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A Legal Critique of the Federal High Court (Federal Inland Revenue Service) Practice Directions, 2021 as it Relates to Taxpayers Rights

Chioma Bernadine Nwankwo PhD*

Abstract

There is no doubt that the Chief Judge of the Federal High Court (FHC) has ample powers under Order 57 Rule 3 of the Federal High Court, Civil Procedure Rules 2019 to issue Practice Directions as relates the speedy resolution of tax cases pending before the court. Guided by such powers, the Chief Judge of the Federal High Court recently issued the Federal High Court (Federal Inland Revenue Service) Practice Directions, 2021dated the 31st of May, 2021 which became effective from the 1st of June, 2021. This write-up is therefore a legal critique of the said Practice Direction as it relates to some areas which the author believes is not in tandem with the powers availed the Chief Judge and therefore over reaching his powers and constituting serious hardship to tax payers.

Keywords: Tax, Practice Directions, Federal High Court, Fairness, Justice, Speed, Tax administration

1. Introduction

The Chief Judge of the Federal High Court on 31st day of May, 2021 made Practice Directions for the Federal High Court for matters pertaining to or arising from Tax Issues and for the Federal Inland Revenue Service (FIRS). The objectives and applicability of the Practice Directions as stated therein on the Practice Directions shall-

1. Save to the extent or as may be directed by the Honorable, The Chief Judge, apply to both criminal matters and civil causes in relation to Tax Issues before the Federal High Court.
2. Ensure effective case management system and expeditious determination of tax related matters.
3. Encourage settlement of Tax debt or liability between disputing parties.
4. Provide directions on applications from the FIRS.
5. Promote the use of electronic filing and service and proceedings in Tax related matters.

From the above objectives, one can decipher that the main purpose of the Practice Directions is for the speedy and expeditious resolution of Tax related matters. The Practice Directions as already stated became effective on the 1st day of June, 2021.

* **Nwankwo , Chioma Bernadine** LL.B, LL.M, BL, PhD is a Lecturer in the Department of Public and Private Law , Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State, Nigeria, Phone :08036727930, Email: cbe.nwankwo@unizik.edu.ng, dr.chiomanwankwo1@gmail.com

2. Some Notable Issues Raised in the Practice Direction

A perusal of the Practice Directions reveal some core controversial areas for which guidelines were laid down to be applicable in Tax related matters. A summary some of these areas are as follows:

Order II

1. An application shall be filed in the Judicial Division from which a claim emanates in conformity with the Civil Procedure Rules of the Court.
2. An application commenced in a wrong Judicial Division shall be dealt with as provided for in the Federal High Court (Civil Procedure) Rules.

Order III

1. In an application for an Interim Order of forfeiture on immoveable property or freezing of bank account (Post No Debit), the FIRS shall file a motion Ex-parte accompanied by an Affidavit setting out the facts and a Written Address.
2. The Motion Ex-parte shall be for the following:

a. Interim order of Forfeiture of (tax payers) immoveable property;
b. Interim order of Freezing of (tax payers) bank accounts;
c. (i) An Ex-parte Order of Court for the FIRS to have access to Tax payers books, documents, servers, billing systems, bank accounts including those stored in a computer, in digital, magnetic, optical and/or electronic form;
(ii) An Ex-parte Order for the FIRS to have access and/or seal the business premises or other known place of business;

Where the tax Payer refuses to willingly grant access to the FIRS.

Order IV

1. Service of Court processes and or hearing notices may be effected by email, whatsapp or as may be directed by the Court and same shall be deemed as good service.
2. The print-out of same shall be sufficient proof of service.
3. Time shall run in accordance with the provisions of the Federal High Court (Civil Procedure) Rules.

Order V

1. A Respondent shall within fourteen (14) days after the service of the court process mentioned in Order III (8) of these Practice Directions enter Appearance by delivering to the Registrar, a Respondent's counter Affidavit and Written Address in support thereof.
2. If the Respondent is not contesting the application, he shall file an application for the leave of court to pay into the designated bank account, the Tax Debt or Liability in question and request the discharge of the entire application.
3. 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.

The above stated Orders of the Practice Direction, it is suggested, is fraught with inconsistencies and restrictions on taxpayers rights and these the writer intends to analyze subsequent in this write-up.

3. The legal Status of Practice Directions

Practice directions are made by the court under a jurisdiction usually called `Inherent jurisdiction of the court`. Directions do not have statutory authority but are sometimes used to introduce important procedural innovations. [1]

In English law, a practice direction is a supplemental protocol to rules of civil and criminal procedure in the Courts. It is a device to regulate minor procedural matters. It is an official announcement by the court laying down rules as to how it should function.[2] Primarily, a practice direction aims to ensure a swift, fair and effective administration of justice, and on this particular case, on tax-related disputes at the Federal High Court.[3] In order words, the practice direction also seeks to promote the use electronic filing and service systems in order to expedite a fast and effective administration of tax disputes in the Federal High Court.

The legal status of Practice Directions was held by the Supreme Court in the case of *Buhari v INEC & Ors*[4]as having the force of law in the same way as Rules of Court. However, it was also held by the Supreme Court, in the same case, that practice directions will however not have the forces of law if they are in conflict with the Constitution or the statutes which enables them. See further the cases of *Abubarkar v Yar Adua*[5], *Owuru v. Awusa* [6]

In order words, Practice Directions, by the above stated cases, although having the force of law are also ranked the lowest in terms of authority under the Nigerian hierarchy of jurisprudence.[7] Where there is a conflict between a Practice Direction and the Constitution. In this case, the Constitution of the Federal Republic of Nigeria 2004 (as amended), and the enabling statutes giving rise to such Practice Directions, in this case, the tax laws, for example, *the Federal Inland Revenue Service Establishment Act*[8] , *the Companies Income Tax Act*[9], such force of law ends to the extent or degree of its inconsistency.

4. Federal High Court (FIRS) Practice Directions 2021 *Viz a Viz* Tax Payers' Rights to Fairness and Justice

No doubt, it is highly commendable that efforts are being made to revolutionize the mechanism and procedures to effective tax administration and adjudication in Nigeria. However, it is

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[1]J JolowicZ, Practice Directions and the Civil Procedure Rules (2000) (59) 1 *The Cambridge Law Journal*, 53-61

[2]C Elliot and F Quinn and E Allbon, *English Legal System*, (19th edn, Pearson 2018).

[3]Delloitte, Federal High Court FIRS Practice Directions, Making an Impact that matters Since 1645<http://www2.deloitte.com/za/en/nigeria/pages/tax/articles/federal-high-court-firs-practicedirection.html> accessed 7th November 2021.

[4](2008) LPELR – 814 (SC).

[5] (2008) 1 SC (Pt 11) 77, (2008) 4 NWLR (Pt 1078) 455 at 511.

[6](2004) ALL FWLR (Pt 211) 1429

[7]ibid

[8]FIRSEA 2007

[9]CITA Cap C 21, LFN 2007.

submitted that such efforts when undertaken should not pose a disadvantage to the tax payers who at the end of the day will suffer the consequences of such reforms.

It is noteworthy that fairness, it is submitted, has the meaning of fair hearing within the context of S36 (1) of the Constitution Of the Federal Republic of Nigeria 1999 (As amended) which means a trial conducted according to all legal rules formulated to ensure that justice is done to the parties. It has been held to encompass not only the compliance with the rules of natural justice but also *audi alteram partem*. See *Bamisile v NJC & Ors*.[10]It also entails doing all things; whether in civil or criminal trials that would make an impartial observer believe that the trial has been balanced and fair on both sides. See *Aman Chukwu v The Federal Republic of Nigeria.*[11]

On the other hand, it is an essential attribute of the administration of justice that justice must not only be done, but it must manifestly be seen to be done.[12] See also the case of *Gomwalk & Anor v Military Administrator of Plateau State & Ors*[13]where the court held thus:

> *When it is said that an opportunity must be given to both sides to present their cases, it means that the court must hear both parties on all material issues, before it can reach a decision on them. The opportunities given to the parties and the consideration of their issues must not be lop-sided, but fair, equal and must be transparent or apparent. See also Ntukidem v Oko[14], Fidelity Bank plc v Money & Ors[15]*

In view of the foregoing, Order III, FHC (FIRS) Practice Directions, 2021, as noted earlier confers on the FIRS the right to file an ex-parte application asking the court for a grant of an Interim Order of forfeiture on immoveable property or for freezing of bank account (Post No Debit) or access or sealing of the premises of a tax payer pending the determination of the motion on Notice. Again, a party against whom a Motion on Notice is served who intends to respond to same is to file a counter affidavit and written address within fourteen (14) days of the service of the motion on him.

In other words, what this simply means is that whilst a tax assessment case is still pending before the court, the practice directions allows an FIRS lawyer to bring an ex-parte application for a grant of an interim order for forfeiture of the tax payers immovable property or freezing of taxpayers' bank account or access or sealing of taxpayers premises (without notice to the tax payer) and the judge to whom such a tax related case is pending before shall accord priority to it.[16] The Judge shall also make such interim Orders pending the determination of the Motion on Notice to be filed by the FRSC after fourteen days (14) of granting of the interim Order, seeking for an Order absolute.[17]

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[10](2012) LPELR -8381 (CA).
[11] (2009) 2-3 SC (Pt 1) 93 at 102 -103.
[12]*The Admin & Exec of the Estate of Abacha v Eke Spiff & Ors* (2009) LPELR -3152 (SC);*R v Sussex Justices Ex parte Marcathy* (1924)1 KB 256, Pg 259
[13](2011) LPELR -9185(CA)
[14](1985) 5 NWLR (Pt 45) 909
[15] (2012) LPELR -7819(SC)
[16] Order iii Rule 4 Federal High Court (Federal Inland Revenue Service) Practice Directions, 2021
[17]*Ibid* Order 3Rules 5(i) (ii) (iii), 6(i)

Flowing from the above, where the Respondent does not intend to oppose the application, he shall file an application for leave to pay into the designated account the tax liability or debt and request for the discharge of the entire application. However, where he wants to challenge the assessment served on him, he shall pay half of the assessed sum into an interest yielding account of Federal High Court, pending the determination of the Application. [18]

This in a nutshell is the major summary of the Practice Directions, 2021. First of all, the use of an ex-parte application as a legal procedure in such an important legal process which has the ability to have crippling, long lasting effects on tax payers, it is submitted, is not to be applauded. Ex-parte application by its normal application is usually intended for situations of real emergency in order to ward off serious and irreparable damages.[19]

Under these Practice Directions under review, a Judge is mandated to grant the interim order for forfeiture of property, freezing of bank account or access or sealing of the premises of a tax payer pending the determination of the motion on notice. In order words, all these can be achieved even without notice to the affected tax payer. As stated earlier, ex-parte applications is an excellent application for warding off serious and irreparable damages and not to be arbitrary used, to avoid the process being abused.[20]

It is submitted that the principle from which this caution has its root are those embedded in the fundamental rights of fair hearing entrenched in the constitution.[21] No doubt, such serious consequences as stated in the Practice Directions ought not to be done without being cognizant of the tax payer's rights and obligations. An Order for forfeiture of property, freezing of bank account or access or sealing of the premises of a tax payers pending the determination of motion on notice ordinarily without hearing from the affected tax payer qualifies to deprive such a tax payer the constitutional right of fair hearing as enshrined in our constitution.

Again, on the issue of deposit of 50% of the assessed sum into an interest yielding account of the Federal High Court, where the respondent intends to oppose the application, it is submitted that such Rule[22] in the Practice Direction being inconsistent with some enabling tax laws should be null and void to the extent of its inconsistency. Let's look at some of these provisions.

S 33(1) of the Federal Inland Revenue Service (Establishment) Act[23], provides as follows:

> *Without prejudice to any other power conferred on the Board for the enforcement of payment of tax due from a company, where an assessment has become final and conclusive(concluded in court) and a demand notice has in accordance with the provisions of the relevant tax laws in the First Schedule to this Act, been served upon the taxable person or upon the person in whose name the taxable person is chargeable, then, if payment of the tax is not made within the time limited by the demand notice, the board may in the prescribed form, for the purpose of enforcing payment of the tax due –*

[18] *Ibid* Order V Rules 1, 2, 3
[19] *Woluchem v Wokoma* (1974) 1 ANLR 605
[20] *Kotoye v CBN* (1989) 1 NWLR (Pt 98) 419
[21] S.36 CFRN 1999 (as Amended)
[22] Order IV Rule 3
[23] *Op cit*

a. distrain the tax payer by his goods or other chattels, bonds or other securities;

b. distrain upon any land, premises, or place in respect of which the tax payer is the owner and, subject to the following provisions of this section, recover the amount of tax due by sale of anything so distrained. (emphasis added)

By the above *S 33 of the FIRSEA*, the FIRS is only empowered to distrain assets of tax payers when the case of unsettled tax assessments have been concluded and finalized in court. This is in contrast with the Practice Directions Rules which empowers the distress of assets of the tax payers without conclusive resolution of an assessment action. This is even more worrisome when such distress can be done by an ex-parte application as provided in the Practice Directions. Again, the Practice Directions does not require any proof of final conclusion of the court processes before the deposit of 50% of the tax assessments, assuming the respondent is challenging same. The above Practice Direction by its order III and V is inconsistent with the extant provisions of *S 33 of the FIRSEA Act* and it is suggested that the required Orders of the Practice Direction be amended to be in tandem with the tax laws that give it force.

It is noteworthy that the above *S 33 of the FIRSEA Act* is *impari materia* with S.86 of the Companies Income Tax Act.[24]

Furthermore, the 50% (half of the disputed tax assessment), as required to be deposited, if the respondent intends to oppose the application, is rather unfair to the respondent \ tax payer. While the Respondent is still battling with the unfairness of the ex-parte application provision for the freezing of bank accounts etc, the 50% deposit of the tax assessments for an assessment under contest in court and still *sub judice*, it is opined, is rather unfair to the tax payer.

As stated earlier, fairness entails doing all things that would make an impartial observer believe that the trial has been balanced and fair on both sides. In the instant scenario, I posit otherwise. This Practice Directions seems to be most favorable to the applications by the FIRS, while the tax payers will have a long loop to take before getting justice. It also violates tax payers' constitutional rights of fair hearing.

Again, in an event the tax payer succeeds in his trial, the Practice Directions did not state how the deposited 50% tax assessment in the designated interest yielding account of the Federal High Court will be recovered back by the tax payer. Even who takes the accrued interest was not stated. Does the interest go to the taxpayer or the Federal High Court? The Practice Directions is silent on this issue.

5. Recommendations

By *Order 57Rule 3 of the Federal High Court Rules*, the Chief Justice of the Federal High Court has power to issue practical directions, protocols, directives and guidance towards the realization of speedy, just and effective administration of justice. It is respectively submitted that by the above stated controversial provisions of the Federal High Court, Practice Directions 2021, the rights of tax payers are unjustly restricted. The tax payers' right to access to court, fairness and justice are greatly jeopardized. The tax payers' constitutional right to fair hearing almost

[24] Op cit

restricted and there is likelihood of bogus claims being commenced against tax payers, after all, where the tax payer intends to oppose same, a 50% deposit of the tax assessment sum is a sure deal. No doubt, an efficient and effective tax administration requires an effective tax collection processes. While the efforts of the adoption of this Practice Direction is commendable for speedy resolution of tax disputes, it is over reaching the rights of the tax payers and it is recommended that the Chief Judge of the Federal High Court consults with relevant tax consultants and stakeholders in order to amend the Practice Directions geared towards the intendment of efficient and speedy tax proceeding pending before the Federal High Court without derailing the tax payers rights.

6. Conclusion

The tax payers' rights to fair and just trial should not be butchered on the altar of speed. A speedy efficient, effective and just tax proceedings is acknowledged and encouraged but such should not be to the detriment of the tax payers rights to fair hearing and justice as guaranteed in the constitution. A timely update or amendment of the Federal High Court Practice Direction by the Chief Judge of the federal high court to inculcate the above areas as discussed above is highly encouraged.