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VALUE ADDED TAX: LEGISLATIVE FRAMEWORK AND THE AUTHORITY TO AMEND THE CHARGEABLE RATE

ARTICLE SERIES

INTRODUCTION

In a bid to shore up its revenue base to finance the 2020 budget, the executive arm of the Federal Government of Nigeria has expressed its intention to increase the chargeable rate of value added tax from 5 per cent to 7.5 per cent. The government's intention was unveiled on 11 September 2019, when after its Federal Executive Council meeting, it disclosed that the chargeable rate of Value Added Tax ("VAT") shall be increased by 50 per cent, effective 2020. Later, on 8 October 2019, while presenting the Fiscal Allocation Bill to a joint session of the National Assembly, the President of Nigeria, Muhammadu Buhari, hinted that the 2020 budget will be partly funded by the 7.5 per cent VAT.

A lot of thoughts have come out of these announcements, with the major public discourse being the actual need for the increase in view of the lop-sidedness of tax collection in Nigeria and lack or irregular accountability of revenue from tax. Another important, but less discussed issue, is the question on who has the requisite power to amend the chargeable rate of VAT. Is it the Minister of Finance or the National Assembly?

This article highlights the origin of VAT and the history of its amendments relative to the chargeable rate. It will thereafter make an extensive review of the power to amend the rate of VAT.

HISTORY OF THE VALUE ADDED TAX ACT

Value Added Tax is a consumption tax targeted at the supply of certain goods and services in Nigeria. The tax liability is eventually borne by the final consumer. As at the date of this article, this tax is regulated by the Value Added Tax Act 1993, Cap. V1, LFN 2004 (VATA).

VAT emerged in Nigeria first through a military decree on 24 August 1993 under the regime of General Ibrahim Babangida. The VATA was then promulgated as the Value Added Tax Decree No. 102 of 1993 with 1 December 1993 as the commencement date. Section 1 of the Decree 102 "…imposed and charged a tax to be known as the Value Added Tax… which shall be administered in accordance with the provisions of this Decree."

In relation to the computation of the chargeable rate of VAT, section 4 of the Decree 102 provides that "The tax shall be computed at the rate, specified in column B of the Schedule 1 and 2 of this Decree, of the value of all taxable goods and services as determined under sections 5 and 6 of this Decree." Schedules 1 and 2 of the Decree set out the taxable goods and services and the applicable rate of tax, which is a uniform 5 per cent.

It would be noted that section 4 of Decree 102 did not specify the chargeable rate in the body of the statute, but by the Schedule. However, on 23 October 1996, the Federal Military Government, under General Sani Abacha, promulgated the Finance (Miscellaneous Taxation Provisions) (No. 2) Decree 1996,

Decree No.31, which amended section 4 of Decree No. 102. Section 27 of Decree No. 31 provides that the “tax shall be computed at the rate of 5 per cent on the value of taxable goods and service as determined under sections 5 and 6 of this Decree.”

Whereas there were further amendments of the VAT Decree, including that of Finance (Miscellaneous Taxation Provisions) (No. 3) Decree 1996, Decree No. 32, the chargeable rate was left untouched at 5 per cent. The rate remained so until Nigeria transited from military rule to a democratic state in 1999. In view of section 315 of the Constitution of the Federal Republic of Nigeria, 1999, the existing military Decrees which constitute laws that the National Assembly could make by reason of the Constitution, became Acts of the National Assembly. Consequently, the Value Added Tax Decree became known as the Value Added Tax Act of 1993 with 5 per cent as the chargeable rate.

AMENDMENT OF THE CHARGEABLE RATE OF VAT

Section 34 of VAT Decree 102 gave the Secretary or Minister responsible for matters relating to finance to vary the Schedule of taxable goods, services and rate of VAT. The section provides that “TheSecretary may by order published in the Gazette- (a) amend the rate of taxchargeable; and (b) amend, vary or modify the lists set out in Schedules 1, 2,and 3 to this Decree.”

Understandably, the rate of VAT under Decree 102 was not specifically set out in section 4 of the Decree. Rather, it refers to Schedules to the Decree which can be amended regularly or at anytime without affecting the wordings of section 4 of the Decree.

The Secretary could therefore tweak the contents of the Schedules without varying the principal legislation. More importantly, as at 1996 under military rule, there was a fusion of legislative and executive functions/powers, as there was no separate legislature. Thus, while the Secretary of Finance played the executive role, he also had seeming legislative powers under the Decree that could not be questioned judicially.

In 1996, when the Federal Military Government later promulgated the Finance (Miscellaneous Taxation Provisions (No. 2) Decree No. 31, it retained the power of the Secretary

to amend the rate of VAT. However, by section 27 of the Decree 31, the chargeable rate of VAT was no longer set out in a Schedule,but made part of the operative part of the Valued Added Tax Decree. Section 21 of Decree No. 31 amended section 4 of Decree 102 to specifically state that the tax shall be computed at 5 percent on the value of taxable goods and services. In the same vein, section 32 of Decree 31 amended section 34 of Decree 102 by "substituting for the words'lists set out in Schedules 1, 2 and 3', the words 'list set out in the Schedule to.'" Section 21 of Decree No. 31 invariably empowered the Secretary in charge of finance to amend the rate of VAT as stated in the body of the statute.This amendment placed the Secretary or Minister of finance in the position of a legislature capable of amending a principal provision of a statute unlike that of Decree 102 which limits the amendment to the Schedule to the Value Added Tax Decree.

Since its inception, the chargeable rate of VAT remained at 5 per cent. First, on goods and service, then in 1996, from Decree 31, on the value of goods and services. The rate continued on the value[2] of goods and services from the military rule until 1999 when Nigeria transited from military rule to democratic rule.

As from the transition to democracy in 1999, the roles of the legislature and the executive were clearly spelt out in the Constitution of the Federal Republic of Nigeria, 1999.

Furthermore, the judicial arm is also empowered to interpret the Acts of the legislature. Therefore, effective 29 May 1999, Ministers appointed or to be appointed by the President of the Federation into the Federal cabinet are to solely play executive role.[3]

While the National Assembly, comprising the Senate and the House of Representatives assumed and exercised legislative functions at the federal level.[4] This invariably means that a Minister cannot amend or alter any principal legislation unless he is so empowered by the National Assembly to provide regulations in relation to the principal legislation.

Section 4 of the Value Added Tax Act puts the chargeable rate of the VAT at 5 per cent in the following terms "The tax (i.e. VAT) shall be computed at the rate of 5 per cent on the value of all taxable goods and services as determined under sections 5 and 6 of this Act."

Though the 5 per cent chargeable rate of VAT had largely been the rate from inception, two Ministers under the democratic era had exercised their power under section 38 of the VAT Act to amend the chargeable rate from 5 per cent to 10 per cent, and back to 5 per cent. These amendments were published in Gazettes as required by section 38 of the VAT Act.

First, by the Federal Republic of Nigeria Original Gazette No. 58 Volume 94 titled "Valued Added Tax Act 1993 Rate of Tax Chargeable Order," Mrs. Nenadi E. Usman,[5]

[2]Section 2 of Decree 102 was amended by section 31 of the Finance (Miscellaneous Taxation Provisions). Decree 1996, Decree No. 30 as follows "Section 2 of the principal Decree is amended by substituting the words 'on the goods', the words 'on the value of the goods.'"
[3] Section 5(1) of the Constitution, 1999.
[4] Section 4(1) of the Constitution, 1999.
[5] The Minister of Finance.

Minister of Finance under President Olusegun Obasanjo, amended the VAT rate from5 per cent to 10 per cent commencing 23 May 2007. The Gazette reads in full:

"In exercise of the powers conferred upon me by section 38 of the Value Added Tax Act 1993 and all powers enabling me in that behalf, I, MRS. NENADI E. USMAN, Honourable Minister of Finance hereby make the following order:

The value added tax (herein referred as the principal Act) is hereby amended as follows:

a. in section 4 of the Principal Act the figure 5 per cent is deleted and substituted with 10 per cent.
b. In part I of the first schedule by inserting the following words in item 6 after the words "all exported" "excluding non-oil exports which enjoy zero rated status."
c. In part II of the first schedule by inserting in item 4 the following words "excluding non-oil exports which enjoys zero rated status" immediately after the words "all export services."

2. As from the commencement of this Order:
a. all value added tax and other Tax collecting agents shall pay remittances direct into designated Federal Inland Revenue Service Accounts.
b. All current existing bank account holders shall have a unique tax-payer identification number to be provided by the Federal Inland Revenue Service

3. This Order may be cited as the Rate of Tax Chargeable Order 2007

Made at Abuja this 25th day of May 2007

MRS. NENADI E. USMAN
Honourable Minister of Finance"

Labour unions, civil societies as well as members of the public condemned the increment of the chargeable rate of VAT. As a result of the agitations, the next Minister of Finance, Dr. Shamsuddeen Usman, under President Umaru Musa Yar'Adua, equally exercised the power to amend the VATA in the manner vested on him by section 38 of the VAT Act. Thus, Dr. Shamsuddeen Usman published in the Federal Republic of Nigeria Gazette No. 100 Volume 94 titled "Rate of Tax Chargeable (Amendment) Order, 2007, which commenced at 27 September 2007. The amendment as published in the Gazette reads:

"In exercise of the powers conferred upon me by section 38 of the Value Added Tax Act 2004 and all other powers enabling me in that behalf, I, DR. SHAMSUDDEEN USMAN, OFR, Honourable Minister of Finance hereby make the following Order:

1. Sub-paragraph (a) of paragraph 1 of the Order is hereby deleted

2. The rate of tax chargeable as stipulated in section 4 of the Value Added Tax Act 2004 is hereby restored. This Order may be cited as the Rate of Tax Chargeable (Amendment) Order, 2007

Made at Abuja this 27th day of September, 2007

DR. SHAMSUDDEEN USMAN, OFR
Honourable Minister of Finance"

One thing that is paramount in the 2007 amendments, is the introduction of the term, "in exercise of the powers conferred upon me by section 38 of the Valued Added Tax Act." The question that requires an answer is whether the Minister, in the performance of his executive functions under the Constitution of the Federal Republic of Nigeria, 1999 (as amended) can amend the provision of the VAT Act, a legislation. The other question is whether the National Assembly can abdicate or delegate its legislative function to the executive, to amend a piece of legislation.

AMENDMENT OF LEGISLATION

By section 4 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the legislative powers at the federal level are vested in the National Assembly. Whereas the executive powers are vested in the President, either acting directly or through his Minsters by virtue of section 5 of the Constitution. By section 4 of the Constitution, the making of every enactment of legislation or amendment is the sole responsibility of the legislature. These powers comprise of making laws that will affect everybody, agency and sector within Nigeria. Thus, as stated earlier, by section 315 of the Constitution, the National Assembly is deemed to have enacted the Valued Added Tax Act, which was formerly a Decree under military regimes.

The National Assembly in exercise of its legislative powers, has by section 38 of the VAT Act, empowered the Minister in charge of finance in Nigeria to "amend the rate of tax chargeable; and amend, vary or modify the list set out in the First Schedule to the VATA." The only condition the Minister is required to meet is to publish the amendment in a Gazette. This condition was recognised by the Federal High Court in the case of Rita Okoji v. Retail Supermarkets (Nigeria) Limited & FIRS,[6] where Justice A. M. Liman held on 1 July 2013 that

[6] (2014) 14 TLRN 136.

> “section 38 which empowers the Minister to vary the rate of tax impliedly under Section 4 of the Act, also requires that it can only be exercised by an order published in a gazette.”[7]

When the Federal Executive Council hinted that the National Assembly will amend the rate of VAT, the question that readily comes to the fore is whether that is the procedure set out by the VAT Act itself? Does the intended action of the Federal Executive Council to make the National Assembly to amend the rate, not negate the provision of section 38 of the VAT Act? These questions appear to expose some contradictions between an express provision of the statute and the general legislative powers of the National Assembly under section 4 of the Constitution.

Section 4 of the Constitution puts exclusive legislative powers on the National Assembly to enact and equally amend legislations. It thus means that the powers of the National Assembly are not exercisable by any other body, person or agency. It appears that by section 38 of the VAT Act, the Minister is not embarking on any executive legislation where he makes an order or orders an amendment without a legislative backing.

This is because, there is an express provision of legislation empowering him to so act. Thus, provisions of the law are clear and unambiguous. Accordingly, the courts, when faced with such question on the Minister’s function will have to determine whether the Minister is unilaterally usurping the functions of the legislature or he is exercising the powers vested on him by the National Assembly.

There is however another concern. Can it be said that empowering the Minister to amend an Act of the National Assembly amounts to the National Assembly delegating its powers? Can there be delegation of legislative powers? This is particularly worrisome, as section 4 of the Valued Added Tax Act is specific on the rate of chargeable as VAT. It is unlike the original Decree 102 which states the rate in a Schedule that could be amended from time to time without affecting the principal legislation.

If the Minister in a published Gazette states rate of VAT to be 7.5 per cent, will the provisions of the Gazette erase section 4 or amend section 4 of the VAT Act? If an amendment of a principal provision of a legislation is what is intended, is it not that the Minister has consequently carried out a legislative function whereby, in reading the VAT Act, when reference is to be made to section 4, recourse would be made to the Gazette? If the Gazette and

[7] Okoji v. Retail Supermarkets &FIRS (supra) p. 151.

section 4 of the VATA compete for supremacy, will reference to chargeable rate of VAT be to section 4 of the VATA or the Gazette?

As the Minister's Gazette cannot automatically amend the rate of tax stated in section 4 of the VATA, it then means that the constitutionality of the Minister's Gazette will be open to judicial challenge. This is because a principal legislation cannot be subservient to a subsidiary legislation? This therefore means that the Federal Executive Council should give a deep thought to the relevant process before embarking on the proposed amendment of the VATAct.

It seems more plausible that the National Assembly, by section 4 of the Constitution, has exclusive legislative powers to amend an Act of the National Assembly and this power cannot be delegated. There is another thin but potentially volatile constitutional point on whether the National Assembly has the power to legislate on value added tax? If it does, it can exercise such powers to amend the rate of tax. But if it does not, then the National Assembly is bereft of such powers. The power of the National Assembly in this regard will be considered subsequently. At the moment, let it be assumed that the National Assembly has the powers to legislate on value added tax.

CONCLUSION

It appears that although section 38 of the VATA vests the Minister with the powers to amend the rate of tax chargeable as VAT, there is a probability that the exercise of those powers will be subjected to judicial challenge in view of section 4 of the Constitution. It then should be noted that by section 1(1) and (3) of the Constitution 1999, any law that goes contrary to the provisions of the Constitution is void to the extent of its inconsistency. Whilst section 38 of the VATA empowers the Minister to amend the VAT rate, the court may hold that that section is void in view of the exclusive legislative powers of the National Assembly stated in section 4 of the Constitution, and such a function cannot be delegated by the National Assembly to the executive. It will therefore be advisable for the National Assembly to take a more holistic view of sections 4 and 38 of the VAT Act. If the National Assembly intends the Minister to exercise the power to amend the rate with less challenge to the legislative function, then the specific rate in section 4 has to be deleted and probably placed in a schedule as the original section 4 of Decree No. 102. This will enable the Minister to, by order or regulation, amend the rate as will from time to time be published in Gazette.

CONCLUSION CONT'D

If the eventual intention of the National Assembly is to retain the power to amend the VATA by legislative means, then section 38 of the VATA has to be deleted or amended to remove powers to amend the rate of VATA from the Minister.

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