

**Freezing of
Accounts and
Deduction of
Taxes by
Nigerian
Banks on
behalf of FIRS**

– IS THIS
ACTUALLY
LEGAL?



... whether the Notices infringe the taxpayers' rights given that same were issued solely to the banks and whether the banks (Collecting Agents) are required to comply with the Notices?



The Federal Government of Nigeria (FGN) has revamped its commitment towards improving the rate of tax collection. This commitment has been shown in the Federal Inland Revenue Service's ("**FIRS**") relentless revenue drive through various mechanisms such as the Voluntary Assets and Income Declaration Scheme (VAIDS), grant of waivers on interests and penalties to defaulting taxpayers and increased collaboration with regulatory agencies like the Corporate Affairs Commission and the Central Bank of Nigeria.

In line with these efforts, the FIRS recently issued a notice addressed to all commercial banks in Nigeria (the "**Notice**") appointing them as tax collecting agents ("**Collecting Agents**") for some 2933 companies which, according to the FIRS, are in default of their tax obligations. Relying on the provisions of the Federal Inland Revenue Service (Establishment) Act¹ ("**FIRS Act**") and the Companies Income Tax Act² ("**CITA**"), the Notice purports to authorise all Collecting Agents to deduct and remit to the FIRS the alleged tax debt from the taxpayers' accounts domiciled with the Collecting Agents, deliver the bank statements and records of the taxpayers and its principal officers, and prevent the taxpayers from conducting any transactions on those accounts until the tax liabilities have been settled (together, the "**Directives**").

The Notice and the attendant Directives raise a number of questions which are discussed below, the principal of which is whether the FIRS has the authority to issue the Notice in the first place. Also, whether the Notices infringe the taxpayers' rights given that same were issued solely to the banks and whether the banks (Collecting Agents) are required to comply with the Notices? Finally, what recourse is available to the taxpayers especially those whose alleged tax liabilities have been disputed?

¹ Cap F36, Laws of the Federation of Nigeria, 2004

² Cap C21, Laws of the Federation of Nigeria, 2004

Appointment of banks as a collecting agent for defaulting taxpayers

The FIRS Act empowers the FIRS to appoint any person to be the agent of a taxable person for the collection and payment of any tax due to the tax authority from monies held by the agent on behalf of the taxable person. This power of substitution is also replicated in the CITA.

The appointed agent is required by these legislations to pay the taxes considered due from the taxpayer and to provide the FIRS with any information as to the monies and funds held by him or due from him to the relevant taxpayer.

The FIRS Act contemplates that such an appointed agent must be in possession of moneys belonging to the taxpayer, from which the taxes may be paid. Given that the taxpayers in question are customers of the relevant banks, with deposit accounts that hold their moneys, the FIRS resorted to appointing commercial banks in Nigeria as collecting agents within what the revenue authority apparently considers to be within the purview of the laws.

At first glance, it would appear that the FIRS was within its statutory rights to appoint commercial banks as Collecting Agents for the recovery of unpaid taxes. In our opinion, the exercise of this right should be preceded with some basic statutory requirements. That is; the appointment of Collecting Agents is a recovery effort which must comply with the general conditions laid down by law for the recovery of tax namely: (i) the taxpayer must owe tax to the tax authority which tax has remained unpaid, and (ii) the unpaid tax assessment must be final and conclusive. According to the provisions of the CITA, a tax assessment becomes final and conclusive when (i) the tax payable has been assessed on the taxpayer, and (ii) no valid objection or appeal was filed against the assessment/demand notice by the taxpayer within the statutorily-stipulated one-month period. It is only upon the fulfillment of these conditions that the FIRS can commence recovery/enforcement procedures.

Secondly, the FIRS in the Notices, requires the Collecting Agents to deliver to it, bank statements and financial records of the taxpayers, its principal officers and its subsidiaries ('the Request'). It also demands that all transactions on the taxpayers' accounts including those of its subsidiaries should be conducted subject to the approval of the Chairman of the FIRS. Certainly, these directives do not appear within the scope and contemplations of the powers created in the FIRS Act and the CITA. While the FIRS Act empowers the FIRS to request information from a Collecting Agent, there is no power which would be a basis for the FIRS to (i) restrain other activities on a taxpayer's account and (ii) require the submission of financial information on accounts other than the taxpayers' accounts.

Considering the well-established principle of distinct legal personality of corporate entities as well as the separate recognition for tax purposes accorded to subsidiaries within a group structure, it is difficult to see the basis for the FIRS to assume such powers over the accounts of the subsidiaries of a tax payer. In so far as the Nigerian tax system does not allow the FIRS to demand taxes owed by a company from the subsidiaries of that company, in the same vein, the FIRS is not entitled to freeze a subsidiary's financial activities as a result of the parent's non-payment of tax.

As a result, the Notice – in particular, the requirement that the alleged tax defaulters and their subsidiaries' accounts be subject to the FIRS' purview - exceeds the scope of the powers of the FIRS and its Chairman and may be considered invalid by a court or tribunal for purporting to impose directives which are extraneous to the relevant provisions of the FIRS Act and the CITA.

The Taxpayer / Collecting Agents' challenge rights

The FIRS Act and the CITA permits a Collecting Agent to treat the Notice as an assessment. In other words, the Collecting Agent has a right to challenge the Notice for collection of taxes from monies held on behalf of the taxpayer in such manner as a taxpayer would in respect of any tax assessment issued upon it by the tax authority. Section 31 (5) of the FIRS Act provides that “*the provisions of this Act with respect to objections and appeals shall apply to any notice given under this section as if such notice were an assessment*”. On the strength of this provision, the Collecting Agent/ bank may step into the shoes of the taxpayer to object the mandated collection of taxes on grounds including that an alleged tax liability is either not owed, due, subject to an ongoing appeal and/or not final and conclusive or other grounds that avail the taxpayer.

Furthermore, recognizing the contractual duty owed to the taxpayer as a result of the banker-customer relationship, at the minimum, the Collecting Agent may engage both the tax payer and the tax authority to confirm the taxpayer's liability prior to the execution of its mandate as a Collecting Agent. This confirmation may be evinced by tax assessments and correspondences between the taxpayer and the tax authority showing the taxpayer's agreement to the tax liability. Although a Collecting Agent is protected by section 50 of the CITA, which indemnifies an agent against any person for all payments made by him for the recovery of unpaid tax, it is important, in the bank's interest, to avoid overreaching the taxpayer by inadvertent mis-payments to the tax authority on the taxpayer's behalf.

The taxpayer, on its side, may also file an appeal to the appropriate authority to challenge the Notices where it considers the assessments to be incorrect or premature. Although it may be argued that the taxpayer has no right to challenge the Notices, the taxpayer may rely on previous decisions of the Tax Appeal Tribunal which held that an ultimate taxpayer will always be availed the opportunity to object to an assessment even though the assessment was not addressed to it³. This appeal may be commenced with the Collecting Agent as a party. In addition to filing an appeal, the taxpayer could, on the back of the above-mentioned appeal, also obtain an injunction to restrain the Collecting Agent and the tax authority from giving effect to the Notice until the appeal is concluded.

³ *Eso Exploration and Production Nigeria Limited & Shell Nigeria Exploration & Production Company Limited v FIRS*
TAT/LZ/001/2013

Next Steps

The FIRS' Notice has the effect of potentially shutting out taxpayers from expressing their legitimate objections to tax assessments. By not allowing the taxpayer the requisite statutorily provided time to validly enter an objection to an alleged assessment or file an appeal, FIRS is infringing the taxpayer's right to fair hearing and prematurely wielding the big stick on a hapless victim.

Expectedly, FIRS' Notice was met with various objections and outcry from stakeholders including taxpayers and commercial banks. As a result, FIRS, on 15 February, 2019, issued a subsequent notice to the Collecting Agents suspending the "lien" on the accounts affected by the Notice ("**Suspension Order**"), for a period of 30 days from the receipt of the Suspension Order, on grounds that it is currently attending to a large number of taxpayers seeking tax reconciliation. A temporary suspension does not appear to be an adequate response from the FIRS in this circumstance. It is still bound to comply with the statutorily-stipulated recovery procedures before undertaking any recovery measures including the practical step of providing the Collecting Agent with information on the taxpayer's tax status upon appointment.

Affected tax payers should however take advantage of the Suspension Order to reconcile their tax records, and if in default, comply with their tax obligations or explore available legal remedies if not in default.

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