

PROPER EXERCISE OF THE POWERS OF THE FIRS TO FREEZE DEFAULTING TAXPAYERS' ACCOUNTS AND APPOINT BANKS AS TAX COLLECTING AGENTS

Background

Section 31(1) of the Federal Inland Revenue Service (Establishment) Act, 2007 (the "FIRS Act") empowers the Federal Inland Revenue Service ("FIRS" or the "Service") to, by notice in writing, appoint any person to be the agent of a taxable person; if the circumstances specified in section 31(2) of the FIRS Act make it expedient to do so. The agent so appointed may be required by the FIRS to pay any tax payable by the taxable person, from any money held by the agent on behalf of the taxable person.¹ In addition, section 8(1)(g) of the FIRS Act empowers the Service to adopt measures to identify, trace, freeze, confiscate or seize proceeds derived from tax fraud or evasion.

In exercise of this power, the FIRS has evolved the practice of directing banks to restrict taxpayers' accounts on the ground that such taxpayers have outstanding tax liabilities to settle. In response to such directives of the FIRS, the banks, usually, do not question or investigate the legality of these directives before acting pursuant thereto. The banks simply proceed to



restrict the taxpayers' bank accounts until the alleged outstanding tax liabilities have been resolved between the taxpayer and the FIRS.

Hence, on March 15, 2019, the FIRS issued a public notice informing the general public of its intention to resume, from that day, the freezing of the bank accounts of alleged defaulting taxpayers. The public notice was targeted at taxpayers with a minimum annual turnover of One Hundred Million Naira (₦100,000,000) who had allegedly failed to register for taxes but who had been collecting Value Added Tax ("VAT") and Withholding Taxes ("WHT") on payments made by or to third parties; without remitting same to the FIRS.

¹ See section 31(2) of the FIRS Act.

In the recent case of *Ama Etuwewe, Esq. (Carrying on legal practice under the name and style of Ama Etuwewe & Co.) v Federal Inland Revenue Service & Guaranty Trust Bank Plc² ("Ama Etuwewe")*, the plaintiff, a legal practitioner operating under the name and style of Ama Etuwewe & Co. – a registered business name – was assessed to tax by the FIRS. In a bid to recover the assessed tax, FIRS appointed the commercial bank with whom the plaintiff maintains an account ("**the bank**") as a collecting agent for the purpose of deducting the alleged unpaid tax from the plaintiff's account and for remitting same to FIRS. Following the appointment, the bank placed a restriction on the plaintiff's account.

The Issues in Ama Etuwewe

Aggrieved, the plaintiff filed an action at the Federal High Court ("**FHC**" or the "**Court**"), challenging the validity of the Assessment and the restriction placed on his bank account.



The plaintiff contended that the restriction violated his constitutional right to fair hearing and was illegal, because he was

² (Unreported judgment delivered on Monday, September 30, 2019 in Suit No. FHC/WR/CS/17/2019, by Hon. Justice Emeka Nwite of the Federal High Court, Warri Division.

not afforded an opportunity to be heard and that the tax assessment upon which FIRS' account-freezing and agent-appointment directives were based, was in respect of Company Income Tax ("**CIT**"). It was further contended that being an individual who carries on legal practice in Nigeria as a registered business name and not an incorporated company, the plaintiff is not subject to the Companies Income Tax Act ("**CITA**") and hence not liable to pay CIT. The plaintiff also argued that the action of the bank in freezing his account on the directive of FIRS, without recourse to him, was in negligent breach of the fiduciary duty of care owed to him by the bank. He argued further that the placement of the restriction on his account was illegal and void, having been done without an order of a court of law. The plaintiff also challenged the validity of the appointment of his bank as collecting agent by FIRS. The plaintiff premised his argument on the fact that section 28 of the FIRS Act vests the power to appoint an agent squarely on the Board of FIRS or the Service itself and therefore, the agent-appointment letter signed solely by the Chairman of FIRS is ultra vires the powers of the Chairman and was as such void and ineffective. Hence, the plaintiff sought reliefs jointly and severally against FIRS and the bank.

FIRS, as the 1st defendant in the suit, argued that an unincorporated body, such as a business name, though not liable to pay CIT, is under statutory obligation to withhold taxes at the appropriate rates when making payments to companies and remit same to the FIRS. It was also argued that a registered business name carrying on legal practice, is not among the list of exempted businesses under the VAT Act³ and is therefore subject to the payment of

³ Cap. V1 Laws of the Federation of Nigeria ("**LFN**") 2004 (as amended in 2007)

VAT. It was then contended that, where a person (including a registered business name) having a duty to make deductions for WHT and to remit same appropriately fails in this statutory duty, the FIRS is empowered by the law to recover the accruable tax from the person who so fails, by way of substitution⁴.



Also, it was contended that the FIRS has statutory powers to request for information from any bank, including bank statements of suspected tax defaulters, for the purpose of investigation, establishment and recovery of tax debts. Further to this, it was argued that, the FIRS has powers to appoint a bank as tax recovery or collecting agent. In support of this position, FIRS referred the Court to relevant sections of the Companies Income Tax Act (“CITA”)⁵, Companies Income Tax (Rates etc., of Tax Deducted at Source (Withholding Tax)) Regulations, 1997 (“WHT Regulations”), VAT Act and the FIRS Act.

The bank, which is the 2nd defendant in the suit, contended that its actions, by obliging the FIRS and freezing the plaintiff’s account did not amount to a breach of the fiduciary relationship between the bank and the plaintiff. It was argued that, while it is unarguable that banker-customer relationship imposes a

fiduciary obligation on a bank to maintain confidentiality of its customers’ information and transactions and to prevent such from unauthorized access by third parties; the fiduciary obligation is qualified by certain exceptions. The bank asserted that the said exceptions had been laid down in relevant statutes such as the FIRS Act and that the position had been given judicial imprimatur.

On the whole, the issues decided by the Court can be summarized into the following:



- Whether the plaintiff was a company liable to pay CIT;
- Whether the bank owed the Plaintiff a duty of care and was negligent in the exercise of that duty; and
- Whether FIRS’ powers to appoint a tax collecting agent was legally and validly exercised.

The Decision of the Court

After hearing arguments of the parties, the Court came to the conclusion that the FIRS, acting through the bank, did not follow due process in exercising its statutory powers and that the rights of the plaintiff were negligently breached by the bank. For these reasons, the Court awarded damages jointly and severally against FIRS and the bank. The FHC specifically held that:

⁴ Section 31, FIRS Act

⁵ Cap. C21 Laws of the Federation of Nigeria (“LFN”) 2004 (as amended in 2007).

- The plaintiff, not being an incorporated company, is not liable to pay CIT;
- VAT is a consumption tax payable on goods and services and not chargeable on turnover in the plaintiff's bank account;
- The plaintiff only receives payment of professional fees from his client and does not make payments to companies and is therefore not under a statutory obligation to deduct and remit WHT;
- Freezing of the plaintiff's bank account without recourse to him violated his right to fair hearing, was negligently done in breach of the bank's fiduciary duty to the plaintiff, and was illegal without the backing of an order of court; and
- Only the Board of the FIRS or the Service itself is statutorily empowered to appoint an agent under the FIRS Act for the purpose of recovering and collecting tax debts and as a result, the Chairman of FIRS cannot solely sign an agent's appointment letter.

Commentary

In the first analysis, we are of the opinion that the Court may have missed the point of the FIRS' arguments in **Ama Etuwewe** as it was not contended that the Plaintiff, an unincorporated body carrying on legal practice in Nigeria as a registered business name, is liable to CIT under the CITA. The argument of FIRS was that the Plaintiff, though not subject to CIT under the CITA, was subject to WHT obligations under the CITA and the VAT Act. The Assessment raised on the plaintiff related

to alleged VAT and WHT collections by the plaintiff that were not remitted to the FIRS as required by law. The Court should therefore have limited its decision on this point to the question of whether the Service had successfully proved the allegation and not whether the plaintiff is subject to CIT under the CITA.



In addition, the Court's view that the appointment powers of the FIRS under section 31 of the FIRS Act can only be exercised by the FIRS Board (the **"Board"**) or the Service itself, and not the Executive Chairman of the Service, appears to have no clear basis in law. Whilst it is not contestable that the FIRS (or the Service), the Board and the Executive Chairman of FIRS are three distinct personalities created separately under the FIRS Act and with clearly specified powers and functions; it should be noted the powers of the Board specified under section 7 of the FIRS Act relate only to matters of general policy guidelines and do not include the power to appoint agent. Similarly, the functions of the Service, as provided under section 8 of the FIRS Act, include matters relating to tax assessment, audit, collection, investigation, and collaboration with law enforcement agents for purposes of tax debts recovery. In exercising its powers, the Service either acts through its Board or its Executive Chairman or any other officer properly so delegated. Specifically, section 53 of the FIRS Act provides that anything done or required to be done by the Service in

pursuance of any of its powers or duties under the FIRS Act or under the law may be signified under the hand of the Executive Chairman or under the hand of an officer authorized by the Board for the particular purpose.

The above notwithstanding, the FHC decision is noteworthy as it clarifies a thorny issue that has become of serious concern to taxpayers in Nigeria: that is, whether the FIRS can restrict or direct the restriction of alleged defaulting taxpayers' bank accounts without recourse to the judicial process of the courts. The decision in **Ama Etuwewe** has authoritatively determined this question in the negative⁶.

In other words, while the powers of the FIRS, to restrict defaulting taxpayers' bank accounts and appoint third parties (such as banks) as tax collecting agents, under the provisions of sections 8(1)(g) and 31 of the FIRS Act, is not in contest, it is our considered view that the powers must not be exercised arbitrarily. At any rate, section 31 of the FIRS Act does not empower the Service to restrict or direct the restriction of alleged defaulting taxpayers' banking accounts. It only empowers the FIRS to appoint a third party

⁶ The decision in *Ama Etuwewe* followed the decisions of the Court of Appeal in *Megawealth Limited v Securities & Exchange Commission* (2017) 13 NWLR (Pt. 1583) 345, 380 and *Guaranty Trust Bank Plc v Akinsiku Adedamola & 2 Ors.* (Unreported judgment delivered on March 1, 2019 in Appeal No. CA/L/1285/2015); where it was held, respectively, that a government agency such as the Securities and Exchange Commission (SEC) has no power to freeze the account of any person who allegedly has acted in violation of the Investments and Securities Act without a judicial order and that the Economic and Financial Crimes Commission (EFCC), as a government agency, cannot on its own direct a bank to place a restriction on a person's account without an order of court.

as tax collecting agent in respect of a taxpayer's property where the tax sought to be collected has become legally "payable" and whereupon the agent will be required to pay over to the FIRS the amount of the tax which has become final and conclusive, from any money held by the agent which belongs to the taxpayer. It should be noted that tax is legally "payable" where the assessment has become final and conclusive. That is, (i) no valid objection or appeal challenging the assessment was lodged by the taxpayer within the time allowed by law, or (ii) any such objection or appeal has been finally determined by the courts with right of appeal completely exhausted.

As the FHC decision in **Ama Etuwewe** has established, where a taxpayer's banking account is unlawfully restricted by a bank on the appointment or directive of the FIRS, the remedy available to the aggrieved taxpayer is to seek declaratory and injunctive reliefs against both the Service and the bank at the FHC. It is therefore incumbent on the FIRS to lawfully and diligently exercise its statutory power of substitution, through appointment of tax collecting agents, in order to minimize potential crises in our tax administration.

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