

FEDERAL HIGH COURT TAX PRACTICE DIRECTIONS 2021: BALANCING REVENUE DRIVE AND EASE OF DOING BUSINESS IN NIGERIA

DETAIL COMMERCIAL SOLICITORS

Detail

BACKGROUND

Practice directions which are essentially supplemental protocols to rules of civil and criminal procedure in the courts, have been used to regulate procedural matters in many instances. They also provide written explanation on how courts will proceed in a particular area of law. Practice directions have the force of law in the same way as rules of court¹ and parties are required to adhere strictly to them.²

On the 31st May 2021, the Chief Judge of the Federal High Court (“FHC”), Honourable Justice Terhemba Tsoho issued the Federal High Court (Federal Inland Revenue Service) Practice Direction, 2021 (the “**Practice Directions**”). The objectives of the Practice Directions are to:

-
1. Buhari v. INEC (2008) 19 NWLR (Pt. 1120) 246; Abubakar v. Yar'Adua (2008)
 2. Nwoko v Azekwo (2012) 12 NWLR (Pt. 1313) 151



- 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 made by the Federal Inland Revenue Service (“**FIRS**”) to the FHC; and
- d) promote the use of electronic filing and service systems in tax related matters. The Practice Directions made significant introductions into the Nigerian tax enforcement landscape and apply to both civil and criminal cases in relation to taxation before the FHC. The Practice Directions took effect on 1st June 2021.

The crux of this article is to highlight the key provisions of the Practice Directions and spotlight the legal issues arising from the Practice Directions which ultimately affect businesses in Nigeria.



HIGHLIGHTS OF THE PRACTICE DIRECTIONS

1. Filing of Applications for Interim Orders by the FIRS: By the Practice Directions, the FIRS may file a motion ex-parte in the FHC (i.e. an application to court where the other party is not put on notice) to obtain any of the following interim orders from the FHC:³

- a) Interim order for forfeiture on immovable property (i.e. land and building) of a taxpayer;
- b) Interim order for freezing of a taxpayer's bank account;
- c) Ex-parte order empowering the FIRS to have access to taxpayer's books, documents, servers, billing systems, bank accounts, including those stored in a computer; in digital, magnetic, optical or electronic form; and
- d) Ex-parte order empowering the FIRS to have access and/or seal the business premises or other known place of business, where the taxpayer refuses to grant access to the FIRS willingly.

The application mentioned above must be accompanied with an affidavit which shall be supported by any of the following documents/exhibits (as applicable):

3. Order III Rule (1)- (3), Federal High Court (Federal Inland Revenue Service) Practice Direction 2021

- a) a copy of the Notice of Assessment or the Tax Demand Notice served on the taxpayer by the FIRS;
- b) a copy of the Notice served by the FIRS on the taxpayer requesting access to the taxpayer's books, documents for the purpose of tax investigation or audit;
- c) a Warrant of Distraint and/or Warrant of Access duly executed by the Executive Chairman of the FIRS as provided for in the FIRS (Establishment) Act as amended; or
- d) a Brief Written Address.

2. Where the judge to whom the case is assigned is satisfied that the requirements in the Practice Directions are complied with, the judge is required to:

- a) accord priority to the application; and
- b) make an interim order of (i) forfeiture of the property to the FIRS on behalf of the Federal Government; or (ii) the freezing order; or (iii) the business premises sealing order pending the determination of the Motion on Notice.

3. Upon the grant of the interim order of forfeiture or freezing of a bank account by the FHC, the FIRS is required to file a Motion on Notice with an affidavit and a Written Address within fourteen (14) days after

service of the interim order on the taxpayer. The FIRS shall, by the Motion on Notice, seek for an order absolute for the immovable property or an order forfeiting the assessed amount.

4. Mode of Entering Appearance: The taxpayer/Respondent is required to enter appearance within fourteen (14) days after the service of the court processes on him by delivering to the Registrar of FHC, a Respondent's Counter Affidavit and Written Address in support.

5. A taxpayer served with a Motion on Notice can choose either to: (i) pay the assessed tax; or (ii) challenge the assessment. Where the taxpayer decides to pay the tax as assessed by FIRS, he will file an application for the leave (i.e. permission) of the court to pay the tax debt or liability in question into the designated bank account and request the discharge of the entire application. On the other hand, where the taxpayer decides to challenge the assessment, he shall pay half of the assessed amount in an interest-yielding account of the FHC, pending the determination of the application.

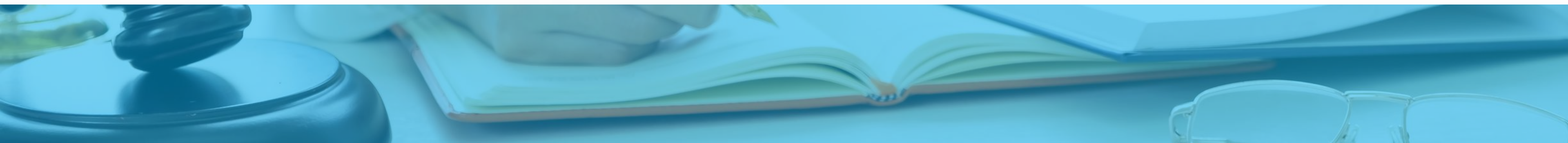


MATTERS ARISING UNDER THE PRACTICE DIRECTIONS

1. Fulfillment of the Conditions Precedent for the Initiation of a Tax Suit: The Practice Directions empower the FIRS to obtain interim orders of forfeiture of immovable properties, freezing of bank accounts⁴ or the distrain of a taxpayer's business premises upon application by the FIRS. However, the Practice Directions are silent on whether the conditions precedent set out in the enabling provisions of the tax laws such as the Companies Income Tax Act as amended ("**CITA**") and the FIRS (Establishment) Act on recovery of tax from taxpayers and the distraint of a taxpayer's property will be complied with before the FHC can grant such reliefs sought by the FIRS. For instance, under the provisions of CITA and the FIRS (Establishment) Act, the FIRS' power to recover taxes from a defaulting taxpayer or to distrain a taxpayer's property can only arise when the tax assessment against the taxpayer has (i) become **final and conclusive**; (ii) a demand notice has been served on the taxpayer by the FIRS; and (iii) the taxpayer fails to pay the tax within the time limited by the demand notice.⁵

4. Order III Rule 2, Federal High Court (Federal Inland Revenue Service) Practice Direction 2021

5. Section 33 the FIRS (Establishment) Act, Cap F36 LFN 2004, section 76 of CITA



Statutory and judicial authorities concur that an assessment is final and conclusive when (i) the taxpayer does not object to the assessment raised on him/it within 30 days; or (ii) where the tax assessment has been agreed to by the taxpayer; or (iii) where the tax assessment has been determined or revised upon the taxpayer's objection; or (iv) where the tax assessment has been determined on appeal.⁶ Therefore, where an assessment has not become final and conclusive as stated above, the FIRS' right to invoke the jurisdiction of the FHC cannot be triggered as same will be premature.

2. The Requirement to Pay 50% of Assessment Tax: The Practice Directions requires that where a taxpayer intends to challenge an assessment served on him by the FIRS, the taxpayer shall pay half of the assessed amount in an interest yielding account of the FHC, pending the determination of the application.

6. Section 76 of CITA. See also the case of Lagos State Internal Revenue Service vs. Star Deep Water Petroleum Limited

This requirement is a clear departure from the provisions of sections 68(2) of the Personal Income Tax Act (“PITA”), section 77(3) of CITA⁷ and Paragraph 15(7) of the Fifth Schedule to the FIRS (Establishment) Act. Section 68(2) of PITA and section 77(3) of CITA which are to the effect that where a taxpayer has given a notice of objection or appeal, the collection of tax shall remain suspended, until the objection or appeal is determined provided that the taxpayer has paid the portion of the tax assessment that he does not dispute. It follows from the above provisions that where the taxpayer disputes the entire tax assessment, he is not required to pay the 50% of the Assessment Tax as set out in the Practice Directions.

Paragraph 15(7) of the Fifth Schedule to the FIRS (Establishment) Act on its part empowers the FIRS to apply to the Tax Appeal Tribunal (“TAT”) at the hearing of any tax appeal before the TAT for an order

7. Based on the amendment made to section 77 of CITA generally by the Finance Act, 2019 and Finance Act 2020, this provision is now section 77(2) of CITA

mandating the taxpayer to pay an amount on account of the tax charged by the assessment under appeal as security for prosecuting the appeal where the taxpayer's appeal is suspected to be frivolous or vexatious amongst others. It is imperative to note from this provision that the said application can only be made by the FIRS after the tax appeal has been filed by the taxpayer but not before the filing or the hearing of the appeal as contemplated by the Practice Directions.

'It is trite principle of law that practice directions which are subsidiary legislation cannot overrule the provisions of Acts passed by the legislature.⁸ Consequently, the Chief Judge of the FHC does not have the power to override the clear provisions of Acts of the National Assembly by a Practice Directions. Practice directions as subsidiary legislation will be ultra vires where they are inconsistent with a primary legislation such as the relevant tax laws cited above.⁹

8. Buhari v INEC (2008) LPELR- 814 (SC)

9. Auwalu v FIRS (2017) LPELR-43824 (SC)

Furthermore, the requirement that taxpayers are to pay 50% of the assessed tax appears to infringe on a taxpayer's constitutional right to fair hearing as it presumes liability on the taxpayer before an objection or appeal is determined. This is contrary to the principle of fair hearing and the statutory interpretation of tax statutes which holds that tax laws should be construed strictly against the tax authority and in favour of the taxpayer.

A negative effect and unintended consequence that this requirement is likely to have is that it may provide an incentive for the tax authority to arrive at and levy excessive and unreasonable tax assessment against taxpayers knowing that the taxpayer will be required to deposit 50% of the unreasonable assessed amount even when the assessment is ultimately found to lack any basis.

3. Impact on Businesses: Similar to the concern above, we consider that the new requirement to pay 50% of the assessed amount will significantly affect the cash flow of businesses, increase the liability in its accounts and hamper its ease of doing business in Nigeria. A situation where a business will commit so much of its operating capital into an idle account that pays trifling interest will very likely stifle the growth of that business, and lead to its untimely end. There is also the negative impact it has on economic indices and the overall growth of the Nigerian economy and the welfare of Nigerians who will ultimately bear the fall out of the challenges that will be faced by these businesses.



CONCLUSION

The purpose of practice directions is to ensure that cases are disposed by the court justly, fairly and equitably. However, considering the notable drawbacks in the Practice Directions under discourse, there is a need to amend the Practice Directions with a view to preventing abuse and ensuring that its provisions are not exploited against taxpayers. In the same vein, the Practice Directions need to be amended to continue to foster an investment friendly economic climate and not undo the laudable efforts made by the Nigerian government in improving Nigeria's position on the ease of doing business ranking.

Notwithstanding the above, taxpayers and businesses should take note of the compliance requirements in the Practice Directions and take proactive steps to resolve tax disputes amicably with the FIRS before same is escalated to courts.

Prepared by:



Chukwudi Ofili – Associate Partner and Head of Legal Tax Advisory Practice



Anthony Ezeamama – Senior Associate, Legal Tax Advisory Practice



Chiedozie Kelechi Ogbu – Trainee Solicitor, Legal Tax Advisory Practice

Detail Commercial Solicitors is distinct as Nigeria's first commercial solicitor firm to specialize exclusively in non-courtroom practice.

Connect With Us



Detail Commercial Solicitors



Detail Nigeria



Detail Solicitors



www.detailsolicitors.com