Introduction

The scope of taxes and levies collectible by each level of government is a serious challenge of tax administration and collection in Nigeria. The prevalence of the authorities of the federal, state and at the local government levels imposing and levying indiscriminate taxes and levies in contravention of the law is a burden to taxpayers and investors. It is important to point out that a few taxpayers have successfully challenged some of the illegal taxes and these illegal impositions by tax authorities in court. A

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[1]Unreported case of *Emerging Markets Telecommunication Services Ltd v Anambra State Rural and Urban Transmission Supervisory Unit & 3 ors* in Suit No A/248/2017.

review of the cases however show that the challenges have been either between the state government and federal authorities or state government and local government.[2]

Notwithstanding that some of such taxes imposed by government authorities were declared to be null and void, the practice is still to leave the particular taxpayer who had gone to court and continue to enforce same illegal taxes against others. It has been the argument of the people who contravene the law, that a revenue law cannot be arrested or put in abeyance at the instance of one or a few aggrieved taxpayers to the detriment of the public treasury. This trend has continued and led to eh confession experienced in the telecommunication sector of the economy.

1.1 Meaning of Tax

Tax is defined as a monetary charge imposed by the government on persons, entities or property to yield public revenue. Most broadly the term embraces all governmental impositions on the person, property, privileges, occupations and enjoyment of the people and includes all duties, imports and exercises.[3] Tax is seen as a pecuniary burden laid upon individuals or property to support government, a payment exacted by legislative authority or a compulsory contribution to the support of government levied on persons, property, income, commodities, transactions and others.[4] Ayua defines tax as a pecuniary burden laid upon individuals or persons or property to support the government and is a payment exacted by legislative authority. Tax is therefore not a voluntary donation or payment but enforced contribution exacted pursuant to legislative authority.[5] Tax has two main objectives;

i. To raise revenue to finance government expenditure
ii. To influence activity in the economy as a whole. This means that tax policy will provide a mechanism for influencing consumer demand and for providing incentives for production, investment and savings. It is therefore a key factor for promoting the

[2] *Attorney-General Ogun State v Aberuagba* (1985) 1 NWLR (pt. 3) 395, *Attorney General of Lagos State v Eko Hotels &anor* (2009) 1 TLRN 198, *Lagos State Board of Internal Revenue v Nigerian Bottling Co. Ltd &anor* (2009) 1 TLRN 294, *Mobil Producing Nigeria Unlimited v Tai Local Government Council & 2 or*s (2004) 10 CLRN 100; *Eti-Osa Local Government v Mr Rufus Jegede* (2007) 2 NWLR (pt. 1043) 537, *Mama Cas Restaurant Ltd &ors v Federal Board of Internal Revenue &anor* (2010) 2 TLRN 98 and *Hon. Minister of Justice & AG Federation v AG Lagos State* (2013) 8 ALL NTC 425.

[3] B A Garner (ed) Black's Law Dictionary (10th edition, USA: Thomson Reuters, St Paul M N, 2014).

[4] A B Ahmed Residence and Permanent Establishment Issues in Nigerian Taxation in AETA Tax Law Journal of Nigeria, 2012 vol 1, 97

[5] I AAyua, Nigerian Tax Law (Ibadan, Spectrum's Law Publishing, 1966) p. 25.

government overall economic and social objective, as it is used by governments to raise more revenue to promote economic growth and to meet other government expenditures.[6]

2. Distribution of Taxing Powers amongst Tiers of Government in Nigeria

The jurisdiction of the taxing powers and the various authorities assigned the duties of the collection of tax are specified in the Constitution.

2.1 Taxing Powers of the Federal Government

The National Assembly has powers to make laws on any matter included in the Exclusive Legislative List[7] and any matter in the concurrent legislative list to the extent prescribed in the second column opposite thereto.[8] The National Assembly exercises power exclusively to legislate on the imposition and collections of customs and excise duties,[9] import duties,[10] maritime and navigation,[11] mines, mineral and petroleum and the like,[12] posts, telegraphs and telephones,[13] stamp duties[14], taxation of incomes, profits and capital gains,[15] trade and commerce[16], wireless, broadcasting and television[17] and any matter incidental or supplementary to any matter mentioned elsewhere in the list.[18]

2.2 Taxing Powers of the State Government

The State Houses of Assembly have power to make laws on matters not included in the Exclusive Legislative or Concurrent Legislative List.[19] The States Houses of Assembly

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[6]R S David and J L B K Eassion, Cases and Materials on Revenue Law (6th edition.London: Sweet and Maxwell, 1990) 1.

[7] The Constitution of Federal Republic of Nigeria, 1999 as amended section 4(2)

[8]*Ibid* section 4(4)(a)

[9]*Ibid*, Exclusive Legislative List, Second Schedule, Item 16.

[10]*Ibid*, item 25

[11]*Ibid*, item 36, but the shipping and navigation on tidal waters, River Niger and its affluent and on any such other inland water way as may be designated by the National Assembly to be an international waterway or to be an inter-state waterway and federal ports.

[12]*Ibid*, item 39.

[13]*Ibid*, item 46.

[14]*Ibid*, item 58, however, see Taxes and Levies (Approved List for Collection) Act, chapter T2 LFN 2004, schedule, part I, item 7. The Federal Government shall collect Stamp Duties on bodies corporate and residents of the Federal Capital Territory Abuja.

[15]*Ibid*, item 59, except as otherwise prescribed by the Constitution.

[16]*Ibid*, item 62.

[17]*Ibid*, item 66, the exception is broadcasting and television provided by the government of a state.

[18]*Ibid*, item 68.

[19]*Ibid*, section 4(7)(a) & (b) any matter not included in the Exclusive Legislative List set out in part I of the Second Schedule to this Constitution and (b) any matter included in the Concurrent Legislative List set out in the First Column of Part II of the Second Schedule to this Constitution to the extent prescribed

have the responsibility to legislate on the imposition and collection of taxes by local government councils[20]. By the provisions of the constitution, the Federal Capital Territory is neither a state nor a local government council.[21] The Federal Capital Territory cannot impose nor collect tax.[22]

2.3 Taxing Power of Local Governments

The Constitution[23] did not allocate legislative powers to the local governments in Nigeria. Despite the guaranteed democratic local government system, the State Houses of Assembly legislate for Local Government Councils.[24] Another problem of the local government council is that it is not a component of the Nigeria federation.[25] Suffice it to say that the prevailing position is that the federal government ultimately has overriding authority on taxation matters with some latitude to state governments to introduce taxes, fees and charges (collectible by the local government councils). As a result of the lacuna in the constitution, state governments and local government council are immersed in the tussle of who should collect which tax or the other.[26] This has continued despite that the taxes collectable by each tier of government in enumerated.[27]

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in the second column opposite thereto. The states enjoy the latitude of imposition tax on residual matters as held in Attorney-General Ogun State v Aberuagba (1985) 1 NWLR (pt 3) 395 at 413.

[20]*Ibid*, sections 4(7), 7(1) & (5) and the fourth schedule.

[21]*Ibid* section 299. It is ironical that the same Constitution that made State and Federal Capital Territory to be major component of the federation never assigned any duty or role designated but the section alluded that Federal Capital Territory can function as a state which were vested in the National Assembly, the president and in the Federal Capital Territory Courts.

[22]*Ibid*, section 4(1) & (6) and S 7(1). Despite the glorification of the status of the Federal Capital Territory to that of a state, there is no executive governor in charge, the head is a minister appointed by the president. The territory also does not have a House of Assembly.

[23]*Ibid*, section 7(1). The State Government is to ensure the existence of Local Governments Councils via a law which shall provide for the establishment, structure, composition, finance and functions of such councils.

[24]*Ibid* section 7 and the fourth schedule to the constitution guarantees an independent local government system. However, there is a summersault in items 9 and 10 of the concurrent legislative list wherein the imposition and collection of tax by the local government council is left at the mercy of the State government.

[25]*Ibid*. section 2(2) made it without equivocation that Nigerian is a federation consisting of states and a Federal Capital Territory.

[26]See, Multi-Purpose Ventures Ltd & 57 ors v Attorney-General of Rivers State & 3 ors (1997) 9 NWLR (pt. 522) 642, Guardian Newspapers Ltd v AG Federation (1995) 5 NWLR (pt. 398) 703, Knight, Frank &Rutley v AG Kano State (1998) 7 NWLR (pt. 556) 1-37, Bamidele v Commissioner for Local Government and Community Development (Lagos State) &Anor (1994) 2 NWLR (pt. 328) 568, Shell Petroleum v Burutu Local Government Council (2000) NRLR 1, Thompson & Grace Investment Ltd v Government of Akwa-Ibom State & 2 ors Suit No HEK/MISC 95/2009, Eti-osa Local government v Jegede (2007) 10 NWLR (pt. 1043) 557, Idowu v Attorney General & Commissioner for Justice Lagos

3. Power to Impose and Collect Telecommunication Tax

Communication is in the Exclusive Legislative List in the second schedule to the constitution. It is the exclusive power of the Federal Government to control and regulate posts, telegraphs and telephones,[28] wireless, broadcasting and television.[29] The limitation to the control and regulation by the Federal Government is as it concerns the broadcasting and television provided by the government of a state.[30] Nonetheless, it is the Federal Government that allocates wave-lengths, broadcasting and television transmission, even to States.[31] In order to cover the field in the telecommunication industry, the Constitution made provision for the federal government to exclusively deal on any matter incidental or supplementary to any matter mentioned elsewhere in this list.[32]

By virtue of the 1999 Constitution,[33] the National Assembly has exclusive legislative powers to make laws with respect to any matter contained in the Exclusive Legislative List.[34] The Houses of Assembly of the State have no jurisdiction to make laws on any matter contained in the Exclusive Legislative List.[35] Any other matter incidental or supplementary to any matter mentioned in the Exclusive Legislative List[36] is also an exclusive reserve of the National Assembly.[37] The jurisdiction of the National Assembly is extended to matters contained in the Concurrent Legislative List.[38]

State (2011) 5 TLRN 86 and Attorney-General Cross-River State v Ojua in Suit No FHC/PH/CS/220/2008.

[27]*Op cit* item 46 of the Exclusive legislative list, part 1 schedule 2.

[28]*Ibid*

[29]*Ibid,* item 66

[30]*Ibid*

[31]*Ibid*

[32]*Ibid,* item 68

[33] Op cit, section 4(2),

[34]*Ibid*. Second schedule to the Constitution, part 1

[35]*Ibid* section 4(3), The Power of the National Assembly to make laws for the peace, order and good government of the Federation with respect to any matter included in the exclusive legislative list shall, save as otherwise provided in this constitution, be to the exclusion of the Houses of Assembly of States.

[36]*Ibid,* item 68.

[37]*Ibid,* section 4(4)(b) and 12(2)

[38]The extension was for matters in the concurrent legislative list set out in the first column of part II of the second schedule to the constitution to the extent prescribed in the second column opposite thereto.

The legislative scope of the State Houses of Assembly is the residual matters left over by the National Assembly as contained in the concurrent legislative list[39] or those matters which the Constitution expressly empowered the states to legislate upon.[40]
The law clarified three areas the State Houses of Assembly has power to make law to include;

a. Any matter not included in the exclusive legislative list set out in part 1 of the Second Schedule to the Constitution;[41]
b. Any matter included in the Concurrent Legislative List set out in the first column of part II of the second schedule to this constitution to the extent prescribed in the second column opposite thereto;[42]
c. Any other matter with respect to which it is empowered to make laws in accordance with the provisions of the Constitution.[43]

Telecommunication is on the exclusive legislative list[44], the State Houses of Assembly by necessary implication do not possess the legislative competence to legislate on telecommunication; any attempt to do so shall be viewed ultra vires and the law made shall to the extent of its inconsistency with the law made by the National Assembly shall be void.[45]

Following the power invested on the National Assembly to legislate and regulate telecommunication tax in Nigeria, the National Assembly enacted certain laws and bodies or agencies charged with the powers of regulating and controlling telecommunication in Nigeria. The agencies include the National Broadcasting Commission Act[46], the Nigerian Communication Commission Act[47] and Wireless Telegraph Act.[48]

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[39]In Attorney-General of Ogun State v Aberuagba (1985) 1 NWLR (pt. 3) 395, the Supreme Court called the powers residual powers.
[40]*Op cit*, section 4(7)
[41]*Ibid*, section 4(7)(a)
[42]*Ibid*, section 4(7)(b)
[43]*Ibid*, section 4(7)(c)
[44]*Op cit*, item 46 and 66
[45]*Ibid*, section 4(5)
[46] Chapter NII, LFN 2004,Byan act to establish the National Assembly Commission and for matters connected therewith.
[47]Chapter N97 LFN, 2004. The long title is An Act to establish the Nigerian Communication Commission and for matters connected therewith.
[48]Chapter W5 LFN 2004. The long title is an Act to make provision for the regulation of wireless telegraphy

4. Agencies and Law Regulating Telecommunications in Nigeria

4.1 The National Broadcasting Commission

The Commission[49] is charged with the responsibility of advising the federal government generally on the implementation of the national mass communication policy with particular reference to broadcasting.[50] Other powers granted to the commission are receiving, processing and considering applications for the establishment, ownership or operation of radio and television stations including,[51] radio and television owned by the state and local government; recommending applications through the minister to the President for the grant ofradio and television licences,[52] regulating and controlling,[53] undertaking research and development in broadcasting industry[54] among others.

The grant of licence by the commission shall be subject to the terms and conditions set out in the third schedule to the Act.[55] The fund[56] of the commission include;

a. Such percentage of fees and levy to be charged by the commission on the annual income of licensed broadcasting stations owned, established or operated by private individual(s), federal, state and local government.
b. Such moneys as may from time to time, be lent or granted to the commission by the government of the federation or of a state;
c. All moneys raised for the purposes of the commission by way of gifts, loans, grant-in-aid, testamentary disposition or otherwise.

4.2 Nigeria Communications Commission

The Commission[57] was established to create regulatory environment for the supply of telecommunications services, facilities and to promote fair competition and efficient

[49]NBC Act section 1
[50]*Ibid*, section 2(1)(a)
[51]*Ibid*, section 2(1)(b), cable television services, direct satellite broadcast and any other medium of broadcasting and radio, television stations owned, established or operated by the Federal, State or Local Government.
[52]*Ibid*, section 2(1)(c). However the only persons disqualified from the grant are religious organization and a political party.
[53]*Ibid*, section 2(1)(d)
[54]*Ibid*, section 2(1)(e)
[55]*Ibid*, section 12. The terms of the licence provides amongst others that a licence is valid for a period of five years.
[56]*Ibid*, section 14
[57]Nigerian Communications Commission Act chapter N97LFN 2004 (NCC Act), section 1

market conduct within the telecommunication industry. Telecommunications[58] is defined to mean any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by wire, radio, visual or other electromagnetic system.[59] The functions of the Commission[60] includes, amongst others;

a. economic and technical regulation of the privatized sector of the telecommunications industry;[61]
b. protection of service providers,[62] facilitation of markets for the services,[63] undertaking studies into space and utilization of satellite,[64] regulating licensees from misuse,[65] intervention between service providers in dispute,[66] developing performance standards,[67] issuance of telecommunication standards,[68] and enforcement of operational conditions.[69] The Commission also has powers to revoke or renew a licence.[70]

It is particularly important to note that the commission may with the approval of the minister make regulations in relation to;

a) payment of license fees, annual levy on gross turn-over by specified licensees and other charges;
b) procedures for obtaining licences or permits and the conduct of holders of licences and permits.
c) tariff charged by operators
d) cashing and such other matters as may be referred to it by the minister[71]

4.3 Wireless Telegraphy Act[72]

[58]NCC Act Chapter N97, section 36
[59]*Ibid*
[60]*Ibid* section 4
[61]*Ibid* section 4(a)
[62]*Ibid* section 4(g)
[63]*Ibid* section 4(h)
[64]*Ibid* section 4(i)
[65]*Ibid* section 4(j)
[66]*Ibid* section 4(k)
[67]*Ibid* section 4(p)
[68]*Ibid* section 4(q)
[69]*Ibid* section
[70]*Ibid* section 13 and 12
[71]*Ibid,* section 26. It is important to note that a licencee on telecommunication undertakings is expected to perform one or more of installations of terminal or other equipment, provision and operation of public pay-phones, provision and operation of private network links employing cable, radio communication or satellite within Nigeria, provide and operate public mobile communication, provide and operate community telephones, value-added network services, repair and maintenance of telecommunication facilities and cabling.
[72] Chapter W5 LFN 2004. An Act to make provision for the regulation of wireless telegraphy.

The Act requires that no person shall establish or use any station for wireless telegraphy or install or use any apparatus for wireless telegraphy except under and in accordance with a licence in that behalf.[73] It is an act for the regulation of wireless telegraphy. Wireless telegraph means the emitting or receiving, over paths which are not provided by any material substance constructed or arranged for that purpose of electromagnetic energy of a frequency not exceeding three million megacycles a second, being energy which either;

(a) serves for the conveying of messages, sound or visual images (whether the messages, sound or images are actually received by any person or not) or for the actuation or control of machinery or apparatus or is used in connection with the determination of position, bearing or distance or for the gaining of information as to the presence, absence, position or motion of any object or of any objects of any class, however, there is a proviso.[74]

It is to be noted that the Act[75] provides for the commission to direct and regulate the use of wireless telegraphy when it relates to telecommunications, the Nigerian Communications Commission and on broadcasting, the National Broadcasting Commission. The fees and charges for licences[76] or security by way of deposit for issuance or renewal of licence shall be paid to the commission.

From the foregoing, the regulation of telecommunication operation is under the exclusive list in the Constitution of the Federal Republic of Nigeria. The National Assembly empowered to make law for the regulation and control of telecommunication has moved a step further to enact National Broadcasting Commission Act, Nigerian Communication Commission Act and Wireless Telegraphy Act. It is submitted that by the enactment of these legislations, the National Assembly has expressly covered the field in the area of

[73] Wireless telegraphy Act, chapter W5 LFN 2004, section 4.
[74]Provided that where:
(i) a station or apparatus for wireless telegraphy cannot lawfully be used without a licencee or could not lawfully be used without a licence but for regulations under this Act; and
(ii) any such electro-magnetic energy as aforesaid which is received by that station or apparatus serves for the conveying of messages, sound or visual images and
(iii) any apparatus is electrically coupled with that station or apparatus for the purpose of enabling any person to receive any of the messages, sound or visual images.
[75]Op. cit, section 3(1)
[76]*Ibid,* section 7(1)

control and regulation of telecommunication in Nigeria. A review of the provisions of the Nigerian Communications Commission Act will reveal thus;[77]

> Subject to subjection (2) of this section, the commission shall specify and publicize to the general public technical code and specifications in respect of communications equipment and facilities that may be used in Nigeria.[78] A person who uses any technical equipment or systems which hinder network inter-operability, commits offence and on conviction is liable to a fine not exceeding N100,000.00 or to imprisonment for a term exceeding 1 year or to both such fine and imprisonment.[79] A licencee shall in installing its network facilities, take all reasonable steps to ensure that he cause little damage as is practicable.[80]

5. Validity of the State Government Venture in Telecommunication Tax

The legislative competence of the State House of Assembly in enacting a law to regulate a telecommunication operator or a licencee of the Nigerian Communication Commission was an issue in Registered Trustees of Telecoms v Lagos State Government &Ors.[81] The picture in the case is that the plaintiffs who have obtained necessary licences, permit and approval for the operation of their business in Nigeria including Lagos State were being required to obtain necessary and virtually the same permit in Lagos State if they will to stay in operation.[82]

The Infrastructure Maintenance and Regulatory Agency Law 2004, Lagos State was enacted by the Lagos State House of Assembly to regulate the installation of telecommunication equipment. The law[83] provides that all existing towers, masts or cables shall be certified by an engineer of the Agency to be structurally sound and in conformity with the Building Code requirements as set out by the Federal and State Laws. It further stated that the owner of any tower, mast or cable shall exercise adequate care, install devices and provide methods for preventing failures and accidents which are likely to cause damages, injuries or nuisance to the public to find that they are the same which is an encroachment on the federal legislation.[84]

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[77] *Ibid,* section 7(2)
[78] NCC Act, op cit. section 130(1)
[79] *Ibid,* section 131(1)
[80] *Ibid,* section 136(1)
[81] FHC/L/CS/517/2006, an unreported case.
[82] Supra
[83] Infrastructure maintenance and Regulatory Agency Law 2004, section 21(1)
[84] *Ibid,* section 23(1)

A similar law[85] by the Anambra State cited as the Anambra State Rural and Urban Transmission Supervisory Unit Law[86] provides as the functions of the Unit to;

1. ensure that guidelines on technical specifications for the installation of telecommunication masts and towers as issued by the NCC (hereinafter referred to as the guidelines) are strictly adhered to.
2. Monitor the erection of towers, VSAT, masts and internet services
3. Monitor the laying of cables within the state in such a manner as to ensure that the interests of the public health and safety are protected.
4. Check the radioactive emissions of each mast in the state and others.

The provisions of the excerpts of the two laws above shows they recognised the superiority of the laws made by the National Assembly. The Houses of Assembly of States have the power to make legislation for Lagos and Anambra State with regards to the subject matters reserved for it in the concurrent legislative list that is a residual power[87] but only where there is no law covering the subject matter or where the issue is neither here nor there. A look at the provisions of the section 2 of IMRA law and section 5 of ASRUTSU law will reveal that by the functions of the agencies, the agencies are taking over the functions of NCC. This amounts to encroachment on the powers of the NCC. The driving force behind the enactment of these state laws is to generate revenue for the states as each of the states have numerous laws dealing with the issue of urban planning and even tax on properties regardless of whether they are companies or private residence.

The State Houses of Assembly of the two states have no right to enact laws that are similar or identical to that of the National Assembly. What the states are doing in this case is to create an agency that will get its own share of the booty as it was alleged that the operators are making billions of Naira.[88]IMRLA and ASRUTSU laws deal with the issuance of licence, regulate erection of tower and mast and the power to issue permit and

[85] A law to establish the Anambra State Rural and Urban Transmission Supervisory Unit and to provide for connected purposes that came into force on 23rd day of December, 2014.
[86]Anambra State Rural and Urban Transmision Supervisory Unit Law (herein referred to as ASRUTSU Law) 2014, section 5
[87]Attorney-General Ogun State v Aberuagba (supra).
[88]IMRA, section 3 and ASRUTSU, section 4.

development permit. The laws,[89] if allowed to subsist will create confusion in the telecom industry as to who will be in charge of issuing permits for the telecom operators.

The Federal High Court in Lagos while declaring that Lagos State Government has no power and legislative competence to impose taxes, fines, levies, fees or penalties or howsoever described for telecommunications services and operation and matters ancillary or related thereto held;

> The picture here is that the plaintiffs have obtained necessary licences, permit and approval for the operation of their business in Nigeria including Lagos State if they want to stay in operation. This is not the intention of the federal government in granting licence to the telephone operators. It will be very difficult to do telecommunication business in Nigeria if every state in the federation which is not unlikely, if this case succeeds to enact their own laws, to take a piece of the action.

The IMRA law is a carbon copy of the NCC Act, it was only given a different nomenclature. The whole purpose of the law was just to generate revenue for the state government simpliciter. The state cannot pretend to be acting under residual powers to impose taxes under any guise when the Federal Government has already levied such taxes. It will amount to double taxation on the telecoms operators. Any attempt to exercise jurisdiction by the state will be ultra vires. In Attorney-General Cross River State &anor v Matthew Ojua[90], the court held that a close look at the urban development law shows that it is the function assigned to the local government which deals with the assessment of privately owned houses or tenements for the purpose of levying the rates and collection of same. In Fast Forward Sports v Port Harcourt Local Council,[91] the imposition of another Agricultural Development levy outside the one collected by Rivers State Government under the Economic Development Levy Law[92] was declared to be double taxation. In Eti-Osa Local Government v Jegede[93], the court held that no tier of government should collect taxes outside what it has jurisdiction to collect under the Taxes and Levies Act.

[89]Registered Trustees of Telecoms v Lagos State Government &ors (2007) 6 ALL NTC 203 at 220.
[90]FHC/PH/CS/220/2008. See also Idowu v Attorney General & Commissioner for Justice Lagos State & 2 ors (2011) 5 TLRN 86.
[91](2011) 5 TLRN 101
[92]Economic Development Levy Law of Rivers State, 1999.
[93](2007) 2 NWLR (pt. 1043) 537.

5.1 The Emerging Market's Case

The decision in Emerging Markets Telecommunication Services Ltd v Anambra State Rural and Urban Transmission Supervisory Unit[94] is a restatement of the law. The judgment of the court on 28/5/2018 has consolidated the decision of the Federal High Court in *Registered Trustees of Telecoms v Lagos State Government &Ors*[95] that the State Government has no power and legislative competence to impose taxes, fines, levies or penalties or howsoever described for telecommunications services and operation and matters ancillary or related thereto having regard to the provisions of section 4(2) of the 1999 Constitution of the Federal Republic of Nigeria as amended and items 46, 66 and 68 of the Exclusive legislative list to the constitution.

The facts of the case is that in December 2014, the Anambra State House of Assembly passed the Anambra State Rural and Urban Transmission Supervisory Unit (ASRUTSU) Law 2014 which came into force on 23/12/2014. In compliance with the ASRUTSU Law 2014, the 1st defendant on behalf of 2nd and 4th defendants served four separate demand notices for the sum of N300,000 for each operational base transceiver stations located in urban areas and N200,000 for each located in rural areas. The plaintiff therefore took out an originating summons challenging the competence of the defendants to assess, impose and demand or collect the levies. The judgment of the court restated the law thus;

> There is certainly no dispute that the State House of Assembly has the power to make laws for the state. I refer to Part II, Section 4(6) of the Constitution, however, the caveat thereat is that laws made by State must or shall be consistent with the laws made by the National Assembly, see section 4(5) of the Constitution. Nigeria is a federation and the Constitution is the supreme law of this country. It must be followed or any law that is inconsistent with it shall be null and void. See section 1(1) of the Constitution and 1(3) of same. A look at this law in contention (ASRUTSU law 2014) shows that the unit shall have power to ensure compliance with NCC laws, monitor masts etc see section 5 of this law. A close look at the second schedule to the constitution – the Exclusive Legislative list show in items 46, 66 that matters concerning telephone and wireless communications are the exclusive preserve of the National Assembly. It is by this power that the Nigerian Communications Commission was created. See chapter II (sections 3, 4(1) to (2) of the Nigerian Communications Act Cap N97 Laws of the Federation of Nigeria, 2004, see also the Wireless Telegraphy Act

[94]Suit No A/248/2017 delivered by Hon Justice D A Onyefulu sitting at Awkajudicial jurisdiction of Anambra State judiciary on 28/5/2018

[95] Supra

> W5 Laws of the Federation of Nigeria 2004 all duly passed by the National Assembly. In section 4(1) (e) (f) (g) and (h) of Cap N97 Laws of the Federation, the NCC has the express power for granting and renewing licence of telecommunication firms operating in Nigeria, fixing and collecting fees for them, develop and monitor the performance standards of telecommunication firms, relating to the quality of telephone and other communication services and facilities…

The decision has categorically put it beyond doubt that the requirement for licencees to obtain approval from any other body where NCC Act has covered the field is unlawful. The NCC Act has adequately taken care of affairs of Telecoms operations in Nigeria and therefore there is nothing left for the state government to cover as residual power. This is against the backdrop of the claims of the defendant that none of the provisions of the law offends NCC Act. Their claim is hinged on the power State Governor under the Land Use Act to make such laws as the telecoms operate on the state land. It is unfortunate that the defendants put up this argument despite the existence of the Anambra State Physical Planning Law.

6. Conclusion

The Anambra State Rural and Urban Transmission Supervisory Law 2014 empowers the Agency or unit to collect from Telecommunication operators annual VSAT/communication fees payable by firms operating in Anambra State, annual operating fees payable in respect of each of the operational Base Transceiver Stations in Anambra State; fees for laying cables within State Roads (Right of way), annual certificate of conformity fees and charges for compliance supervisory services. This law and the Nigerian Communication Commission Act are targeted at telecommunication operators. The burden of meeting up with the fees on a similar item is borne by the operators. Allowing the two to exist alongside each other would amount to double taxation upon the taxpayer or telecom operators.

Nigerian Communication Commission regulates and supervises the telecommunications operators to the exclusion of any state body. Moreover, the National Assembly has covered the field by the enactment of the Nigerian Communication Commission Act.[96] From the foregoing, the Anambra State Rural and Urban Transmission Supervisory Unit Law[97] being inconsistent with the Nigerian Communication Commission is void.

[96] Cap N97 Laws of the Federation of Nigeria, 2004.
[97] Law 2014, No ANHA/LAW/2015/03;

It is finally submitted that the aforesaid Anambra State Rural and Urban Transmission Supervisory Unit Law is no longer in existence having been so declared in the judgment of Hon Justice D A Onyefulu of the Awka Judicial Division of Anambra State Judiciary in Emerging Markets Telecommunication Services Ltd v Anambra State Rural and Urban Transmission Supervisory Unit &Ors[98]. Telecoms operators in Anambra State shall only pay fees and tariffs charged by Nigerian Communication Commission.

Telecommunications is under the Exclusive legislative list and no state government or State Houses of Assembly has the jurisdiction to legislate on it, any such legislation is null and void. Moreover, the whole purpose of the state's law was just to generate revenue for the state government simpliciter which amounted to taxing the telecommunication operators indirectly.

6.1 Recommendations

1. The import of the judgment is that the telecoms operators in Anambra State and indeed every other state in Nigeria should know and resist any demand by the state agents for payment of any fee as telecoms charges as same is not within their jurisdiction. The State Government or State Houses of Assembly can only embark on the voyage of discovery of revenue windows when sections 4(2) and 4(3) and items 46, 66 and 68 of the Exclusive legislative list of the 1999 Constitution as amended are amended to accommodate them.
2. Nigeria tax policy should uphold the tenets of fiscal federalism in the generation and expenditure of revenue by government at all levels. The system is at the best centralized and needed to be decentralized to resolve the issues of who collects what, how it is collected, who controls what is collected and how what is collected is shared. Each tier of government should know its limits and powers, as it is desirable that the taxing powers of the different and independent layers of government should be consisted with each other as if they clash this could be disastrous and is bound to cause distortion in the national economy. The Constitution of the Federal Republic of Nigeria provides for taxing powers that are not clearly consistent. The federal government can always delve into law making in any area of their choice. Section 4, concurrent legislative list of the second schedule

[98] A/248/2017 – an unreported decision of Anambra State High Court Awka per Hon Justice D A Onyefulu on 28th day of May, 2018.

part II particularly paragraphs 1 and 2 of item A, 7, 8, 9 and 10 of item D and 17(b) of item H should be amended.

3. The fiscal federalism issue for the appropriate formula for the inter-state sharing of centrally collected revenues as a result of the extent of the influence exerted by federal government over the constituent units should be looked into. The court in Registered Trustees of Telecoms v Lagos State Government &Ors, held that the whole purpose of the law was just to generate revenue for the state government simpliciter. What the state is doing is to create an agency that will get its own share of the booty as the operators are making billions of naira. It is therefore recommended that Sections 162 and 163 of the Constitution should be amended.
4. The amendment of section 4 of the Constitution will make Value Added Tax and others like; Education Tax, Capital Gains Tax, Stamp Duties and Petroleum Tax to become state tax as federal government has no business legislating on the areas.
5. Sensitization and exposure of the tax authorities and tax payers on the spheres of authority of state to impose and collect tax is very important.

The Taxes and Levies (Approved List for Collection) Act should be further amended to avoid unnecessary tension created by the schedule to the Taxes and Levies (Approved list for Collection) Act (amendment) order, 2015 which was made ultra vires.