

FHC nullifies the Schedule to the Taxes and Levies (Approved List for Collection) Act (Amendment) Order, 2015

KPMG in Nigeria

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The Federal High Court (FHC or “the Court”) sitting in Lagos, on 8th May 2020 delivered judgement in the case between *The Registered Trustees of Hotel Owners and Managers Association of Lagos (RTHMAL or “the Plaintiff”)* and *Attorney-General of the Federation & Minister of Finance (“the Defendants”)* nullifying the Schedule to the Taxes and Levies (Approved List for Collection) Act (Amendment) Order, 2015 (“Amendment Order”) issued 5 years earlier by the Minister of Finance (“the Minister”), in the exercise of the power conferred on her by Section 1(2) of the Taxes and Levies (Approved List for Collection) Act, Cap. T2, Laws of the Federation of Nigeria (LFN) 2004 (TLA or “the Act”).

The Plaintiff, amongst other things, had prayed the Court to declare the Amendment Order null, void and unconstitutional in line with the provisions of the Constitution of the Federal Republic of Nigeria, 1999 Cap. C23 LFN 2004 (“the Constitution”).

Facts of the case and Issues for determination

The TLA stipulates the different taxes and levies that are collectible by the three tiers of government in Nigeria, namely, the Federal, State and Local governments. Section 1(2) of the Act provides that, “*The Minister of Finance may, on the advice of the Joint Tax Board and by Order published in the Gazette, amend the Schedule to this Act.*” Accordingly, the Minister issued the Amendment Order which expanded the Schedule to the TLA by including, amongst others, “*Hotel, Restaurant or Event Centre Consumption Tax*” to the list of taxes to be collected by State governments. Consequently, various States, including Lagos, have enacted consumption tax laws and commenced collection of the tax from businesses in this category.

Aggrieved by the imposition of consumption tax by the Lagos State government, the Plaintiff instituted a legal action against the Defendants at the FHC and formulated the following issues, which were also adopted by the Court, for determination:

1. Whether by virtue of Section 4 of the Constitution, the legislative power of the Federal Republic of Nigeria was vested in the National Assembly;
2. Whether the Minister, a member of the executive arm of the Federal Government, has constitutional power (legislative competence) to amend an Act of the National Assembly or any part thereof;
3. Whether Section 1(2) of the Act, which vests the Minister with the power to amend the Schedule to the Act, is inconsistent with the provisions of the Constitution and, therefore, unconstitutional, null and void in light of Section 1(3) of the Constitution; and
4. Whether any purported amendment to the Act by the Minister, a member of the executive arm of the Federal Government including, but not limited to, the Schedule to the Act is illegal, unconstitutional, null and void in light of Section 1(3) of the Constitution.

FHC decision

After considering the arguments of the parties, the FHC held that:

- the power to legislate is the function of the parliament to exercise, and that power cannot be shared with or delegated to another body. Therefore, the delegation of the legislative function by the Act to the Minister is a violation of the principle of separation of powers as laid down in the Constitution;
- the Minister is not the appropriate authority with the power to revise or rewrite the laws of the Federation under the Constitution. Therefore, the Schedule to the Act, being part of the Act, cannot be amended except in the same way that the Act itself can be amended;
- Section 1(2) of the TLA is inconsistent with the provisions of the Constitution and, therefore, the amendment of the Schedule to the Act by the Minister through the Amendment Order is unconstitutional, null and void.

Commentaries:

The judgement of the FHC that the Minister lacks the power to amend the TLA, an Act of the National Assembly, has effectively challenged the legal basis for the imposition of consumption tax and other taxes and levies by any State Government in Nigeria pursuant to the Amendment Order. Interestingly, the FHC Lagos in an earlier judgement on 3 October 2019 in the case between *RTHMAL vs Attorney-General of Lagos State and Federal Inland Revenue Service* upheld the validity of the Hotel Occupancy and Restaurant Consumption (HORC) Law and Regulations of Lagos State and the imposition of consumption tax in the State. In reaching the verdict, the FHC had relied on the provisions of the Section 4(7) of the Constitution to state that consumption tax neither falls under the Exclusive nor the Concurrent Legislative List and, therefore, it is a residual matter on which the States are empowered to legislate. At the same time, the FHC acknowledged the

amendments to the TLA introduced by the Amendment Order and thereby pronounced in its judgement that *“With this Order, the responsibility for collecting consumption tax by hotels, restaurant and event centres lies with the State Government, ...”*

The later judgement of the FHC in *RTHMAL and Attorney-General of the Federation & Minister of Finance* to the effect that the Minister does not have the power to amend the Schedule to the TLA cannot override the earlier FHC judgement endorsing the Amendment Order and upholding the HORA Law and Regulations of Lagos State, as the two courts are of coordinate jurisdiction. However, it exposes the vulnerability of the part of the previous judgement endorsing the validity of the Amendment Order and suggests how a higher court might determine the issue.

Relatedly, the judgement casts a doubt on the legality of amendments made by various agents of the executive arm of the government, such as the Minister, pursuant to the powers conferred on them by provisions of the relevant Acts. A recent example is the issuance of the Value Added Tax (VAT) (Modification) Order 2020 by the Minister expanding the list of exempt items in the First Schedule to the VAT Act as amended by the Finance Act, 2019. This was pursuant to her powers under Section 38 of the VAT Act, which provides that *“The Minister may by order published in the Gazette (a) amend the rate of tax chargeable; and (b) amend, vary or modify the list set out in the First Schedule to this Act.”* The wording of the above provision in the VAT Act is similar to that of the TLA. This a wake-up call to both the legislature, which has conferred such powers on agents of the executive arm of the government, and the executive officers upon whom the powers have been confirmed by the legislature, to revisit and regularize their positions.

Another significant implication of the judgement is that any amendment, variation or modification of a Schedule to an existing legislation can only be made through the National Assembly. Given the dynamic nature of the global economy and taxation, the need for administrative action by the executive pursuant to powers conferred by statutes cannot be totally dispensed with. While it is consistent with democratic tradition for the legislature to confer administrative powers under statutes on the executive for ease of their administration, the challenge is how to ensure the executive can act legitimately without usurping the power of the legislature. The Finance Act, 2019 provides an acceptable practice in this regard by conferring on the Minister the power to issue an order to *“determine what constitutes significant economic presence of a company other than a Nigerian company.”* The Minister has pursuant to this power issued the Companies Income Tax (Significant Economic Presence) Order 2020 (SEP Order). While the Order advances the purpose of the Act for ease of its administration, it does not in any way amend any of its provisions.

Conclusion

The imposition of consumption tax by the various States of the Federation continues to be a contentious issue given the differing pronouncements on the matter by the courts of coordinate jurisdiction. Pending when a higher court makes a more authoritative pronouncement on the subject, State governments are incapacitated to impose consumption tax or any other tax authorised by the nullified Amendment Order, unless they enact a law to that effect.

For enquiries please contact:

Wole Obayomi

NG-FMTAXEnquiries@ng.kpmg.com

www.home.kpmg/ng

home.kpmg/socialmedia

