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# NO TAXATION WITHOUT LEGISLATIVE CONSENT: A REVIEW OF THE LEGALITY OF THE EXPATRIATE EMPLOYMENT LEVY (EEL) IN NIGERIA[1]

## 1. Introduction

It is commonplace in the jurisprudence of taxation in Nigeria that there is no taxation without legislative consent.[2] This implies that the imposition of any levy or tax in Nigeria must be authorized by the National Assembly. Surprisingly, the President and Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria, through a handbook, singlehandedly "launched,"[3] the Expatriate Employment Levy (the "**EEL**") in Nigeria on the 27th day of February, 2024 and this imposition received widespread criticisms from major stakeholders in the labour and employment sector in Nigeria. Ten (10) days after its unfortunate introduction, the Federal Ministry of Interior (the "**FMI**") issued a Press Release suspending the operation of the EEL.[4]

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2 Kareem Adeyimika Adedokun, *Enforcement of Income Taxes (Law, Practice and Procedure)* (Princeton & Associates Publishing Co. Ltd. 2023) 51; Josephine A. A. Agbonika, 'Tax System in Nigeria: Emerging Issues and Way Forward' (2019) 1 MTMJ 1, 52; Rose Ohiama Ugbe and others, 'Taxes and Levies (Approved Lists for Collection) Amendment Order 2015: Matters Arising' (2020) 7(1) (Jan) PHJBL 26, 33; MTN Communications Limited v. BIRS (2021) LPELR – 56259 (CA) at pp. 49 – 50, paras. E – B, per Honourable Justice Yargata B. Nimpar, JCA.

3 Ministry of Interior, '*Public Notice: EEL*' <https://eel.interior.gov.ng/welcome> accessed 30 April 2024.

4 Ministry of Interior, '*FG Addresses Stakeholders' Concerns on Expatriate Employment Levy*' <https://interior.gov.ng/press-release/fg-addresses-stakeholders-concerns-on-expatriate-employment-levy/> accessed 30 April 2024.

However, since a "suspension" is only a temporary stoppage of an act, this Article queries the legality of the EEL and provides answers to the following questions: Can the Federal Government of Nigeria (the "**FGN**"), the FMI and/or the Minister of Interior (the "**Minister**") introduce and impose the EEL without the consent of the National Assembly? Does the EEL Handbook qualify as a subsidiary legislation of the Immigration Act 2015?

## 2. What is the Expatriate Employment Levy (EEL)?

The EEL has been aptly described in Paragraph 1.1 of the EEL Handbook as a "*government-mandated contribution imposed on employers who employ expatriate workers in Nigeria*"[5] and it was introduced as a fiscal measure to address certain socio-economic considerations within the country. The EEL, which is mostly applied on the offshore earnings of expatriates working in Nigeria, aims to balance economic growth and workforce development by ensuring equitable contributions from expatriate employment.

## 3. Who has the Power to Impose the Expatriate Employment Levy (EEL)?

Government, acting through the National Assembly, has the inherent power to legislate on and impose tax in Nigeria.[6] This fact is given life through the provisions of Section 4(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) [the "Constitution"] which vests the legislative powers of the Federal Republic of Nigeria in the National Assembly, made up of the Senate and House of Representatives.[7] This legislative power is given to cover taxation of incomes, profits and capital gains; any matter incidental or supplementary to taxation; and any other matter in which the National Assembly has powers to legislate[8] in the interest of peace, order and good governance of the Federation.[9]

In this wise, the National Assembly is constitutionally positioned to make laws for the "*imposition of or increase in any tax, duty or fee or any reduction, withdrawal or cancellation thereof*."[10] This legal reality leads to two logical conclusions: firstly, that the power to make, impose or bring into effect any tax or levy is vested in the

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5 Expatriate Employment Levy Handbook <https://eelstorageacctprod.blob.ng2.stack01.mdx-i.com/eeldocuments/EEL-Handbook.pdf.> accessed 30 April 2024.

6 See, the evergreen views of Hononurable Justice Monica Dongban-Mensem, JCA (now PCA), in the case of Eti-Osa Local Government v. Mr. Rufus Jegede & Anor. (2007) 10 NWLR (Pt. 1043) 537 (CA) at p. 558; (2007) LPELR – 8464 (CA) at p. 17, paras. B – C.

7 See also, sections 47 and 58(1) of the Constitution.

8 See, Items 59, 67 and 68 of Part 1 of the Exclusive Legislative List found in the Second Schedule to the Constitution.

9 See, section 4(2) and (3) of the Constitution.

10 See, sections 58(1) and 59(1)(b) of the Constitution.

National Assembly; and secondly, that no financial burden can be placed on anyone in the form of tax or levy without express tax or fiscal legislation. Authenticating the foregoing conclusions, an erudite jurist, in the case of **Peace Mass Transit Limited v. Federal Capital Territory (FCT) & 2 Ors.,**[11] had this to say:

> *Again, Section 7 – 10 of the Concurrent Legislative List provides that collection of taxes shall be prescribed by the National Assembly. I also took a look at Sections 14(2)(c) and 299 of the 1999 Constitution as amended, referred to by the Respondents' counsel in his argument.*
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> *…. **I am at one with the views expressed by the learned counsel for the appellant that before the respondent can introduce any levy or tax on anybody, the validity of such an act must be authorized by the National Assembly**.[12] (Emphasis mine)*

In a similar situation in the case of **A. O. Williams v. Lagos State Development and Property Corporation**,[13] where the Defendant purportedly imposed a levy on the strength of a mere letter setting out the policy of the Corporation and acting under a Town Planning Regulation which stipulated a covenant to pay "*outgoings of whatever description as implied in every building lease*", the Supreme Court held *inter alia* that the Defendant could not unilaterally and arbitrarily impose such a tax under the guise of "outgoings" unsupported by any statutory authority and that since such a charge was not otherwise payable, it was a transparent attempt to impose an illegal levy. Dispelling all contorted obscurities, the Court declared:

> *The rule of law is that **no pecuniary burden can be imposed upon the subject by whatever name whether tax, due, rate or toll except upon a clear and distinct legal authority** established by those who seek to impose the burden…. We are firmly of the opinion that … **it is a transparent attempt on the part of the respondent to impose an illegal levy**.[14] (Emphasis mine)*

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11 (2014) LPELR – 23740 (CA), per Honourable Justice Amiru Sanusi, JCA (as he then was).

12 *Ibid.* at p. 26, paras. B – G. See also, the views of Honourable Justice Ian Lewis, JSC, in the case of S. A. Authority v. Regional Tax Board (1970) LPELR – 2967 (SC) at p. 15, paras. C – D.

13 (1978) 3 SC 11 at pp. 17 – 19; (1978) LLJR – SC; (1978) LCN/2101 (SC). As pronounced by Honourable Justice A. R. Alexander, CJN (as he then was).

14 *Ibid*, at pp. 17 – 18. See also, the compelling views of Honourable Justice Albert Gbadebo Oduyemi, JCA, in the case of Ahmadu v. Governor of Kogi State (2002) 3 NWLR (Pt. 755) 502 (CA) at p. 522.

4. **Is the Expatriate Employment Levy (EEL) Handbook Subsidiary Legislation?**It has been brilliantly argued, on the foundation of section 112 of the Immigration Act,[15] Section 18 of the Interpretation Act[16] and the *ejusdem generis* principle,[17] that the EEL Handbook is a subsidiary legislation and that the definition of "Regulations" as encompassing "rules" and "byelaws" extends to and accommodates "handbooks".[18] As attractive as this view (of the EEL Handbook being a subsidiary legislation) looks, it is not without loopholes.

Firstly, since fruits do not hang in the air; but depend on a structural base in the form of an attachment to a tree branch for their formation and growth, the same logic applies to the EEL Handbook as a subsidiary legislation. There should be a primary or principal statute imposing the EEL to enable the EEL Handbook to flourish as a subsidiary legislation.[19] The subsidiary legislation will then add workability to the provisions of the primary statute and provide details for its effective administration and implementation. It is rather surprising that the primary taxing legislation for the EEL is a "handbook" and there is no principal statute imposing the EEL and enabling the EEL Handbook. No power is ceded or delegated to the FGN or the Minister under the Constitution and/or the Immigration Act to impose the EEL in Nigeria. On this note, the EEL Handbook falls flat and does not qualify as subsidiary legislation.

Secondly, the EEL Handbook has *ex facie* shown that it is nothing more than a policy document directed at providing information and insights to stakeholders. This is reflected in its provision that "*this handbook* ***aims to provide information*** *to all stakeholders on the EEL* ***and insights*** *into its purpose, mechanics, implications, and*

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15 The Immigration Act 2015, in Section 112(1), provides that "*The Minister may make regulations as in his opinion are necessary or expedient for giving full effect to the provisions of this Act and for the due administration thereof.*" Subsection (2) of the said Section, without limiting the general power to make regulations as set out in subsection (1), mentions few areas, to wit: (i) control of immigrants resident in Nigeria; (ii) patrol of Air, Sea and Land Borders; (iii) administration, control and issuance of passports, visas and other travel documents; and (iv) any other matter covered by the provisions of the Act.

16 The Interpretation Act, in Section 18(1), provides *inter alia* that "*'Regulations' in an enactment passed or made before the passing of this Act, includes rules and bye-laws*".

17 This is a Latin phrase that means "*of the same kind*". It is a canon of interpretation which a Court will apply in an appropriate case to confine the scope of general words which follow special words as used in a statutory provision or document within the genus of those special words. See the dictum of Honourable Justice Edozie, JSC, in the case of Ojukwu v. Obasanjo (2004) 12 NWLR (Pt. 886) 169 (SC) at pp. 226 – 227.

18 Banwo & Ighodalo, '*Regulatory Alert: Federal Ministry of Interior, Introduction of Expatriate Employment Levy and Other Matters*' (Banwo-ighodalo.com, 6 March 2024) 1 <https://banwo-ighodalo.com/assets/grey-matter/60307d74316fd2e31f23e19032c24007.pdf> accessed 30 April 2024.

19 See the case of Chief Denis C. Osadebay v. Attorney General of Bendel State (1991) LPELR – 2781 (SC) at p. 40, paras. D – E, per Honourable Justice Adolphus Godwin Karibi-Whyte, JSC.

*compliance requirements.*"[20] Corroboratively, the EEL Handbook has been described on the official website of the FMI as a "*multi-faceted policy instrument*".[21] Thus, it would be a strange, esoteric and ambitious move to elevate the EEL Handbook to the status of a subsidiary legislation. In the case of **Comptroller General of Customs & Ors. v. Comptroller Abdullahi B. Gusau**,[22] the Supreme Court clearly pronounced that "*policy documents, commonly referred to as guidelines, are not subsidiary legislations*." Consequently, the EEL Handbook can, at best, be said to be a policy instrument or an administrative document and can be likened to departmental circulars which are administrative aids but have no statutory authority and legal effect.[23]

Thirdly, assuming without agreeing that the EEL Handbook qualifies as a subsidiary legislation, the EEL Handbook 'has bitten off more than it can chew'. An exercise of subsidiary legislative power must be within the four walls of the primary or principal statute that has provided for it[24] and its provisions must conform with the terms of the enabling law.[25] Sadly, no provision for EEL was made under the principal Act, that is, the Immigration Act.[26] The EEL Handbook cannot exist at large as a subsidiary legislation intended to extend the frontiers of the Immigration Act. It is elementary law that power not vested in a body by its enabling Act cannot be vested in such a body by a subsidiary legislation to the Act.[27] In this wise, transfiguring the power to make

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20 See, paragraph 1.3 of the EEL Handbook.

21 See, Ministry of Interior, 'Pre-registration: EEL' <https://eel.interior.gov.ng/auth/register> accessed 30 April 2024.

22 (2017) LPELR – 42081 (SC) at p. 12, paras. F – A, per Honourable Justice Ejembi Eko, JSC.

23 On the nature and legal status of departmental, administrative and/or government circulars, see the following cases: Alhaji Zanna Maideribe v. Federal Republic of Nigeria (2014) 5 NWLR (Pt. 1399) 68 (SC) at p. 92, paras. A – F; (2013) JELR 35531 (SC); O. Amaechina & Anor. v. The Hon. Minister of Education & Ors. (2018) LPELR – 51051 (CA) at pp. 21 – 22, paras. B – A; and Raymond Temisan Omatseye v. Federal Republic of Nigeria (2017) LPELR – 42719 (CA) at pp. 15 – 16, paras. A – A and at pp. 19 – 21, paras. B – A. On the nature and legal status of Information Circulars, see the case of Global Marine v. FIRS (2013) 12 TLRN p. 1; and FBIR vs. Haliburton (WA) Limited 9 All NTC 565 (CA) at p. 589, paras. 25 – 30.

24 See, Godwin Iheabunike, *'The Making of Subsidiary Legislation: (Rules, Regulations, Orders, Etc.)'* **(Academia.edu)** <https://www.academia.edu/37764731/THE_MAKING_OF_SUBSIDIARY_LEGISLATION> accessed 30 April 2024.

25 See, Prince Ademolu Odeneye v. Prince David Olu Efunuga (1990) LPELR – 2208 (SC) at p. 21, paras. A – C, per Honourable Justice Karibi-Whyte, JSC.

26 Importantly, Section 112(1) of the Immigration Act 2015 instructs that any Regulation made under the Act must be geared towards *"giving full effect to the provisions of this Act and for the due administration thereof."* This implies that a subsidiary legislation in this regard is only expected to build on the framework or substructure put in place by the Immigration Act 2015. Something cannot be built on nothing. See the ageless dictum of Lord Alfred Thomas Denning in the case of Benjamin Leonard MacFoy v. United Africa Company Limited (1961) 3 All ER 1169 (PC) at p. 5.

27 Shell Nigeria Exploration and Production Company Limited v. NOSDRA (2021) LPELR – 53068 (CA) at pp. 41 – 43, paras. A – D, per Honourable Justice Joseph Eyo Ekanem, JCA.

subsidiary legislations and expanding[28] it into a substantive power to make, introduce and/or impose novel taxes or levies without the consent of the legislature amounts to a breach of constitutional and/or statutory procedure[29] and renders the outcome *ultra vires*,[30] illegal,[31] unconstitutional,[32] null[33] and void.[34]

Conclusively, the exercise of the power to impose the EEL by the FGN, the FMI and/or the Minister is not contemplated by the Constitution and the Immigration Act 2015 and as such, amounts to an abuse of power. In the case of **Head of the Federal Military Government v. Public Service Commission of Mid-West State & Anor, Ex Parte Maclean Okoro Kubeinje**,[35] the Supreme Court held that "abuse of power" includes where a statutory body with limited powers assumes jurisdiction to perform an act unauthorized by law.

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28 In the case of Securities and Exchange Commission v. Professor A. B. Kasunmu & Anor. (2008) LPELR – 4936 (CA) at pp. 24 – 27, paras. F – A, Honourable Justice Paul Adamu Galinje, JCA (as he then was), reiterated this position when he held that "*a subsidiary legislation derives its authority and validity from a substantive law and it does not have the capacity to extend such authority*." See also, the case of Governor of Oyo State & Ors. v. Folayan (1995) LPELR – 3179 (SC) at p. 59, paras. C – F.

29 See, Lady Care Hair Products Co. Ltd. v. Ogochukwu Nwakwelu & Anor. (2021) LPELR – 56043 (CA) at p. 18, paras. A – B, where the Penultimate Court held that where a procedure is laid down for the attainment of a thing, that procedure and none other should be followed. See also, the case of Adesanoye v. Adewole (2006) LPELR – 143 (SC) at pp. 22 – 23.

30 See, I. G. P. v. Mobil Producing (Nig.) Unlimited (2018) 14 NWLR (Pt. 1639) 379 (SC) at p. 393.

31 See, A. O. Williams' Case (n 13 and n 14).

32 See, Section 1(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). See also, the reasoning of the Court of Appeal on the inconsistency and unconstitutionality of a tax legislation in the case of Uyo Local Government Council v. Akwa Ibom State Government & Anor. (2020) LPELR – 49691 (CA) at pp. 31 – 36, paras. D – B. Furthermore, the failure of persons and authorities to act in accordance with the provisions of the Constitution of the Federal Republic of Nigeria 1999 (as amended) or to abide by them render those actions of non-compliance unconstitutional. See the following cases: Attorney-General of Abia State v. Attorney-General of the Federation (2006) 16 NWLR (Pt. 1005) 265 (SC); and Hon. Chigozie Eze & Ors. v. Governor of Abia State & Ors. (2010) 15 NWLR (Pt. 1216) 324 (CA).

33 See the reasoning of the Court of Appeal in Shell Nigeria Exploration and Production Company Limited's Case (n 27) and the case of Mobil Producing (Nig.) Unlimited v. Johnson (2018) 14 NWLR (Pt. 1633) 329.

34 See, Chairman of the Board of Inland Revenue v. Joseph Rezcallah & Sons Limited (1961) NRNLR 32 at p. 38; (1962) LLJR – SC where the Supreme Court, per Unsworth, F.J., declared certain acts of assessment "*not made in accordance with law*" as "*null and void*".

35 (1974) LPELR – 1360 (SC) at p. 52, paras. C – D, per Honourable Justice George Baptist Ayodola Coker, JSC.

## 5. Conclusion

The imposition of taxes in Nigeria is constitutionally mandated to be done by legislation. Hence, the Executive arm of government, administrative agencies, government ministries and departments and regulatory authorities cannot unilaterally impose tax.[36] From the foregoing analysis, the EEL Handbook is a mere administrative document conveying new policy guidelines by the FGN and cannot be construed as a subsidiary legislation.

Consequently, there is no legal obligation to comply with the executive-imposed EEL handed down via a Handbook until it receives the stamp and approval of the legislature. The wise

counsel of the Court of Appeal, in the case of **Eti-Osa Local Government v. Mr. Rufus Jegede & Anor**,[37] is apposite in conclusion:

> *While legitimate imposition of taxes and levies is the source of funding of every tier of Government, the matter should not be allowed to degenerate into a desperate extortion, usurpation and illegitimate exploitation of the public by the said governments (of whatever tier or cadre). It should come to a stop.*[38]

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[36] Where any arm of government, agency, department or organization deriving power from the Constitution exceeds such powers, the Courts have an obligation to declare such action as *ultra vires* its powers, null, void and of no effect. See the following cases: Alhaji Sani Dododo v. EFCC (2013) 1 NWLR (Pt. 1336) 468 (CA); and Attorney-General of the Federation & Ors. v. Alhaji Atiku Abubakar (2007) 10 NWLR (Pt. 1041) 1 (SC).

[37] (2007) LPELR – 8464 (CA).

[38] *Ibid.* at p. 18, paras. B – F, per Honourable Justice Dalhatu Adamu, JCA.