



## THE FEDERAL HIGH COURT (FEDERAL INLAND REVENUE SERVICE) PRACTICE DIRECTIONS, 2021: AN ATTEMPT TO EXPAND FIRS' POWERS OF TAX ENFORCEMENT?

### A. Introduction

On 31 May 2021, the Honourable Chief Judge of the Federal High Court, Honourable Justice John Terhomba Tsoho, issued the Federal High Court (Federal Inland Revenue Service) Practice Direction, 2021 (the “**Practice Direction**”). The Practice Direction, which became effective on 1 June 2021, contains far-reaching procedural provisions on the powers of the Federal Inland Revenue Service (“**FIRS**”) to enforce the payment of tax and/or recover unpaid tax liabilities from taxpayers.

The Practice Direction applies to both criminal matters and civil causes in respect of tax issues before the Federal High Court<sup>1</sup> and it provides the FIRS with “*how to proceed*” in the exercise of some of its powers under the Federal Inland Revenue Service (Establishment Act) 2007 (“**FIRS Act**”) especially its power to distrain a defaulting taxpayer's assets either through the seizure of immovable property or freezing monetary assets. Specifically, the Practice Direction was issued to: (a) ensure effective case management system and expeditious determination of tax related matters, (b) encourage settlement of tax debt or liability between disputing parties, (c) provide directions on applications from the FIRS, and (d) promote the use of electronic filing and service systems and proceedings in tax related matters<sup>2</sup>.

### B. Overview of the Practice Direction

As a prelude, it is important to note that the Practice Direction is not a tax legislation and does not create new tax principles. Rather, it contains statements by the judiciary intended to guide the Federal High Court and the legal profession on matters of practice and procedure<sup>3</sup> on how the FIRS can exercise the substantive powers conferred upon it by the FIRS Act and other relevant legislation.

The most telling theme of the Practice Direction, however, is that it seems to suggest a new regime for FIRS' tax enforcement procedures against defaulting taxpayers which departs from the procedures already enshrined in the relevant statutes. Most apparent here is that the Practice Direction makes no reference to the detailed objection process provided for taxpayers in tax statutes to challenge assessments which is at variance with their tax positions. At first blush, on a perusal of the Practice Direction, one may assume that the Federal High Court intends to empower the FIRS to abandon the objection process for assessments, and to, upon issuance of

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<sup>1</sup>Order 1 (1) of the FIRS Practice Direction.

<sup>2</sup>Order 1 (2-5) of the FIRS Practice Direction.

<sup>3</sup>Oni v. Fayemi & Ors (2007) LPELR-8700(CA).

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an assessment, proceed to enforce same on the sole basis of that assessment regardless of the taxpayer's statutory right to object and challenge any tax assessments. However, a close reading of the Practice Direction vis-à-vis the FIRS Act and other tax statutes reveals otherwise.

The successive paragraphs of this newsletter analyses the key provisions of the Practice Direction in the light of FIRS's powers under the FIRS Act and other relevant tax laws and examines the realities of the implementation of the Practice Direction.

## **Interim Order of Forfeiture of Immovable Property**

Order III Rule 2 of the Practice Direction provides for the procedure for applying for an interim order of forfeiture. This direction seems to be predicated upon the FIRS' statutory power to distrain, i.e., seize and sell, the movable properties (goods and other chattels) and the immovable properties of a defaulting taxpayer contained in section 33 of the FIRS Act.

The Practice Direction, however, does not appear to take cognisance of the provisions of the FIRS Act which provides that the FIRS' right to distrain may not be exercised except upon the fulfilment of the following conditions: (i) the assessment has become final and conclusive, (ii) a demand notice has been served on the taxpayer by the FIRS, and (iii) the taxpayer fails to pay its tax liabilities within the time stipulated in the demand notice<sup>4</sup>. As a matter of law, a tax assessment will only become final and conclusive if the taxpayer fails to appeal such assessment within 30 days from the date on which a copy of the assessment is made or deemed to have been made<sup>5</sup>. Once an assessment becomes final and conclusive, the FIRS must issue a demand notice and can only proceed to distrain if the taxpayer fails to pay the assessed tax within the period indicated in the demand notice.

Evidently, therefore, where a tax assessment has not become final and conclusive (either because the taxpayer has triggered the objection process or the time within which payment may be made has not elapsed), the right to distrain a taxpayer's assets in the manner provided in the FIRS Act, and for that matter, the Practice Direction, may not be available to the FIRS.

## **Interim Order of Freezing Bank Account**

The Practice Direction also permits the FIRS to apply for and obtain an interim order freezing the bank account of a defaulting taxpayer (a Post no Debit order) pending the determination of the motion of notice<sup>6</sup>. Although, not expressly provided for in the FIRS Act, we note that the power of the FIRS to freeze a taxpayer's bank account is traceable to its power to distrain as well as its power of substitution<sup>7</sup>. By its power of substitution, FIRS can, via the issuance of a notice or letter of substitution, appoint any person (including commercial banks) as the agent of a taxpayer ("recovery agent") and request the person to pay over to it the outstanding tax liabilities of the taxpayer<sup>8</sup>.

As with the power of the FIRS to distrain taxpayers' assets, this tax enforcement mechanism may only be employed by the FIRS where it has ascertained that the relevant tax assessment has become final and conclusive and is not the subject of an ongoing tax appeal.

## **Ex Parte Order to Have Access to Taxpayers Books of Account Etc.**

Generally, for the purpose of obtaining full information in respect of a taxpayer's profit or income, the FIRS has the power to call for a taxpayer's book of accounts, documents, and other information<sup>9</sup>. In this regard, therefore, the Practice Direction did not introduce any novel provision, rather it merely discourages the resort to self-help by stipulating that when a taxpayer willingly refuses to produce its books of account, documents or information requested, the FIRS must apply to the Federal High Court for an *ex parte* order to compel the

<sup>4</sup>Section 33 of the FIRS Act, 2007.

<sup>5</sup>Section 13 (3) of the Fifth Schedule to the FIRS Act, 2007.

<sup>6</sup>Order III Rules 2(b) and 5(ii).

<sup>7</sup>Sections 33 and 31 of the FIRS Act.

<sup>8</sup>In 2019, the FIRS Issued letters of substitution to banks in Nigeria appointing them as collection agents for certain listed customers in default of their tax obligations.

<sup>9</sup>Sections 26, 29 and 30 of the FIRS Act, 2007.

production of the requested book of accounts, documents, or other information. The application for *ex parte* order must, however, be preceded by a prior demand by the FIRS and the refusal of a taxpayers to produce its books of account, documents and other information.

## C. The Implications of the Practice Direction

The application of the Practice Direction in its current state is likely to throw up some practical challenges touching on the exhaustion of administrative remedy, the power of the Chief Judge of the Federal High Court to impose further conditions for challenging tax assessments i.e., the requirement for a taxpayer to pay half of an assessment into an interest yielding account of the Federal High Court, and the “comply and complain” pattern of enforcement.

### Exhaustion of Internal Remedy

Typically, if a taxpayer fails to comply with a tax assessment or other decisions of the FIRS, the latter is expected to exhaust the statutory administrative remedy put in place i.e., go the Tax Appeal Tribunal to resolve issues before approaching the court. To underscore this point, section 14 of the Fifth Schedule to the FIRS Act provides that if the “Service is aggrieved by the non-compliance by a person in respect of any provision of the tax laws, it may appeal to the Tribunal where the person is resident giving notice in writing through the Secretary to the appropriate zone of the Tribunal”. Indeed, in **FIRS v. TSKJ Construcoes Internacional Sociedade Unipessoal LDA**<sup>10</sup>, the Court of Appeal held that the Tax Appeal Tribunal is a condition precedent to the jurisdiction of the Federal High Court in tax matters.

It follows, therefore, that where the FIRS requests the production of documents or other information and a taxpayer fails to comply with its request, FIRS should first apply to the Tax Appeal Tribunal for an order to compel the production of the requested documents. Should the Tax Appeal Tribunal refuse the application, the FIRS could then apply to the Federal High Court for an order of production vide the laid down rules and procedure in the Practice Direction. On that basis, it may be argued that the applications contemplated under the Practice Direction ought to be made to the Tax Appeal Tribunal in the first instance.

Notwithstanding the above, a contrary position may be taken by proponents of the Practice Direction that by the provisions of the FIRS Act, an application to sell the immovable property of a defaulting taxpayer seized by the FIRS pursuant to its power to distrain can only be made to the Federal High Court<sup>11</sup>. The same rule applies to an application for order to enter the business premises of a taxpayer for inspection<sup>12</sup>.

### The Comply and Complain Approach

Order V Rule 3 of the Practice Direction impose additional condition on taxpayers who intends to challenge an assessment. It says that “where a Respondent intends to challenge an Assessment served on him, he shall pay half of the assessed amount in an interest yielding account of the Federal High Court, Pending the determination of the application”.

Neither the FIRS Act nor any other tax legislation imposed the condition that a taxpayer must first pay half of an assessed amount before objecting or responding to a tax assessment claim. The condition clearly conflicts with the provisions of sections 68(2) of the Personal Income Tax Act, section 77(3) of the Companies Income Tax Act and section 13 of the Fifth Schedule to the FIRS Act<sup>13</sup> which jointly provides that where a taxpayer has given a notice of objection or appeal, the collection of tax shall remain in abeyance, i.e., suspended, until the objection or appeal is determined. Being a subsidiary legislation, the Practice Direction is manifestly inconsistent with the provisions of extant tax legislations.

<sup>10</sup>(2017) LPELR-42868(CA).

<sup>11</sup>Section 33 (4) of the FIRS Act 2007. In *FIRS v. TSKJ Construcoes Internacional Sociedade Unipessoal LDA*, the Court of Appeal held that the Tax Appeal Tribunal is a mere administrative tax appeal tribunal which is not on concurrent jurisdiction with the Federal High Court.

<sup>12</sup>Section 29 (6) of the FIRS Act 2007.

<sup>13</sup>Sections 61 and 62 of the Personal Income Tax Act.

Further, the requirement to pay half of the assessed tax would appear to be an amendment of section 13 of the Fifth Schedule to the FIRS Act, which is ultra vires the powers of the Chief Judge of the Federal High Court.

Being an Act of the National Assembly, it is only the National Assembly that has the power to amend the FIRS Act or any other tax legislation. What is more, by requiring a taxpayer to pay half of an assessed tax amount before challenging an assessment, the Practice Direction adopts a “comply and complain approach” to the enforcement of tax assessment, which impliedly breaches taxpayer's right to fair hearing. It assumes that FIRS tax assessments are always correct and once issued, the taxpayers are liable to pay, regardless of their objections and without being heard. Clearly, this approach would contravene the elementary principle of fair hearing which requires that a party cannot be condemned for a wrong unless he is heard or given an opportunity to be heard<sup>14</sup>.

## D. Conclusion

It is most expedient for taxpayers and the tax authority to recognise that the Practice Direction is, at best, a subsidiary legislation issued to give effect to the powers of the FIRS under its enabling statute. Consistent with the trite position of the law that a subsidiary legislation cannot expand and must be within the authority derived in the main enabling statute, therefore, the Practice Direction can only serve to give effect to the FIRS Act and cannot erode or supersede any of the provisions contained therein.

Therefore, the procedures set out in the Practice Direction should only be triggered and implemented by the FIRS with due reference to the tax enforcement provisions contained in the FIRS Act and other relevant tax legislations.



<sup>14</sup>Buhari v INEC & Ors (2008) LPELR-814 (SC)