

THE LEGALITY OR OTHERWISE OF ENFORCEMENT OF 7.5 PERCENT VALUE ADDED TAX RATE IN NIGERIA: AN APPRAISAL*

Abstract

The recent approval of the new Value Added Tax (VAT) rate by the Federal Executive Council (EFC) from 5% to 7.5% has continued to generate controversies. In fact the 2019 Appropriation Bill sent to the National Assembly projected an 11% increase from VAT collections compared to 2018 projections, based on the unauthorized increment in the rate. The driving force for the increment in the rate of Value Added Tax is improved revenue collection by the government. The new rate is expected to take effect from 2020 after due consultations with the relevant stakeholders. The controversy is whether the Federal Executive Council can amend the Value Added Tax Legislation to the exclusion of the National Assembly. This work by doctrinal method analyzed data, facts and reviewed the provisions of the extant tax law. Furthermore, the attitude of the Court and opinions of tax experts on the issue was consulted. The result was that only the National Assembly has the capacity to amend the current VAT Act. It therefore became imperative that due process should be followed in amending the VAT Act.

Keywords: Legality, Value Added Tax, Enforcement, Rate of tax, Amend

1. Introduction

Tax is viewed in *Nicholas v. Ames*¹ as the 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 is to the natural man. It has not only the power to destroy; it has power to keep alive. It is a tool at the disposal of government for the effective delivery of economic and social dividends to the citizens. It is a source of revenue accruing to the government in order to use the fund for the provision of infrastructure like electricity, roads, pipe borne water, healthcare, housing, employment, security and other welfare packages to the people. One of the reasons offered by the Executive arm of government for the increase is political and economic uncertainty occasioned by long standing corruption and poor economic management. Also the dwindling oil revenue which is less than 10 percent the gross domestic product severally affected the balance of payments. This led the government, that is, the Federal Executive Council to adopt a 44 percent hike in Value Added Tax rate from 5 percent to 7.5 percent. This move was as a result of the advice of the Chairman of the Federal Inland Revenue Service and Udo Udoma, the former Minister for National Planning² that the increase was to enable government fund the new maximum wage at 30,000.00 per month.

2. Tax

This is a pecuniary burden laid upon individuals or corporate persons to support government expenditure. In *Matthews v Chicory Marketing Board (v)*³, tax is a compulsory exaction of money by a public authority for public purposes. Ayua⁴ opined that it is a pecuniary burden laid upon individuals or persons or property to support the government and is a payment exacted by legislative authority. From the depositions, it means that money cannot be laid upon or exacted from people except it is provided by law.

3. Value Added Tax (VAT)

This is a consumption tax on goods and services. The tax is levied or charged or payable on the supply of all goods and services otherwise called taxable goods and services.⁵ These are goods and services other than the goods and services listed in the first schedule to the Act.⁶ A taxable person⁷ shall within six months of the commencement of the VAT Act or within six months of business register with the board for the purposes of the Act. Under the Act⁸ a

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¹ 175 US 509 (2899) 515

² This day, Wednesday, October 16, 2019, Budden of VAT increase on Nigerians , page 1

³ (1938) 60 CLR 263, 276

⁴ 1A Ayua, *Nigerian Tax Law* (Ibadan: Spectrum law publishing 1996) 4. See also I. K.E.Oraegbunam, 'Prospects of Electronic Taxation Jurisprudence in Nigeria', *Afe Babalola University Ado-Ekiti Law Journal*, 2015, Vol. 1, No. 3, pp. 183-214.

⁵ VAT Act, 2007, S.2

⁶ Ibid 15.3

⁷ Under section 46 of VAT Act, a taxable person includes an individual or body of individuals, family, corporation sole, trustees or executor or a person who carries out in a place an economic activity, a person exploiting tangible or intangible property for the purpose of obtaining income there from by way of trade or business or a person or agency of government acting in that capacity.

⁸ VAT Act, 2007, S.14

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taxable person is under an obligation to collect tax called output tax from the customers or clients or business agents. The court has always interpreted the words of a tax statute liberally⁹ to give the words their ordinary meaning:

Exempted Good¹⁰

The goods that are exempted under the Value Added Tax Act include;

- (a) Basic medical and pharmaceutical products
- (b) Basic food items
- (c) Books and educational materials.
- (d) Baby product
- (e) Fertilizer, locally produced agricultural and veterinary medicine, farming machinery and farming transportation equipment.
- (f) All exports
- (g) Plants, machinery and goods imported for use in the export processing zone or free trade zone; provided that 100 percent production of such company is for export otherwise tax shall accrue proportionally on the profits of the company.
- (h) Plant, machinery and equipment purchased for utilization of gas in downstream petroleum operations
- (i) Tractors, ploughs and agricultural equipment and implements purchased for agricultural purposes.

Services Exempt¹¹

The services exempt include;

- a. Medical services
- b. Services rendered by community Banks, people's Banks and Mortgage institution.
- c. Plays and performances conducted by educational institutions.
- d. All export services

Zero Rated Goods and Services¹²

- a. Non-oil exports
- b. Goods and services purchased by diplomats
- c. Good and services for humanitarian¹³ donor funded projects

4. Rate of tax

The tax shall be computed at the rate of 5 percent of all goods and services taxable.¹⁴ The rate has always remained the only section each subsequent government wants to amend by an executive fiat.

5. Power to amend Value Added Tax Act

Under the Act¹⁵, the provision of the previous Act¹⁶ which was boldly headed "the power of the Minister to vary schedules" was retained. It provides that the Minister may by order published in the Gazette amend the rate of tax chargeable and (b) amend, vary or modify the list set out in the first schedule to the Act. It is clear that the drafters of the Act summed up the powers of the Minister in the Act to be that of varying the provisions of the schedule only. From the Act, the use of the phrase power to amend the rate of tax, only related to the power to remove or add to the schedule¹⁷. Again, by a community reading of the provisions of the section, the law intends that the removal or varying would mean removing of certain goods and services from exemptions or zero rated to become taxable at the rate of 5%. It also means the Minister moving an item of goods or services that are taxable to the exemptions of *vice versa*.

⁹*Al-Maseer law Firm v FIRS* (2019)12 NWLR (Pt. 1687) 555.

¹⁰VAT Act, 2007, S.13, part 1 of the first schedule

¹¹VAT Act, 2007, part 11 of the first schedule

¹² VAT Act 2007, part 111 of the first schedule

¹³Humanitarian donor funded projects includes projects undertaken by non-Governmental organizations and religious and social clubs or societies recognized by law whose activities is not for profit in the public interest

¹⁴ VAT Act, 2007 S.4

¹⁵ Ibid S. 38

¹⁶ Value Added Tax Act, 1993, S.34

¹⁷ VAT Act 2007, S.38

6. Rationale for Policy or Rule making by the Executive arm of Government

It is noteworthy that the argument in favour of the executive arm to engage in law making is that the business of the legislative arm may be cumbersome. The legislature with the pressure will not have time to attend or consider in details every legislation. Sometimes the legislation may also be very technical for effective handling on the floor of the National Assembly. It could also be that the matter may require some measure of flexibility so as to take care of the future contingencies or unforeseen supervening developments in the execution of government policy. In as much as there may be reasons why the executive arm may intervene in the rule or policy making generally, but in the tax matters except where the law permits there will be a serious problem. Abdulrazaq¹⁸ opined that where the power of the executive arm is merely aimed at varying the details on the schedules, there is no problem, thus:

Indeed the rule making powers of a minister may vary according to his responsibility and one of such powers usually exercisable by a minister is the power to vary schedules. There seems to be no serious problem where the power is merely aimed at varying the details on the schedule to an Act or law rather than modifying the policies or principles underlying the legislation itself.

It is always an issue and possesses a serious challenge where to draw the line where the principles or the provisions of the sections of the law to be affected by the proposed amendment provides for a non-legislative body to act in that capacity without first consulting the legislative arm. The Federal Executive Council capitalized on this confusion to engage in the amendment of the VAT Act. The increment of the Value Added Tax rate from 5% to 7.5 percent and the Nigeria's 2020 budget presented to the National Assembly on the 18th day of October 2019 of an estimate of 9.7tn was partly projected based on the revenue to be derived from the hike in the rate of VAT Act. This was based on the advice of the Bismack Revenue led Presidential Technical Advisory Committee which proposed the increment of the tax rate¹⁹.

7. Powers of the Minister under the Law

The general provision of the Act²⁰ is that the power of the Minister to vary schedules. The Act²¹ provides that the minister may by order published in the gazette amend the rate of tax. It is not in doubt the reason for the confusion in the Act, the precursor to the amended Act, Decree No 31 of 1996 was promulgated during the military administration in Nigeria. The heading of the section relates to the intention of the drafters. This is why Abdulrazaq²² rightly submitted thus',

The power to amend the rate of tax chargeable only related to power to remove or add to the schedule which results in the implication that a removal from the schedule which contains the exempted lists would mean that the removed goods and services would now be taxable at 5% instead of being zero rated and one that was taxable at 5% and is now added to the exempted list rate from 5% to zero.

The right construction or interpretation of the provision is that the Act did not empower the minister to amend the tax rate provided in a different section²³ of the legislation by means of an order in gazette or executive fiat. By the provisions of the Constitution²⁴, the Act was made an existing law and deemed Act of the National Assembly with some modifications. By the corporate reading of the provisions of the constitution²⁵ and the heading of the section 38 of the Act, the subsection (a) of the section is inconsistent with the provisions of the constitution and therefore void.

¹⁸M T Abdulrazaq, 'An Examination of the Power of the Minister of Finance to increase the Tax rate under the Value Added Tax (amendment) Act 2007' in JAA Agbonika (ed) *Topical Issues on Nigerian Tax Laws and Related Areas* (Ibadan: Ababa Press Ltd, 2015) 1-17

¹⁹A. Olasupo, *The Guardian*, Buhari based 2020 budget on proposed VAT rate. <http://guardian.ng/news/buhari-2020-budget-on-proposed-increase-vat-rate-of-the-18/10/2019-assessed-on-19/10/2019>

²⁰VAT Act, 2007, see 38

²¹ Ibid

²² Op. cit. note 17

²³Value Added Tax Act, 2007 S.4. This provides that the tax shall be computed at the rate of 5 percent on the value of all goods and services as determined under sections 5 and 6 of this Act, except that goods listed in part III of the First schedule to this Act shall be taxed at zero rate.

²⁴CFRN, 1999 as amended, S.315

²⁵ The combined reading of sections 1 (3), 4 (1) and 215 (3)(d) of the Constitution

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Again, upon the community reading of the provisions of the constitution and the value Added Tax Act, the Minister nor the Federal Executive Council does not possess the power to amend the Act of the national Assembly. One of the confusion experienced in the Nigeria Taxes System is this attempt to use executive fiat without due process to create different taxes²⁶. One of the instances is the amendment of the Taxes and Levies (Approved List for collection) Act schedule where the minister could not differentiate between taxes properly so called and pay as you go levies. It is submitted that by the amendment of the tax rate from 5% to 7.5%, the Federal Executive Council misconceived the provision of the Act. In *Akingbade v. Lagos Town Council*²⁷, the court cited with approval the ratio of *Attorney General v. Wills Dairies Ltd*²⁸ and *Ormond Investment Co v Beth*²⁹ and hold that rules of law that no pecuniary burden can be imposed upon the subjects of the country, by whatever name it may be called, whether tax, due, rate or toll except upon clear and distinct legal authority, established by those who seek to impose the burden has been so often the subject of legal support of it. The act of the Ministry of Finance and the Federal Executive Council by increasing or hiking the rate of value Added tax is utterly and directly in conflict with known laws and statutes, as such it is illegal. It is a clear usurpation of the powers of the National Assembly.

8. Enforcement of the 7.5% VAT Rate

The cardinal principle relating to acts that impose taxation is that, "No taxation will be imposed on the subject without words in an Act of parliament clearly showing an intention to lay a burden on him"³⁰. The tax payers in Nigeria should approach the courts by a judicial review and writ of certiorari. As expected the courts should rise against and act in line with the established principles in the case of *Asoud v. Regional Tax Board, Williams Adelaja*³¹, *offshore International v. FBIR*³², and *Okupe v. FBIR*³³. It is expected that the court upholding principles enunciated in the cases will declare that the minister of finance or the Federal Executive Council acted *ultra vires*.

9. Conclusion

The new Value Added Tax rate was not only done without due process. In fact it amounts to usurpation of the functions and powers of the legislature. Moreover, it has overriding consequences on the burden of the tax payers, investors in particular and the entire economy in general. As the increase in the VAT rate was done without the legal capacity, it will be counterproductive to the goals of reducing poverty in Nigeria. The controversy it will inevitably generate will give rise to high economic disparity. The companies will raise prices significantly ultimately placing the incidence of the tax increment on the consumers. The Enforcement will affect the purchasing power of the average Nigeria workers even now with the attempt to increase minimum wage, the gain will also be eroded. In a bid to manage costs, companies may likely lay off workers which will heighten the level of unemployment. Finally, the National Assembly should rise up to the occasion to find out the need for the hike in the rate of VAT and due process enshrined in the Act should be followed for the amendment.

²⁶Schedule to the Taxes and Levies (approved list for collection) Act (Amendment) order, 2015. An instance was, when the minister in the exercise of her powers in the Taxes and Levies (Approved list for collection) Act, the minister gave impression that there are 55 types of taxes under the laws and regulations administered in Nigeria.

²⁷ (1955) 21 NLR 90

²⁸ (1921) 37 TLR 884

²⁹ (1928) AC 143

³⁰*Ormond Investment Co. V. Betts* (1928) AC 143, *Sun Trust Savings & Loans Ltd v. Hon. Minister FCT &Ors*(2014) 9 ALL NTC 357

³¹*Williams v. LSDPC* (1978) 3 SC 11 at 17

³² (1976) 2 ALL NTC 67

³³ (1974) 4 SC 930