THE FEDERAL HIGH COURT PRACTICE (FIRS) DIRECTIONS 2021: A CRITICAL REVIEW

INTRODUCTION

The Chief Judge of the Federal High Court only recently issued the Federal High Court (FIRS) Practice Directions 2021 (Practice Directions) pursuant to the Honourable Chief Judge's powers conferred by Order 57 Rule 3 of the Federal High Court (Civil Procedure) Rules 2019. The object of the issue of the Practice Directions is to ensure effective case management system and the expeditious determination of Tax related matters. That objective is incidental to the substratum for the justification and establishment of the Tax Appeal Tribunal. The Practice Directions apply to both criminal and civil causes in relation to tax issues before the Federal High Court and came into effect on 1st June 2021. An overview of the Practice Directions reveal that it constitutes a special procedure for FIRS to apply for far reaching and wide Orders of the Federal High Court against Tax Payers.

It would be recalled that section 251 (1) (b) & (3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) gave the Federal High Court powers to exercise exclusive jurisdiction over criminal and civil causes and matters connected with or pertaining to the taxation of companies or other bodies established or carrying on business in Nigeria and all other persons subject to federal taxation. Despite this, section 59 and the Fifth Schedule to the Federal Inland Revenue Service (Establishment) Act 2007 (FIRSEA) established the Tax Appeal Tribunal with jurisdiction to hear and entertain disputes and controversies arising from the operation of the Federal Tax Legislations. However, by several decisions of the superior courts of record, beginning with the Federal high court in **NNPC v. TAT** with Suit No. FHC/L/CS/630/2013, **(2014) 13 TLRN 39.** In that case, Hon. Justice Buba, held that the jurisdiction of the TAT does not interfere with the exclusive

jurisdiction of the Federal High Court as it operates merely as an administrative tribunal set up to determine preliminary matters before proceeding to the Federal High Court. Also quite recently, the Court of Appeal in **CNOOC Exploration and Production (Nig) Ltd. & Anor v. NNPC & Anor (2017) LPELR 43800 (CA), (2017) 10 CLRN 142**, while relying on its previous decisions in **Shell Nigeria Exploration and Production and Ors v. FIRS and Anor** (Unreported Judgment Appeal No. CA/A/208/2012 delivered on 21st August, 2016); and Esso Exploration and Production Nigeria Limited and Anor v. Nigerian National Petroleum Corporation (Unreported, Judgment Appeal No. CA/A/507/2012 delivered on 22nd Jul 2016, – and affirming the procedure of first applying to the Tax Appeal Tribunal in matters of Federal Taxation held that The Tax Appeal Tribunal had jurisdiction to hear and determine disputes and controversies arising from Federal Taxation. It is pertinent to note at this juncture that the Federal High Court retains exclusive jurisdiction to hear and determine Criminal matters pertaining to Taxation of Companies, bodies and persons subject to Federal Taxation. By Paragraph 12 of the Fifth Schedule to the FIRSEA, the TAT is obliged to pass on any information or evidence of possible criminality which it discovers during adjudication of any dispute to the Attorney General of the Federation or the Attorney General of any relevant state or other relevant law enforcement Agency. By Paragraph 16 (2) of the 5th Schedule to the FIRSEA, a judgement of the TAT is enforceable as a Judgement of the Federal High Court by registering a copy of such Judgement with the Chief Registrar of the Federal High Court. Appeals lie on the decisions of the TAT to the Federal High Court on questions of law alone (See Paragraph 17 (1) of the 5th Schedule to the FIRSEA and section 28 (a) and (d) of the Federal High Court Act Cap F12 LFN 2004 (as amended)).

THE PRACTICE DIRECTIONS

The Practice Directions however, apply to situations where the FIRS invokes the original jurisdiction of the Federal High Court to hear and determine criminal and civil causes and matters connected with or pertaining to the Taxation of Companies, bodies and other persons under Federal Taxation. This makes the Practice Directions an alluring invitation to the FIRS to exercise powers of enforcement and compliance without passing through the fiery rigours of trial at the TAT or the Federal High Court. The Practice Directions

envisages the commencement of a case by motion exparte (See Order II Rule 2 of the Practice Directions). According to Order III Rule 2 of the Practice directions, the FIRS may apply to the Federal High Court by Motion Exparte for: an Interim Order of Forfeiture on a Tax Payer's immovable Property; Freezing of Tax payer's Bank Account; to have access to Tax payer's books, documents, servers, billing systems and bank accounts; or to have access to a business premises of tax payer and/or to seal the business premises or other known place of business of a tax payer.

The FIRS (Applicant) must support the application by Motion Exparte with an Affidavit in support accompanied by the following documents:

a) A copy of the Notice of Assessment or Tax Demand Notice served on the Tax Payer.
b) A copy of the Notice served by FIRS on Tax Payer requesting access to Tax Payer's books, documents, servers, billing systems, bank accounts, including those stored in a computer ; in digital, magnetic, optical or electronic form for the purpose of tax investigation or audit.
c) Warrant of Distrain and/ or Warrant of Access duly executed by the Executive Chairman of FIRS as provided for in the Federal Inland Revenue Service (Establishment) Act (as amended).
d) Brief written Address.

These form the requirements for an application by the FIRS under the Practice Direction.

REVIEW OF THE PRACTICE DIRECTIONS

In the writer's opinion, the practice directions grants the Federal High Court broad powers to grant far reaching interim orders on exparte applications by the FIRS and is thus tenable to abuse. This is not implausible or far-fetched as ex parte orders are an exercise of extraordinary jurisdiction by a court. Ex-parte applications for interim Orders are by nature made by one party to a dispute (without hearing notice to or hearing the other party) to preserve the Status quo between parties until a named date or until the motion on notice is heard. They are for cases of real emergencies and urgent situations when it is shown that irretrievable mischief or damage of unsurpassable proportions may be occasioned to an applicant if an application is not granted (See **KOTOYE V. CENTRAL**

BANK OF NIGERIA (1989) 1 NWLR (PT 98) 419 @ 441 – 442). In **OKECHUKWU V. OKECHUKWU 1989 3 (NWLR) (Pt. 108) 234**, the Court of Appeal, Per Oguntade JCA, in referring to the grant of ex parte injunctions (which operate much like the exparte granted interim orders under contemplation) held that "*If it is used uncaringly and in circumstances that do not warrant its use, it can be an instrument of great injustice which vendetta-seeking litigants can employ to harass and embarrass their adversaries*".

Although the Practice directions direct the practice of the Federal High Court in the area of procedure of FIRS Exparte applications, the general rules of exparte applications ought to apply. Thus an Affidavit in support of an Exparte Application under the Practice Directions should sufficiently state the urgency and exigency of the situation and this stipulation ought to have been included in the Practice Directions. Otherwise it is quite sufficient to file a Motion on Notice. This argument is proffered especially because of the susceptibility to abuse that ex parte applications have. However, this does not appear to be the case because the Practice Directions consist of a special procedure for the FIRS to initiate an action for the Orders in the Practice Directions.

INTERIM FORFEITURE OF IMMOVABLE PROPERTY

An exparte application for an Order for Interim forfeiture of immovable property is by nature given to a government agency where there is fear of dissipation of assets, in this case, by a tax payer. Otherwise, a motion on notice is sufficient to apply for such Order. Ordinarily a violation of the Tax payer's right to own property under section 43 of the Constitution of the Federal Republic of Nigeria 1999 (as amended), the Order falls under one of the exemptions in section 44 (2) (a) of the Constitution. Since the FIRS is not given the power to distrain immovable property under its constituting legislation and other tax legislations, only an application to a court for such a relief is permissible. However, to sufficiently fall under the exemptions as contained under Section 44 (2) (a) of the Constitution, the Court must be satisfied that the imposition or enforcement of tax is finally due. According to Section 86 of the Companies Income Tax Act Cap C21 LFN 2004 (As amended) (CITA), an assessment is not enforceable until it becomes final and conclusive. This occurs after a period of 30 (thirty) days has elapsed since the service of a Notice of Assessment by the FIRS on a Tax payer along with a demand notice and the Tax payer does not object to the Notice of Assessment or file an appeal against such assessment

with the TAT. Similar provisions are contained in section 33 of the FIRSEA and Section 104 of PITA.

The above indicate that the accompanying documents stated in the, Practice Directions, for an ex-parte application for interim order for forfeiture of immovable property is not sufficient. The Notice of Assessment must be shown to be Final and Conclusive. Even the installment payment of tax by a Tax Payer should bar the FIRS from enforcing payment of tax by exparte application for interim forfeiture of immovable property given for merely producing a Notice of Assessment and a demand notice. On this please see the case of **ACCESS BANK V EDO STATE BOARD OF INTERNAL REVENUE (EBIR) (2018) LPELR-44156(CA).** The Practice Directions therefore appear to give the FIRS powers to enforce tax before such enforcement is due in the eyes of the law.

INTERIM ORDER OF FREEZING OF BANK ACCOUNTS:

This Order is one with the potential to cause grave financial hardships and disruptions of a tax payer business operations including the risk of sanctions from a Tax Payer's creditors with the possibility of this occurring on account of a wrongful and abusive Exparte application of the Applicant. Freezing of Bank Accounts is not a power of enforcement given to the FIRS under any of the Taxation Laws. Section 8 (1) (g) of the FIRSEA permits the FIRS to adopt measures to identify, trace, freeze, confiscate or seize proceeds derived from tax fraud or evasion. This power is limited to proceeds derived from tax fraud or evasion which implies a trial by the Courts and a decision therefrom. In **AMA ETUWEWE, ESQ. V FEDERAL INLAND REVENUE SERVICE & GUARANTY TRUST BANK PLC *(Suit No: FHC/WR/CS/17/2019)*** the Federal High Court held that the FIRS can instruct a bank to freeze a customer's account only for the purpose of seizing the proceeds of tax fraud or tax evasion and that the freezing must be made pursuant to a court order.

Therefore, the application for an interim Order of Freezing of Bank Accounts is more applicable for the purpose of seizing proceeds of tax fraud or tax evasion. However, because tax fraud and tax evasion is an offence under Section 40 and 43 of the FIRSEA, a taxpayer must be tried and convicted before an application for an interim Order of Freezing of Bank Accounts may be made by the FIRS (See Section 36 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)).

The FIRS does have power to appoint a bank as a collecting agent of a tax payer under section 31 of the FIRSEA and section 31 Companies Income Tax Act C21 LFN 2004 (as amended) (CITA) but may only impose restrictions on the bank account of the Tax Payer under certain conditions which include that the Tax payer's tax liability has become final and conclusive i.e. a Notice of Assessment has been served on the Tax Payer, 30 days has lapsed since service of such Notice of Assessment and the Tax Payer has neither objected to such Notice of Assessment and Demand Notice nor filed an Appeal before the Tax Appeal Tribunal or other competent Court.

For the FIRS' powers to enforce tax by the interim freezing of Bank Accounts, the FIRS may not apply for such Orders unless the tax becomes due and payable under the conditions listed above. It is important that this conditions should be stipulated under the documents accompanying an Exparte Application. Again it is difficult to conceive of a situation where the Order for freezing of Bank Accounts must be made by Exparte Application. If it is made by Exparte Application, it becomes merely penal as the Tax Payer ought to be able to apply to discharge the Order immediately whereupon the application shall be heard on Notice. Again, such an Order made Exparte does not imply that any such tax is payable until an order to levy such an account is made. Again, this corroborates an argument for the risk of abuse possible if the proper requirements and accompanying documents are not presented before the court for such an application.

ORDER OF COURT FOR FIRS TO HAVE ACCESS TO TAX PAYER'S BOOKS ET AL & ACCESS and/or TO SEAL TAX PAYER's BUSINESS PREMISES

The above captioned Order is one that can have a crippling effect on tax payer's business operations and lead to the breach of a Tax Payer's rights or the rights of its customers and data subjects.

Firstly, it is our opinion that an application for an Order under Order III Rule 2 (c)(i) of the Practice Directions should include the specific court documents required by the FIRS which must be limited to tax records and books with possible accounts for transactions relating to the profits or income of a tax payer for a period covering no more than the previous 6 (six) years. A wide Order for FIRS to have access to tax payer's Books, records and documents including those stored in Computers and computer readable formats or in electronic forms is most likely to constitute a breach of Tax payer's rights and data privacy laws especially for Tax Payers' that collect and store personally identifiable data

of data subjects. Also it may also be in breach of Tax Payer's right to own confidential information, data privacy rights and privileged communications. The Court of Appeal in the recent decision of **INCORPORATED TRUSTEES OF DIGITAL RIGHTS LAWYERS INITIATIVE & 2 ORS V. NATIONAL IDENTITY MANAGEMENT COMMISSION with appeal no: CA/1B/291/2020** and Judgment given on 24th September 2021, per Abba Bello Mohammed JCA, held inter alia that the scope of privacy of citizens as defined in Section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) undoubtedly includes the privacy and protection of the personal data of citizens.

Therefore, a wide Order for access to Tax payer's books and documents including those in electronic formats and Computer records might constitute a breach of Tax Payer's privacy rights. According to Section 50 FIRSEA, Persons of the FIRS are obliged to keep tax payer's records relating to profits, secret and confidential. This obligation only relates to documents, information, returns, assessment, list and copies of such list relating to the profits and items of profits of the company. Personally identifiable data of data subjects, confidential information of a proprietary nature including trade secrets and other Tax payer's privileged confidences are not included among the documents which officials and agents of the FIRS are required to keep secret or confidential. Accordingly, it is imperative for an Order to be unequivocal that the documents the FIRS shall have access to must consist only to those relating to the profits or income of the Tax Paper.

Furthermore, in our opinion an Order for the FIRS to have access and/or to seal the Tax Payer's business is inappropriate in light of the guiding principles and fundamental features of the Nigerian Tax system as listed by the National Tax Policy issued by the Federal Ministry of Finance published in 2017. According to the National Tax Policy, the financial and economic cost of compliance to the Tax Payer should be kept to the barest minimum. An Order for the FIRS to have access to the Tax Payer's premises can be damning and disruptive to the Tax Payer's business depending on when the Order is enforced and the manner in which it is enforced. The Practice Directions imply that before an Order is given to the FIRS for access to the Tax Payer's business premises, proof must be shown that the Tax Payer is unwilling to grant access. It is also important that such requirement of the Practice Directions include the reason (if any) given by the Tax Payer for its inability or unwillingness to grant access to its business premises.

Once again an Order to seal the Tax Payer's business premises should only be made when the Notice of Assessment is Final and Conclusive (see Guaranty Trust Bank v. Ekiti State Board of Inland Revenue(2018) LPELR – 46307 (CA)) otherwise it amounts to a deprivation of the Tax Payer's constitutional rights to Fair Hearing.

COMMENTARY

In **OKECHUKWU V. OKECHUKWU** (Supra) the Court per Oguntade JCA (as he then was) speaking on Exparte Applications held that "If it is used uncaringly and in circumstances that do not warrant its use, it can be an instrument of great injustice which vendetta-seeking litigants can employ to harass and embarrass their adversaries. It can also put the court on the cross-fire line with suspicions enveloping it that it is taking sides with the disputants".

Since under the Practice Directions, the means of commencing the Court process is by an Ex-Parte Application, it implies that there is no need for an urgent reason from the FIRS making it a special procedure for the FIRS. It is important for the Court to thence take steps to prevent an abuse of the process. All the Orders permitted under the Practice Directions for the FIRS to apply for are such that an exparte application is essentially unnecessary and a motion on notice is sufficient to apply for such Order. It is also foreseeable that most of such orders given on an exparte application will be considered invalid. As there is no date when am interim Order under the Practice Directions is vacated and the Order (s) given under the Practice Direction pends until determination of the Motion on Notice the possible injustice suffered by a tax payer is ominous. Worthy of note is the point that there is no corresponding duty of a Judge of the Federal High Court to accord priority to hearing of a Motion on Notice. Following the general principle of law that a Contemnor cannot be heard, a Tax payer might suffer considerable loss and possibly irreparable damage before an application to discharge or vary an Order of the Federal High Court under the Practice Directions is heard (if permissible at all under the Practice Direction).

It is advised that the entire Practice Directions should be revised to protect the Tax Payer against abuse. Though in Order 1 Rule 3, one of the objectives of the Practice Directions is to encourage the settlement of tax debts or liability between the FIRS and Tax Payers.

It however, appears to forcing the Tax Payer to pay tax liabilities though they may be objectionable.

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