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# Does the Minister of Finance have the Power to Amend the Value Added Tax Act?

## Introduction

This newsletter examines the validity or otherwise of the exercise of a delegated power by the Nigeria's Minister of Finance to amend the Schedule to the Value Added Tax Act – a principal legislation. It probes into the following issues: (a) the extent to which legislative powers can be delegated to other arms of government – especially as it relates to amendments, variations and/or modifications of a principal legislation made by the National Assembly; (b) whether or not there is control or reasonable oversight over the exercise of delegated powers to ensure there is no executive dictatorship or lawlessness; (c) what Nigeria must do to ensure power still reside with the people and not hijacked by the executive and/or their unelected agents.

Before delving into the above issues, it must be noted that the principle of the doctrine of separation of powers is not a watertight one. Otherwise, a strict interpretation of the doctrine means that no arm of a constitutional democracy (ie the legislature, executive or judiciary) is allowed to exercise another's function. The reality is that in today's world, the need to meet the exigencies of technicalities, emergencies, timeliness and/or fix trivial issues that need not waste the precious time of the legislature or any other arm of the government requires the deployment of delegated powers outsourced from their traditional base(s) to another arm invested with different powers – such as the power to enforce, make or interpret laws. Thus, the National Assembly may delegate law-making powers to other arms of government.

This includes the power to make regulations, guidelines, rules, etc., to enhance the effective implementation of a principal legislation. But it must be noted that the operations of separation of powers and delegated powers are permitted and circumscribed by the Constitution<sup>1</sup> and/or a principal legislation. It follows that both a donor and donee of delegated power(s) must not go outside the provisions of the constitution; and, in particular, a donee of delegated power must not exceed the statutory limits established by the relevant principal legislation. This implies that both the donor (legislature for instance) and the judiciary (when approached) must keep an eye on the boundaries drawn by the principal Act or limits of operation expressly or impliedly permitted by the Constitution in the exercise of such delegated powers.

## Section 38 Value Added Tax Act

The determination of the extant issues revolves round the validity and/or extent to which the powers conferred by section 38 of the Value Added Tax Act ("VAT Act") is exercised by the Minister of Finance (the "Minister"). This section confers on the Minister the power to amend the rate at which VAT is exigible; and, also, the power to amend, vary or modify the list set out in the First Schedule to the VAT Act – which implies the power to amend a schedule of a principal legislation by a Minister who is a member of the executive arm. In particular, this newsletter considers the validity of the various VAT Modification Orders issued by the Minister which varies the list of exempt and zero-rated items.

### **(a) The extent to which legislative powers can be delegated to other arms of government – especially as it relates to the amendments, variations and/or modifications of a principal legislation made by the National Assembly:**

It is not in doubt that the use of delegated legislation is part of Nigeria's legal history. Apart from our common law inheritance of this practice, the source of delegation of powers is not only the Constitution<sup>2</sup> but also different Acts and Laws of the National Assembly and State Houses of Assembly respectively<sup>3</sup>. Therefore, this newsletter does not question the validity or otherwise of the use of the instrument of delegated powers/legislation per se. Rather, it questions the extent or degree to which delegated powers could be entrusted to and exercised by other arms of government. For instance, it is a given that no arm of government – such as the legislature – can grant rulemaking power outside the powers assigned to it by the Constitution. If a legislature exceeds its constitutional bounds in conferring power on another body or person(s), such grant and subsequent exercise of that power thereof will be null and void.

When a parliament validly delegates its own power to a Minister or any agent of the executive, it is expected that the delegatee must conform with the condition(s) – if any – attached to the exercise of such power. This means that a Minister or an agent of the executive must not go beyond the powers conferred on him; otherwise, such will be ultra-vires the principal legislation from which the power flows in the first place. Also, such delegated powers must not be exercised in an unreasonable manner.

<sup>1</sup>See sections 4, 5, and 6 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) for the partition of legislative, executive, and judicial powers amongst the three arms of governments at both federal and state levels. See also the case of *Ahmad v S.S.H. A* (2002) 15 NWLR (Pt. 791) 545 where this doctrine of separation of powers is recognized as part of Nigeria's legal system.

<sup>2</sup> See sections 46(3), 248, 254, 259, 264, 269, 274, 284 and 279 for powers granted different heads of courts by the Constitution to make rules with respect to the practice and procedure of their courts. See also Paragraph 15(f) of the Third Schedule to the Constitution which grants the Independent National Electoral Commission the power to make rules and regulation guiding political parties.

<sup>3</sup> Powers can also be delegated via Local Government Bye Laws.

The next issue is whether the National Assembly acted within its powers to confer on the Minister of Finance the powers contained in section 38 of the Value Added Tax Act; and if so, whether the Minister acted within the law when she delisted and/or added some items to the First Schedule of the VAT Act via the Valued Added Tax (Modification) Orders of 2020 and 2021 (the "Modification Orders") respectively. By these Modification Orders, the First Schedule to the VAT Act was altered – to delist and/or add certain items to the list of VAT-exempt and zero-rated items.

First, an answer to the above depends on whether VAT is a subject that the National Assembly can validly legislate on – either as a subject contained in the exclusive legislative or concurrent list. In a previous newsletter where we examined the decision of the Federal High Court sitting in Port Harcourt over the constitutionality of the VAT Act, we took the position that the VAT Decree of 1993 which appears to survive as an existing law cannot be supported by the current Constitution since VAT as a subject could not be found in either the exclusive or legislative list of the Constitution. Regardless, let's assume the VAT Act is sustainable as an Act of the National Assembly under the extant Constitution, one would assume that since the Constitution gives the National Assembly the authority to legislate on VAT matters, same National Assembly can validly delegate the power to perform certain acts – such as adding or delisting certain items from a Schedule to the VAT Act.

The above question notwithstanding, it appears that the major constitutional question lies on whether a Minister or any agent of the executive can amend, or alter a Schedule to an Act, which is a principal legislation. In answer to a similar question, the Federal High Court in *Registered Trustees of Hotel Owners and Managers, Lagos v. Attorney General of the Federation and Minister of Finance*<sup>4</sup> (the "HOMAL Case") was faced with determining the constitutionality or otherwise of the *Taxes and Levies (Approved List for Collection) Act (Amendment) Order, 2015* ("TAL Act Order"). The

TAL Act Order was promulgated by the Minister in exercise of the powers conferred on him by section 1(2) of the defunct *Taxes and Levies (Approved List for Collection) Act* ("TAL Act")<sup>5</sup>, which is similarly worded like Section 38 of the VAT Act. The said section 1(2) of the TAL Act granted the Minister of Finance the power to amend the schedule to the TAL Act. The Court declared the section unconstitutional. It held that the promulgation of TAL Act Order by the Ministers amounted to a usurpation of the powers of the National Assembly. It seems that the court's grievance is that National Assembly cannot delegate its principal duty of legislating, amending or altering a principal Act. With due respect, we note that parliament can delegate the power to make changes and/or amend a schedule to principal legislation to respond to urgent societal needs/changes. Our problem with the exercise of delegated powers in Nigeria lies on control, monitoring and involvement of stakeholders or the public in churning out many of the rules, regulations and orders that affect everyone.

**(b) Whether or not there is control or reasonable oversight over the exercise of delegated powers to ensure there is no executive dictatorship or lawlessness**

It is not in doubt that the Constitution provides for legislative oversight over the activities of both the Federal and State executives.<sup>6</sup>

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<sup>4</sup> FHC/L/CS/1082/19

<sup>5</sup> See the case of *Uyo Local Government vs. Akwa Ibom State Government & Anor.* (2020) LPELR 49691 (CA) where the Court of Appeal declared the TAL Act unconstitutional for being inconsistent with the Constitution.

<sup>6</sup> See sections 88, 89, 128 and 129 of the Constitution.

The legislature appears to be empowered by the constitution to control, monitor, and provide oversight functions over the activities of the executives. Unfortunately, however, it is not on record that Nigeria's National Assembly monitors, investigates or queries the exercise delegated powers by the executive or its agents. Unlike other common law countries where you have Statutory Instruments Act<sup>7</sup>, there is no law providing for the examination, publication and scrutiny of regulations and other statutory instruments in Nigeria. This vacuum lends credence to the fear of executive lawless or dictatorship in the exercise delegated powers.

### **(c) What Nigeria must do to ensure power still reside with the people and not hijacked by the executive and/or their unelected agents**

First, the legislature must ensure they exercise their legislative oversight function through committees of the house to monitor the exercise of delegated powers by the executives through Ministries, Departments and Agencies of government. The focus will be to ensure that donees of delegated powers do not exceed their remits in exercise of such thereof; regulations or orders made are not unreasonable; and that legal drafters in ministries, departments and agencies convey the real intent of principal legislation(s) authorizing such delegated power(s) without causing ambiguity that could lead to an entirely different outcome.

Secondly, it is high time Nigeria enacted a Statutory Instrument Act that will mandate and spell out the procedure for examination, publication, and scrutiny of regulations; and, finally, it is advised that every principal legislation donating delegated power to make regulations and orders must provide as a condition that stakeholders in the industry must be engaged by ministries, departments or agencies so they could make inputs to proposed regulations, orders etc. It does not really matter whether inputs of stakeholders are taken; it is enough that the relevant executive body has heard the players in the industry and, perhaps, the public. Any aggrieved person can challenge the act of the executive if it bothers on legislative overreach/ultra vires matter and/or unreasonableness – since our courts allow liberal construction of *locus standi*. This will also prepare the market for changes that the regulation or orders will introduce.

#### **Conclusion**

From the above, it is obvious that the control of the exercise of delegated powers in Nigeria is minimal – if at all there is one in practice. This gives rise to executive dictatorship, which, unfortunately, allows Ministers, Departments or agencies to churn out regulations and orders without proper checks and balances since the legislature care less in controlling and monitoring powers that it outsourced. There is the need for the National Assembly to wake up to its responsibilities in monitor the activities of the executive and its agents. In addition, there is the need for the enactment of Statutory Instruments Act that will provide for the examination, publication, and scrutiny of regulations and orders.

On the legality or otherwise of the issuance of the Modification Orders by the Minister of Finance, a cursory look of the exercise of the power to amend the VAT Act's Schedule appears to be delegated powers duly exercised. But the implication of the decision of the Homal's case suggests otherwise. The decision of the court in the case supports the position that any subsidiary legislation capable of altering an enabling legislation can only be made by the National Assembly or an appropriate legislature. Hence, such power cannot be validly delegated. The implication is that the Minister's Modification Orders were made ultra vires.

<sup>7</sup> For instance, see the Canadian *Statutory Instruments Act* (R.S.C., 1985, c. S-22) and the British *Statutory Instrument Act*, 1946.