

# **TAX THE TAXABLE: THE NEW NORMAL UNDER THE STAMP DUTIES ACT**

**Favour Chukwudi Roberts**

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### ABSTRACT

*In recent times, the Federal Government of Nigeria has become more decisive; a nation on the mission to generate revenue for the purposes of government expenditures, diversifying the economy from the monolithic oil/gas economy to a “multi-talented” and fiscally viable economy where revenue can be generated from everything and from everywhere. In this work, the author is mainly optimizing qualitative data to examine the Constitution of the Federal Republic of Nigeria 1999, Stamp Duties Act, Finance Act 2019, and the relevant extant laws to determine the constitutionality or otherwise of the recent amendment to the Stamp Duties Act. This article is to give perspective, to consider, and examine who is about to infringe on the right of another, if that is the case in the imposition of stamp duties. This paper also questions the power of the Federal Inland Revenue Service to impose stamp duties and the consequences thereof.*

Keywords: Tax Revenue, Stamp Duties, Finance Act

### 1.0. INTRODUCTION

This mission to utilize taxation for revenue accrual is very noble. The hike in the number of taxes, the frequency with which the government has made the issue of taxation, and the enforcement prominent is considered by some as being political. On another hand, some may say it is mainly economical. However, when it comes to certain propositions for our national development and human coexistence, we are in agreement that tax is important. This is the principal reason why as a nation, we have set in motion and establish certain mechanisms to coordinate society and to ensure that the right of one person or entity does not overstep or infringe on the right of another. These legal procedures, mechanisms, and protection of rights is the ends of the rule of law, the state, the elected public officers and the

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substantive law. The first leap of the discourse is to answer a question—can the State derogate from the right of its citizens? Yes, it can.<sup>1</sup> The next leap is ascertaining, in the light of recent events,<sup>2</sup> the possibility that the Federal Government of Nigeria has infringed on the right of the citizens/taxpayers through the increase in the number of mechanisms and prominence of taxes of all kinds. It is possible to infringe on the right of the taxpayers as relating to taxation of their income, but whether or not the Nigerian Government has derogated, violated or infringed on the right of the citizens is the crust of this article. It is not news that the global economy has experienced a unique kind of “hiccup”.<sup>3</sup> This is as a result of the novel corona virus<sup>4</sup> which took the world unawares but certainly made its mark on the economies of the world, and nations have had to make decisions and take actions that would ensure the resuscitation of their economies. Nigeria is not an exception to the problems occasioned by the pandemic and the future threat it presents; this author might even argue that Nigeria, and by extension the developing countries, are the most impacted by the pandemic.<sup>5</sup> This is directly visible in some developing and under-developed countries. The developing economies still depend on the international market and the developed countries in terms of trade and investments. This peculiar period has come with restricted trade and a volatile economy. In Nigeria, the oil

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<sup>1</sup> The right of citizens is not absolute and can be derogated under lawful circumstances. In *Nwarungwa v FRSC & Ors* (2017) LPELR-42818(CA) the Court of Appeal posited that “It is to be noted here that even though the fundamental human rights of a citizen are guaranteed by the Constitution, such is not absolute. A person can sometimes be deprived of his liberty to secure the fulfilment of any obligation imposed by law as stated in Section 35(1)(b)”. See also *Ekwenugo v Federal Republic of Nigeria* (2001) 6 NWLR (Pt. 708) 178 at 185.

<sup>2</sup> Economic downward slope, low revenues, oil dependency, increasing national debt, inflation, currency evaluations, corruption, and lack of trust in government.

<sup>3</sup> The advent of the Coronavirus pandemic, the global lockdown, businesses on permanent or temporary shutdown mode, loss of man power, etc.

<sup>4</sup> C. Riley and J. Horowitz, “The Coronavirus is already hurting the World Economy. Here’s Why it could get really Scary”, available at <https://edition.cnn.com/2020/02/08/business/coronavirus-global-economy/index.html> (accessed 23 December 2020).

<sup>5</sup> Dwindled oil prices, impact on national budget, request for international loans, aids and grants, low international trade and the many consequences of the pandemic.

prices assumed a new low<sup>6</sup> during global lockdowns which would also affect our budget timeline and financing. Tax has proven itself again as being the way forward;<sup>7</sup> it is one viable option in the accrual of revenue for the government. The tax revenue is cumulatively garnered for utilization in the interest of the greater good for the greater majority.

We have certain generally acceptable definitions of tax and the importance of tax to the State, and by extension to the citizen who benefits<sup>8</sup> from the utilizations of the funds accrued from the lawful contributions of the citizens. Adam Smith posited that the subjects (citizens) of every State ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the State.<sup>9</sup> By the position of Smith, it makes some sense that the courts have held tax to be a compulsory exaction of money by a public authority for public purposes, or raising money for the purposes of government by means of contributions from individual persons.<sup>10</sup> These taxes could be direct or indirect. For the purposes of this work, we are particular about stamp duties in Nigeria. The government at all levels is interested and intentional in enforcing the law in the collection of stamp duties. This has not come without the controversy that the government is about to extort the citizens and make life even harder in an already worsening economy. Stamp duties is indeed a significant contribution

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<sup>6</sup> C. Olisah “Oil Price crashes by 25% Over Global Lockdown Concerns”, available at <https://nairametrics.com/2020/04/27/oil-price-crashes-by-25-over-global-lockdown-concerns/> (accessed 10 July 2020).

<sup>7</sup> M.C. Uzonwanne “The Indispensable Role of Taxation for State Development in Nigeria” (2015) 6(2) *International Journal of Economic Research*.

<sup>8</sup> T. Oyedele, “Guess how many Nigerians Pay Tax and how our Government Spends the Money”, available at <https://www.pwc.com/ng/en/assets/pdf/tax-watch-june-2016.pdf> (accessed 10 July 2020).

<sup>9</sup> Adam Smith, *The Wealth of Nations* (1776), Introduction by Alan B. Krueger; Edited, with notes and Marginal Summary, by Edwin Cannan (New York: Bantam Dell (2003), p. 1043, ISBN 10: 0553585975.

<sup>10</sup> Per Chief Justice Lathan of the Australian Supreme Court in the case of *Matthews v Chicory Marketing Board (Vict)*, (1938) 60 CLR 263 at 276.

to Nigeria's national revenue.<sup>11</sup> This is the extent of its importance to Nigeria. To aid our understanding, let us consider the meaning, law and import of stamp duties.

## 2.0. STAMP DUTIES

The extant law that governs and provides for stamp duties is the Stamp Duties Act (SDA).<sup>12</sup> The SDA provides for transactions which are dutiable. The authority to impose, provide for any transaction to be taxed under the Act, to amend, alter the rates, and the enforcement procedure is governed by the Act. The SDA provides for two types of duties which essentially determine the rate to tax any transaction under the Act. The types of duties are fixed duties<sup>13</sup> and ad-valorem duties.<sup>14</sup> The law provides for what kind of transactions and documents would qualify to be dutiable under which head.<sup>15</sup>

Due to the expropriate nature of taxes and their impact on right to property, the exercise of taxing power is subject to certain principles and legal structures, one of which is that taxation can only be imposed by a statutory authority.<sup>16</sup> There are a lot of questions regarding the recent unpermitted and oppressive withdrawals from customer accounts by bankers in the name of stamp duties.<sup>17</sup> This has been

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<sup>11</sup> Punch Online, "Stamp duty: Unending Controversy and its Whirlwind Effects", available at <https://punchng.com/stamp-duty-unending-controversy-and-its-whirlwind-effects/> (accessed 7 June 2020).

<sup>12</sup> Cap. S8, Laws of the Federation of Nigeria (LFN) 2004 (as amended).

<sup>13</sup> Duties that do not vary with the consideration.

<sup>14</sup> Duties that vary with consideration, some examples are duties on share capital, debenture, Deed of Assignment, Bills of Exchange, etc.

<sup>15</sup> The Schedule to the Stamp Duties Act (SDA); see also Federal Inland Revenue Service (FIRS), "Integrated Stamp Duty Services – Stamp Duty Services", available at [https://www.stampduty.gov.ng/stamp\\_duty\\_charges](https://www.stampduty.gov.ng/stamp_duty_charges) (accessed 22 July 2020).

<sup>16</sup> O. Akanle, "The Government, the Constitution & the Taxpayer" in O. Akanle, (ed.), *Tax Law and Tax Administration in Nigeria*, (Nigeria Institute of Advanced Legal Studies: Lagos, 1991), p. 1; see also *Brandy Syndicate v IRC* (1921) KB 64 cited in Manifold Solicitors, "The Legal Framework & System Of Taxation In Nigeria: A Critical Analysis Of Personal Income Tax", available at [https://www.manifoldsolicitors.com/2018/05/18/the-legal-framework-and-system-of-taxation-in-nigeria-a-critical-analysis-of-personal-income-tax/#\\_ftn16](https://www.manifoldsolicitors.com/2018/05/18/the-legal-framework-and-system-of-taxation-in-nigeria-a-critical-analysis-of-personal-income-tax/#_ftn16) (accessed 7 July 2020).

<sup>17</sup> H. Boyo, "Oppressive Bank Charges: Stamp Duty sef dey Inside", available at <https://punchng.com/oppressive-bank-charges-stamp-duty-sef-dey-inside/> (accessed 20 July 2020); A. Jemide, "Banks Illegal Stamp Duty Collections and

fraught with a lot of disdain from the taxpayers and the ordinary citizenry. It will seem to the ordinary citizen that this is a machination of the government and some few individuals/bankers to extort money from the poor citizen/taxpayers: but this is far from the truth. The Executive arm of government is not eligible, competent, or qualified to make any alteration to the rates chargeable under the SDA and enforce what is not dutiable under an extant law. No tax can be imposed on taxpayers without words in an Act of Parliament clearly showing intent to impose such tax.<sup>18</sup>

### **2.1. Power to Impose and Enforce Stamp Duties Act**

In simple terms, to impose is to determine what is taxable, who is taxable, and any exemptions to these. To enforce refers to the administration of the tax law i.e., the collection, enforcement, and implementation of the provisions of the SDA. The Federal Inland Revenue Service (FIRS)<sup>19</sup> has the power to administer the SDA and all its functions are squarely provided under the law. On the other hand, the powers of the President and Governors span only as long and far as the Act provides. Section 115 of the SDA provides that the President and the Governor of a state may make regulations relating to the-

- a. custody of the dies to be used under this Act;
- b. circumstances in which allowance shall be made for spoiled stamps;
- c. accounting for the revenue derived from stamp duties;
- d. substitution of adhesive stamps for impressed stamps, or of impressed stamps for adhesive stamps, or of revenue stamps for postage and revenue stamps;
- e. manner in which and the persons by whom impressed stamps shall be affixed to documents; and
- f. further and better carrying into effect of the objects and purposes of this Act.

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Related Dances”, available at <https://businessday.ng/columnist/article/banks-illegal-stamp-duty-collections-and-related-dances/> (accessed 20 July 2020).

<sup>18</sup> *S.A. Authority v Regional Tax Board* (1970) LPELR-2967 (SC).

<sup>19</sup> Federal Inland Revenue Service (Establishment) Act 2007, s. 7.

This section provides for the scope of the powers of the President and the Governors in relation to regulating stamp duties. The President and the Governors of the states only have the authority to make regulations concerning custody, accounting for duties collected, and all the above for which they are allowed to make regulation. An argument could be made to bring a lot of decisions, actions, and/or omissions under paragraph (f), but the wide nature of the said paragraph is circumscribed by the prior provisions. It is clear on the extent of the power of the Executive Arm. The power to impose and determine who is taxable lies exclusively with the National Assembly through the law-making process.

The Constitution and SDA provide for the authority that can amend the law affecting stamp duties. The National Assembly has, pursuant to its powers and competence,<sup>20</sup> enacted the Finance Act 2019 which amended certain sections of the SDA. The SDA provides that the National Assembly<sup>21</sup> may by resolution increase, diminish, or repeal the duty chargeable under any of the heads specified in the Schedule to the Act in respect of the documents regarding which the Government of the Federation is competent to make laws, and, in respect of any other matter within such competence, may add new duties or otherwise add to, vary, or revoke the Schedule. Stamp duties fall under the Exclusive List for the Federal Government and it is the law as expressly provided that the government of a state has the competence to vary the rate chargeable. It is therefore expedient to point out that the government of a state can only do so when it is under any head exclusively within the competence of the state to make laws.<sup>22</sup> For the purposes of clarity, a state government can impose

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<sup>20</sup> S. 116(1) SDA.

<sup>21</sup> S. 116(2) SDA provides for the competence of the state House of Assembly to do increase, diminish or repeal the duties chargeable in respect of transactions which fall under the exclusive purview of the state House of Assembly

<sup>22</sup> Part II of the Taxes and Levies (Approved List for Collection) Act 2004. This is despite it being under the Exclusive List in Part II of the Second Schedule of the Constitution of the Federal Republic of Nigeria (CFRN) 1999.

stamp duties in exercise of its residual powers; and the doctrine of covering the field will not apply.<sup>23</sup>

### 3.0. THE RECENT ACTS OF ENFORCEMENT AND CHALLENGES

The prominence and need to collect stamp duties is accompanied with the issue of jurisdiction regarding collection of certain stamp duties in certain transactions. The Finance Act amended section 4 of the SDA by replacing the words Federal Government and state government with the Federal Inland Revenue Service and “the relevant tax authority in a state” respectively. The amendment to the SDA is convenient as it has specified which agency or commission is responsible for collection, thus, effectively resolving the dispute between FIRS and Nigeria Postal Service (NIPOST) regarding who can collect stamp duties. Consequently, the dispute over collection jurisdiction and the appointment of agents to collect same by the NIPOST has been laid to rest pursuant to the Finance Act.<sup>24</sup> The troubling fact is that FIRS would still be the appropriate agency to collect the stamp duties before the amendment made by the Finance Act. The law is clear until otherwise repealed or amended that Federal Government is the authority to collect taxes for which the law provides the Federal Government competent to make laws for,<sup>25</sup> and this power is allocated to the FIRS.

Furthermore, regarding the taxes for which the Federal Government is empowered to make laws, it is the FIRS that is empowered to collect all such taxes pursuant to the Federal Inland Revenue Service Act.<sup>26</sup> Nonetheless the amendment might have caused one problem which is cutting down the funding of NIPOST by authorising and prescribing

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<sup>23</sup> J.J. Odinkonigbo and N. Ikeyi, “Is the Power of a State to Impose Sales Tax in Nigeria Fettered by the Imposition of Value Added Tax by the Federal Government?” (2015) 41(4) *Commonwealth Law Bulletin*, available at <https://doi.org/10.1080/03050718.2015.1085322>.

<sup>24</sup> S. 53 Finance Act 2019; see also *Standard Chartered Bank Nigeria Limited v Kasmal International Services Limited & 22 Others*: Appeal No. CA/L/437A/2014; *Retail Supermarkets Nigeria Limited v Citibank Nigeria Limited & Central Bank of Nigeria*: FHC/L/CS/126/2016.

<sup>25</sup> See Taxes and Levies (Approved List for Collection) Decree No. 21, 1998.

<sup>26</sup> S. 8 Federal Inland Revenue Service (Establishment) Act 2007.

the FIRS as the body to collect certain revenues derived from postal and non-postal service of the Postmaster.<sup>27</sup> This is one consequence of the amendment and a reason for the agitation of NIPOST, but it is essentially a non-matter. Whilst solving one problem, another problem and occasion for dispute is created, that is the possible dereliction or delegation of duties that should not be delegated. The power to impose tax is derived from the Constitution and should not be derogated or violated by unconstitutional delegation of powers. This power to impose is allocated to the tiers (Federal and state) of Government in Nigeria. A tax statute enacted pursuant to the taxing powers given to a tier of Government by the Constitution may mandate another tier of Government other than the one that imposed the tax to collect the imposed tax.<sup>28</sup>

The imperative is to clarify that the authority to impose and the power of collection are not the same thing. Nigeria is a Federal structure with a rigid Constitution; the rigidity of the Constitution has sealed the fate of the existing order.<sup>29</sup> The 1999 Constitution governs and allocates the powers accruable to any organ or tier of Government – the Constitution is that authority in Nigeria that determines who gets what, when and how.<sup>30</sup> The Constitution allocates legislative powers between the Federal Government (the National Assembly) and the state governments (each with a House of Assembly) in a manner that suggests that, with regard to taxes, the Federal Government may pass legislation in respect of the taxes expressly specified in the Constitution or incidental to powers expressly granted to the Federal Government under the Constitution;<sup>31</sup> whilst the state governments

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<sup>27</sup> Nigerian Postal Service Act, s. 52(2).

<sup>28</sup> Manifold Solicitors, *supra* n 16.

<sup>29</sup> C. Ekpo. "Interest, Diffidence, Rigidity and the Challenge of Constitutional Change – the Nigeria's Experience", (2017) 1(1) *Legal Aid Oyo Journal of Legal Issues*.

<sup>30</sup> H. Lasswell, *Politics: Who Gets What, When, How* (Whittlesey House: New York, 1936), pp. ix, 264.

<sup>31</sup> In the case of *Eti-Osa LG. v Jegede* (2007) LPELR-8464(CA), the Court held that "It follows therefore that Government has the inherent power to legislate on and impose tax. However, this inherent power cannot be left at large in a huge federating union like our great nation Nigeria. The central Government has the controlling machine. It is the orbit around which all the states of the federation are anchored. Distribution of the mass resources of the nation reposes with the

may pass legislation with respect to taxes not expressly specified in the Constitution and not incidental to powers expressly granted to the Federal Government under the Constitution.<sup>32</sup> The provision and words of the Constitution are simple and must be given their literal interpretation.<sup>33</sup> It is quintessential to follow the wordings of the Constitution where there are no ambiguities or inconsistencies.

The Constitution cannot be strictly interpreted like an act of the National Assembly, and it must be construed without ambiguity as it is not supposed to be ambiguous. All its provisions must be given meaning and interpretation even with the imperfection of the legal draftsman. All cannons of Constitution must be employed with great caution. A liberal approach must be adopted. Where the provisions of a statute are clear and unambiguous, effects should be given to them as such unless it would be absurd to do so having regard to the nature and circumstance of the case. The court of law is without power to import into the meaning of a word, clause or section of the Constitution or Statute what it does not say. Indeed, it is a corollary to the general rule of construction that nothing is added to a statute and nothing is taken from it unless there are grounds to justify the inference that the legislature intended something which it omitted to express. The court must not or is not concerned with the result of its interpretation, that is, it is not the courts province to pronounce on the wisdom or otherwise of the Statute but to determine its meaning. The court must not amend any legislation to achieve a particular object or result.<sup>34</sup>

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central Government which alone necessarily has the inherent power to determine and legislate as to what kind and quantum of taxes and levies should be imposed by each tier of Government. The other tiers of Government are however part of the body which makes the recommendation... To leave taxation at large at the whim and caprice of the different tiers of government would expose the entire citizenry to undue multiple and overlapping taxes and levies". Per Dongban-Mensem, J.C.A (P. 20, paras. A-E)

<sup>32</sup> *Supra* n 23, at 3.

<sup>33</sup> *Awolowo v Shagari* (1979) 6-9 SC 51; *Alamiyeseigha v FRN* (2006) 16 NWLR (Pt. 1004) pg. 1; *Rabiu v State* (1980) 8-11 SC 130; *AG Bendel State v AG Federation* (1981) 10 SC 1.

<sup>34</sup> *Inspector General of Police v All Nigeria Peoples Party & Ors.* (2007) LPELR-8932(CA).

The Second Schedule to the Constitution<sup>35</sup> provides in Item 7 that in the exercise of its powers to impose any tax or duty on (a) capital gains, incomes or profits or persons other than companies; and (b) documents or transactions 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.

This provision is also with responsibility.<sup>36</sup> The Court of Appeal, in *Lagos State Internal Revenue Board v Motorola Nigeria Limited & Anor*, pronouncing on the power of the National Assembly, examined the provisions of the 1999 Constitution which gives power to the National Assembly exclusively to legislate on taxation of income and posited that:

There is no dispute that the provisions of the 1999 Constitution give the National Assembly exclusive power to legislate on taxation of income. Section 4(2) of the Constitution provides: - “The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution”. Item 59 of the second schedule part I lists the taxation of incomes, profits and capital gains as being covered in the Exclusive Legislative List. Even though taxation of incomes, profits and capital gains are items on the Exclusive Legislative List, the collection of taxes is brought under the Concurrent Legislative List, Specifically Item D7 says: “In the exercise of its powers to impose any tax or duty on - (a) capital gains, incomes or profits of persons other than companies; and (b) documents or

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<sup>35</sup> Part II, Concurrent Legislative List of Federal and State Legislative Powers.

<sup>36</sup> Para. 8. Which provides that “Where an Act of the National Assembly provides for the collection of tax or duty on capital gains, incomes or profit or the administration of any law by an authority of a State in accordance with paragraph 7 hereof, it shall regulate the liability of persons to such tax or duty in such manner as to ensure that such tax or duty is not levied on the same person by more than one State”.

transactions 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 the State". Per Akaahs, J.C.A (Pp. 16-17, Paras. E-D)<sup>37</sup>

From the above, the clear provisions of the 1999 Constitution, are that the power to impose stamp duties is on the National Assembly which may provide for collection of such taxes; this must be given its clear and literal interpretation and avoid the absurdity intended in the Finance Act. The power to legislate or impose a tax is not coterminous with the power of collection or administration of the law regulating the tax imposed.<sup>38</sup> In the same fashion, the National Assembly amended the SDA and defined and imposed duties on electronic receipts and transactions. This is valid pursuant to the powers and competence of the National Assembly to impose and make such dutiable.<sup>39</sup> However, the law empowering the FIRS to impose is contrary to the Constitution. The only way to ensure that this amendment is valid is to amend the Constitution which would be needless or amend the SDA and the Schedule in its totality to remove the inconsistencies.

The National Assembly sought to ensure that the FIRS and the Federal Government are not in violation of the law in the imposition and collection of stamp duties on electronic receipts and all such dutiable transactions as defined under the Finance Act.<sup>40</sup> The SDA provides that the National Assembly may by resolution increase, diminish, or

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<sup>37</sup> (2012) LPELR-14712(CA).

<sup>38</sup> T. Sokunbi. "An Overview of Revenue Law in Nigeria", available at [https://www.citn.org/member\\_files/tax\\_content/c8d57ddcf01838c87ec8a9d5953806f8d09ed582.pdf](https://www.citn.org/member_files/tax_content/c8d57ddcf01838c87ec8a9d5953806f8d09ed582.pdf) (accessed 10 July 2020).

<sup>39</sup> For detailed and insightful understanding on the powers to impose tax and the extent of taxing power and sources. The author is in tandem with the views and position of the scholars; *supra* n 23.

<sup>40</sup> Also see the publication of the FIRS for clarifications on the Stamp Duties Act available at <https://www.firs.gov.ng/sites/Authoring/SiteAssets/Lists/Content/GetContent/2019%20FA%20Information%20Circular-Stamp%20Duties.pdf> (accessed 28 June 2020).

repeal the duty chargeable under any of the heads specified in the Schedule to this Act in respect of the documents regarding which the Government of the Federation is competent to make laws, and in respect of any other matter within such competence may add new duties or otherwise add to, vary or revoke the Schedule.<sup>41</sup> The section expressly provides for who has the power to amend or vary the schedule to the SDA, and from a close reading of the Finance Act, we can see that the National Assembly rightly exercised its power thereunder in varying and amending the schedule as is constitutionally apposite. It is important to recall that section 53 of the Finance Act which amended section 4 of the SDA is contrary to the provision of section 116 of the SDA which was not amended. If the intent of the National Assembly was to delegate so enormous a constitutional power, it would have also allowed the FIRS to be the one that made such amendments to the schedule. Furthermore, the Finance Act did not amend the Constitution, and this brings to question any such law that purports to give power to do a thing that is contrary and inconsistent with the fundamental law from which all including the National Assembly gains legitimacy.

The amendment should have amended the said section 4 subsection 1 to read “collect” as is expressly provided in section 4 subsection 2 on the powers of the relevant tax authority of a state to collect the stamp duties. A literal interpretation of the above provisions show what legal conflict would ensue. The import of the amendment seems to span as far as possible that the FIRS can impose stamp duties. The author hopes that the concept of implied repeal would not apply and indeed, it cannot apply here; the result would be a conflict between the Finance Act, SDA and the Constitution which provides for stamp duties under the exclusive purview of the Federal Government, with the National Assembly clearly stated as the competent authority to make laws in this regard.<sup>42</sup> To do otherwise is unconstitutional and to the extent of such inconsistency, the said section/law is void.<sup>43</sup> Just as

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<sup>41</sup> S. 116(1).

<sup>42</sup> CFRN 1999, s. 4(3).

<sup>43</sup> S. 1(3) CFRN 1999. See also the cases of *Uwaifo v Attorney-General of Bendel State* (1982) 7 S.C. 124, per idigbe, JSC; *Ikine v Edjerode* (2001) 18 NWLR (Pt. 745) 466; (2001) 5 SCNJ. 144, per Ejiwunmi, JSC; *Attorney-General of Ogun State*

the FIRS, through a Notice informing the public of its statutory right as the sole agency responsible for collection of stamp duties on behalf of the Federal Government of Nigeria,<sup>44</sup> and rightly so, the Finance Act at best intended to provide that the FIRS is the body to collect taxes for which the President can make regulations and for which the National Assembly can make laws and impose stamp duties or alter the schedule to the SDA. The extent of power of collection is also in line with the purpose for which the FIRS was established and should stick to its expertise. It is important for the tax administration process that the power of imposition should remain with the Federal Government and the National Assembly as provided under the Constitution.

The next question is, considering the nature of this tax and taking into account that this tax is imposed and effected upon documents, does transfer of funds from bank to bank constitute what can be referred to as a document? As stated above, the law governing tax is stringent to the extent that no one can be taxed unless and except such is provided or prescribed as taxable in Nigeria under an extant law. The Finance Act 2019 has, by its amendments, subjected electronic receipt and transfers from account to account as dutiable and essentially all forms of electronic transfer. This is to the exclusion of transfer from one account to another account both belonging to same taxpayer in same bank.<sup>45</sup> While it is admirable to bring a wide gamut of transactions under the coverage of the transactions chargeable and dutiable, the lawmakers may have overwhelmed the calculating taxpayer with a lot of dutiable transactions. Due to the nature of this expropriation, the taxpayer has an opportunity for credit where the stamp duties charged and paid on the transfer or deposit is also for

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& 4 *Ors. v Attorney-General of the Federation* (2002) 12 SCNJ. 191 at 207, per Onu JSC.

<sup>44</sup> W. Obayomi, "FIRS Public Notice on Remittance of Stamp Duties", available at <https://home.kpmg/ng/en/home/insights/2020/02/firs--public-notice-on-remittance-of-stamp-duties-.html> (accessed 6 July 2020).

<sup>45</sup> S. 54(3) Finance Act 2019. In essence a transfer from an account with one banker or deposit with another banker, both accounts belonging to same taxpayer banking with different bankers is liable to be subject to Stamp Duties.

any duty applicable on an instrument denoted with an adhesive stamp.<sup>46</sup>

The directive that the deposit banks and financial institutions are required to charge stamp duties and the imposition of ₦50 (Fifty Naira) on every transaction above ₦10,000 (Ten Thousand Naira) is pursuant to the Finance Act.<sup>47</sup> The implication is first off, any transaction that is over the sum of ₦10,000 (Ten Thousand Naira) qualifies as dutiable on a one-off payment of the said ₦50 (Fifty Naira) under the Act. It is discernible that the recipient bank may be the party to account for it.<sup>48</sup>

The revenue authorities have a time interval to enforce the right of collection of the duties after which it is statute barred.<sup>49</sup> This calls for efficiency of the revenue collecting agencies to collect revenue accruable under the SDA. The stamp duty is recoverable as debt owed to the Federal or state government, as the case may be.<sup>50</sup> This may also be recovered summarily.<sup>51</sup> It is also important to note that the failure to pay stamp duties as at when due has certain consequences. One of the consequences is in the event of such a document being used as evidence. An unstamped document would only show that there was probably an exchange of funds between the parties but cannot be tendered in as evidence.<sup>52</sup>

It is impressive that the Federal Government has made improvements in the inclusion of electronic documents/receipts and the definition for identification of transactions that will qualify as dutiable under the Act.<sup>53</sup>

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<sup>46</sup> S. 54(4) Finance Act 2019.

<sup>47</sup> S. 54 Finance Act 2019, which amended s. 89 SDA.

<sup>48</sup> This is against the backdrop that if all eligible transfers are taxed without the determination of which banker is to collect, it would amount to paying twice, one on the transferor/depositor bank and again on the transferee/recipient bank on one taxpayer.

<sup>49</sup> S. 114 SDA.

<sup>50</sup> S. 110 SDA.

<sup>51</sup> S. 111 SDA.

<sup>52</sup> S. 22 SDA.

<sup>53</sup> FIRS, "Clarifications of the Provisions of the Stamp Duties Act", available at <https://www.firs.gov.ng/sites/Authoring/SiteAssets/Lists/Content/GetContent/20>

A jurisprudential debate is expected whether the FIRS is same as or is an agency of the Federal Government. There are two questions for any association or body to qualify as an agency of the Federal Government; these questions are: (i) Whether the Federal Government has control over it? and (ii) Whether the functions of such organization are aimed at effecting the policies of the Federal Government?..<sup>54</sup> There is no doubt that the FIRS is an agency under the control of the Federal Government and give effect to their policies, but it is grossly debateable whether the imposition of tax (stamp duties) would amount to effecting a policy. In *Trendex* case, the Court could not accept Central Bank of Nigeria as an alter-ego of the Government of the federation or been one and same thing<sup>55</sup> same way is it difficult to accept that the FIRS and the Federal Government are same thing. One might add that it is a distinction without a difference, but it begs the question- why the alteration in substituting the ‘Federal Government’ with the ‘Federal Inland Revenue Service?’

Furthermore, a comprehensive reading of the SDA and the Finance Act is indicative that the National assembly didn’t have the intention to bestow imposition power on the FIRS. In light of section 3 and 116 – the intention is for the Federal Government to retain its powers; consequently, it is arguable whether section 4 is the charging provision or was so intended by the Legislature to still mean collection as was already a function of the FIRS. It raises a question whether any imposition of stamp duties by the FIRS would not be a usurpation of power in section 116, which was not amended. The FIRS may not be in express violation of the extant law pursuant to the Finance Act, but it is worthy of note that the amendment and substitution seems to be the delegation or even relinquish of constitutional power to the FIRS. All the functions statutorily created for the FIRS have to do with the collection and payment of taxes for the federation.<sup>56</sup> If the concept of agency as discussed above hold

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[19%20FA%20Information%20Circular-Stamp%20Duties.pdf](#) (accessed 28 July 2020).

<sup>54</sup> *Olubukola & Anor v A.G of Lagos State & Ors* (2016) LPELR-41451(CA), *Paul Amiolemhen & Ors. v Nigeria Gas Company & Anor* (2012) LPELR - 7957 (CA).

<sup>55</sup> *Trendtex Trading v Bank of Nigeria* (1977) 1 QB 529; Lawrence Atsegbua, “Oil and Gas Law in Nigeria: Theory and Practice” (Ababa Press 3d ed. 2012), p. 251 & 263.

<sup>56</sup> *FIRS v Governing Council of the Industrial Training Fund & Anor* (2018) LPELR-46857(CA).

sway, then the FIRS would have been able to impose stamp duties before now. The Finance Act may have inadvertently expanded FIRS' powers to include the power to impose stamp duties but it is yet to be determined what effect was intended the National Assembly by the substitution. It is hoped that clarity is showered upon a fortunate appearance of this question before the courts.

Another looming concern created by the Finance Act, which amended section 4 subsections (1) and (2) of the SDA is, flowing from the position above, is the National Assembly giving the right to impose and determine what or who is dutiable or not dutiable under the Act, to FIRS? The answer is a "Constitutional No". Recently, FIRS asked landlords and property agents to charge 6% stamp duty on all tenancy and lease agreements they enter into with all leases and remit the same promptly to the Service.<sup>57</sup> The above scenario was one thwarted instance where the power of imposition of stamp duties or power to vary and alter the schedule to the SDA, which are not constitutionally allowed, would have been exercised. Fortunately, the FIRS clarified on who qualifies to pay the 6% and who is to pay lower.<sup>58</sup>

#### **4.0. CONCLUSION/RECOMMENDATIONS**

According to Justice Latham of the United States Supreme Court, taxing power is:

...the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as the air he breathes to the natural man. It is not only the power to destroy; it is also the power to keep alive.<sup>59</sup>

In a time like this, the act of government to keep alive and afloat is encouraged by considering the intent of the law makers. It is pertinent

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<sup>57</sup> Vanguard Online, "Stamp Duty: Landlords, Property Agents to Collect, Remit 6% on Tenancy, Lease Agreements", available at <https://www.vanguardngr.com/2020/07/stamp-duty-landlords-property-agents-to-collect-remit-6-on-tenancy-lease-agreement/> (accessed 26 July 2020).

<sup>58</sup> The Nation Online, "Tenants to pay 0.78 Percent Stamp Duty, FIRS Clarifies", available at <https://thenationonlineng.net/tenants-to-pay-0-78-percent-stamp-duty-firs-clarifies/> (accessed 26 July 2020).

<sup>59</sup> *Nichol v Ames* 173 U.S. 509 (1929), p. 505.

to state that the said amendment of section 4 of the SDA by the Finance Act 2019 be further amended to remove the power of imposition on the FIRS which is contrary to the 1999 Constitution. The best option and way forward to ensure that this amendment is valid is to amend the Constitution which would be needless or amend the SDA and the Schedule in its totality to remove inconsistencies. Only an amendment to the Constitution and the entirety of the SDA would validly pass and make the FIRS the competent authority to impose stamp duties in Nigeria.

Whilst the recent enforcement and the sense of urgency for the collection of stamp duties may seem like a desperate attempt by the government, it is at best an efficient utilization of the extant laws to generate revenue. The FIRS will also need to clarify whether all printed receipts, regardless of whether or not they are dutiable transactions, will need to be stamped. We do not believe that the intention is to impose stamp duties in respect of non-chargeable instruments or transactions.<sup>60</sup> The taxpayer may have legitimate concerns about the utilization of the funds and revenue generated but the basic and only concern as far as the collection and enforcement of the stamp duties is whether the acts of Government is legal. This we have examined is squarely positioned on the law. An overview of the SDA and the Finance Act has given all the powers and boundaries the authorities need to ensure they are not expropriating revenue from taxpayers illegally. The onus has shifted to the taxpayer to ensure that the authorities account properly, utilize, or maximize lawful options to ensure lawful objectives.

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<sup>60</sup> Banwo and Ighodalo, “Stamping of Electronic Documents Under the Stamp Duties Act (as Amended by the Finance Act): Impact of the FIRS Clarification Circular”, available at <https://www.banwo-ighodalo.com/resources/stamping-of-electronic-documents-under-the-stamp-duties-Act-as-amended-by-the-finance-Act-impAct-of-the-firs-clarification-circular-1> (accessed 27 July 2020).