RE: *Widening The Tax Net*
Is Osinbajo's Executive Order Correct?

Thought Leadership | By Gabriel Fatokunbo (Originally published in *ThisDay Lawyer*, 5th September 2017, p.7)

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Jesus said to the paralytic, "Son, be of good cheer; your sins are forgiven you." (Mathew 9:2 NKJV)

Introduction

My learned senior colleague and *ThisDay Lawyer's 'Insight'* columnist, Abubakar D. Sani's, 8th August 2017 piece, *"Widening the Tax Net: Is Osinbajo's Executive Order Correct?"* was an interesting read. Mr. Sani doubted the constitutional validity of the *Executive Order (EO) No. 004 of 2017 on Voluntary Assets and Income Declaration Scheme (VAIDS)* signed by the Acting President on 30th June 2017. VAIDS provides a window for tax defaulters to, between 1 July 2017 and 31 March 2018, regularize their tax status by voluntarily declaring their income and assets for the preceding six years' of assessment. Such would confer benefits such as waivers of penalties and interest and immunity from tax audit and prosecution for tax offences. Mr. Sani argues that VAIDS derogates from the National Assembly (NA)'s exclusive power of regulating tax collection by the Federal Inland Revenue Service (FIRS) and State Boards of Internal Revenue (SBIRs) pursuant to ***section 4(3), Items 59 and 7 of the Exclusive and Concurrent Lists*** of the 1999 *Constitution (1999 Constitution)*. This rejoinder seeks to clarify some grey areas and affirm the constitutionality of VAIDS and its enabling EO.

Origin and Relevance of EO

First, it must be established that the EO results from a valid process backed by law. Black's Law Dictionary 9th Edition (p.651) defines EO as *"an Order issued by or on behalf of the President, usually intended to direct or instruct the actions of executive agencies or government officials or to set policies for the Executive branch to follow."* EO was first adopted in the USA on June 8 1789 when George Washington, the first US President, addressed the EO to Heads of Federal Agencies and Departments, asking them to educate him on the function of their various departments: *"…impress me with a full, precise and distinct general idea of the affairs of the United States in your fields."* Subsequent US Presidents have used EOs for various purposes. Although Nigeria's 1999 Constitution omitted to define an EO, my respectful view is that a gazetted EO (to the extent that it does not conflict with superior provisions), has the force of law.

VAIDS EO: Constitutional?

The President's executive powers are spelt out in ***section 5(1)(a)(b) 1999 Constitution***:

"Subject to the provisions of this Constitution, the executive powers of the Federation: (a) shall be vested in the President…exercised by him either directly or ***through the Vice President*** *and … (b)* ***shall extend to*** *the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters, with respect to which the National Assembly has, for the time being, power to make laws."* Additionally, ***section 130 1999 Constitution*** lucidly states that: *"the President shall be the Head of State, the Chief Executive of the Federation and Commander-in-Chief of the Armed Forces of the Federation."*

According to Mr. Sani, *"…by virtue of sections 5 and 130 of the Constitution, all the Executive Powers of the Federation are vested in the President (or, the Acting President). However, these are general provisions."* My humble view is that the Constitution not only gave the President general powers, it also confers on him certain inherent powers. Hence, the phrase *'shall extend to'* in ***section 5(1)(b) 1999 Constitution*** enables the President to carry out duties beyond execution of laws except such law has been prohibited.

The VAIDS EO is clearly not *ultra vires*, since it was to give effect to tax legislation by encouraging amongst others, increased tax compliance. It is trite that an incidental action meant to further enhance a main object or primary purpose, cannot be set aside to the extent of its consistency with the main object: ***INEC v. Musa [2003] 3 NWLR (Pt. 806), 72***. Secondly, the powers to "forgive" or be "lenient on sins" that the EO exercises (waiver of penalties and interest, instalmental payments, immunity from audit/prosecution) are discretions that tax authorities routinely exercise in negotiated settlements with tax payers, pursuant to enabling legislative provisions.

For example, ***sections 77(2)(c), 68(1)(b) CITA, PITA*** vests the Revenue with discretion to extend the time of making tax payment; by ***section 59 CITA,*** the Revenue may also extend the period for making returns, whilst ***section 45 PITA*** provides for 1% early self-assessment filing bonus. ***Section 102 CITA*** even vests the Revenue with power to pay rewards for information provided by third parties which may be of assistance to Revenue in the performance of its duties. ***Section 85(3) CITA*** authorises FIRS for *"any good cause shown"* to remit the whole or any part of penalty and interest additions (arising from default) to outstanding tax payable. ***Sections 79*** and ***90 PITA*** vests the SIRS/Governor with remission powers on penalty and tax respectively. Further, the President may even grant total or partial tax remission to a company if he is satisfied it is just and equitable to do so (***section 89 CITA***).

The EO also seeks to "lessen" regulatory burden on the Revenue, obviating expenditure of time and resources to "smoke out" tax defaulters, and potentially reduce leverage on "best of judgement" assessments, ordinarily employed where the tax payer has failed to file returns or made inadequate disclosures (***sections 54(3), 65(3) PITA, CITA***). The EO has therefore not gone overboard in essentially 'directing' the Revenue to exercise their discretion in a certain manner. The Finance Minister can make subsidiary legislation in furtherance of tax laws (***sections 81(8), 38, 6(1), 19 CITA, VATA, PPTA, PITA***) whilst the Constitution empowers the President to make EOs that furthers the intent and effect of the legislation or brings them in conformity with the Constitution (***section 5(1)(a)(b)***). That should certainly not raise eyebrows, if the relevant EO is within scope?

One area where Mr. Sani's arguments may be less objectionable relates to the 'ability' of VAIDS EO to also apply to SBIRs (not being FG agencies but the Revenue arm of State Governments (SGs)). However such doubts are unfounded because PITA (a federal law) also provides for the SBIRs (see ***section 87(1) PITA***). Indeed, Regulations made by the Minister pursuant to ***section 81(6) PITA*** have national application. It also noteworthy that SBIRs and FIRS' membership of the Joint Tax Board (JTB) exemplify inter-agency cooperation in furtherance of tax administration in Nigeria. The VAIDS EO therefore dovetails into the expressed intent of current FIRS leadership to realise the potentials of such inter-agency collaboration, for example by sharing data and conducting joint audits.

Mr. Sani's view that EO is unnecessary because it essentially seeks to do what the *Tax Administration (Self-Assessment) Regulations 2011 (TASAR)*, made pursuant to *section 61 FIRS (Establishment) Act 2007 (FIRSEA)*, has already provided for, is in my view, inaccurate. Assuming without conceding he is correct, the EO is still valuable because it sends out a message at the highest level of government; reinforcing that FG intends to give substantial visibility to tax optimisation strategy as a component of the Economic Recovery Growth Plan (ERGP). This view is fortified by *section 60 FIRSEA* which authorises the Minister to issue directives of a policy nature to the FIRS and/or its Executive Chairman of FIRS regarding exercise of their functions, and mandating their compliance with same. The EO, by leveraging 'Presidential clout' does so for a good and beneficial policy purpose, it is therefore not surprising that SGs supported it.

SGs and their SBIRs keying into VAIDS because of the potential benefits to their tax revenue optimisation efforts, means that critics of its constitutionality would have a *locus standi* constraint in challenging same. For instance, ***section 88(1)(c)PITA*** enables the SBIR to make recommendations to the JTB on tax policy, tax legislations, tax treaties etc. *The Taxes and Levies (Approved List for Collection) Act, Cap. T2 LFN 2004* (which has been preserved by ***section 315 1999 Constitution*** as an existing law, and judicially upheld in ***Ikeja Hotels Plc v. LSBIR [2005] All FWLR (Pt.279), 1260***) was also borne out of the realisation that inter-agency cooperation is a pragmatic necessity for Nigeria's multi-jurisdictional tax administration context.

Presidential Powers of Tax Exemption

Perhaps a more compelling analogy is that the President has powers to exempt corporate tax payers from paying taxes: ***section 23(2) CITA.*** It provides***:*** *"the President may exempt* ***by order****-(a) any company or class of companies from all or any of the tax provisions of this Act; or (b) from tax all or any profits if any company or class of companies from any source, on*

any ground which appears to it[sic] sufficient." Furthermore, the President can also propose (with the NA's approval) to alter tax rates for capital allowances such as mining, infrastructure, agriculture, research and development expenditures pursuant to ***section 100 CITA***. Clearly, the VAIDS EO does not contemplate alteration of tax rates, so the NA need not be involved.

Statutory Interpretation to the Rescue?

The specificity of ***sections 23(2)*** and ***100 CITA*** undermines Sani's position where he referenced the popular rule of interpretation that: *"...specific things derogates from general things: generalia specialibus non derogant."* In fact, whilst the President can "by order" grant tax exemption, VAIDS EO did not go as far as that. Rather than undermine NA's law making powers, the EO complements it.

The poignant question remains: did the Acting President usurp NA's powers to make tax laws? My answer is no, because the doctrine of separation of powers under the Constitution, enables the President to exercise some overlapping functions. For instance, the President in exercising legislative function assents to or vetoes bills passed by the NA; similarly the President can modify laws that were made before 1999 and such law would be deemed as passed by the NA pursuant to ***section 315 1999 Constitution***.

However, the EO cannot amount to usurping NA's legislative powers because it is consistent with the Constitution and serves as an administrative tool/policy to enforce tax compliance. In ***AG Abia & 35 Ors v. AG Federation [2003] 4 NWLR (Pt.809), 124*** the Supreme Court (SC) determined the validity of the *Revenue Allocation (Federal Account, Etc) (Modification) Order (S.I. No.9, 2002)* promulgation. Holding that the President acted pursuant to *section 315 1999 Constitution,* and that the Order was constitutional, the SC stated two tests for determining constitutionality of modification to an existing law. These were whether the modification order brings the relevant Act into conformity with the Constitution; and whether the Order itself reflects an infraction of the Constitution.

My learned friend's reference to ***AG Federation v. Abubakar [2007] All FWLR (Pt.375), 405 at 472E and 524*** - that no presumption should be made regarding who can regulate collection of taxes - would not suffice here. What the SC held in that case was that based on separation of powers, the legislature cannot take away from the President [even by court order] or confer on others, functions of a strictly executive nature. This toed earlier SC decision in ***Ajakaiye v. Idehai [1994] 8 NWLR (Pt. 364), 504 at 525-526*** that: *"where there is a statutory provision for making an order, and the making of same is reposed in ... the President of the Republic or Governor of a State, such function cannot be usurped by the Court. The furthest a Court can go is to declare as to validity or otherwise of that order ... but the Court has not got the jurisdiction to take over the functions ... by making its own order."* This means that the EO made pursuant to the President's inherent powers under ***sections 5*** and ***130 1999 Constitution*** cannot be derogated from, if made within the ambit of the Constitution.

I would have agreed with Mr. Sani if the EO was unlawful or unconstitutional. In ***INEC v. Musa [2003] 3 NWLR (Pt. 806), 72 at 157E***, the SC reiterated: *"all powers, legislative, executive and judicial must ultimately be traced to the Constitution."* The VAIDS EO can be traced to the Constitution because it supports other existing tax laws - ***section 44 (PITA)*** *on individual self-assessment and filing returns of income* (see equivalents provisions in ***sections 53, 30 CITA, PPTA*** *etc*). For the avoidance of doubt, ***Paragraph 12 of the VAIDS EO*** succinctly stated that "*this Executive Order shall be read in conjunction with all extant Tax Laws, Regulations, Guidelines as well as those that may be issued pursuant to the Scheme.*"

Conclusion

In conclusion, I submit that the VAIDS EO was a valid exercise of Presidential executive powers contemplated by the Constitution to give effect to laws enacted by the legislature. The EO also represents a pragmatic initiative to breathe new life into the fiscal strategy of government. The fact that the actions proposed by the EO do not require amendment to our tax laws reinforces the argument that the EO does not conflict with them. Its issuance may well be an indication that the government would seek to be as creative as possible in utilising powers they already have towards realising strategic national goals, rather than surrendering to perceived constraints. As with the *Ease of Doing Business* EO a lot can be achieved utilising current framework to the fullest. The limited timeframe of the EO and its *Paras 5 and 8* provisions on '*Requirements for Valid Declaration*' and '*Consequences for Failure to Comply*' should address any fears of potential abuse. Incidentally, prior to VAIDS, I had suggested in an earlier article "*Tax Amnesty: A Step on the Ladder Out of Recession*" (BusinessDay, 10.11.2016, p.30) that: "*the President's tax exemption powers can also be wielded to implement [Tax Amnesty Programme] TAP.*"