



Power Of The FIRS To Access Taxpayers' Servers And Other Matters: Examining The Contentious Issues Arising From The Federal High Court (FIRS) Practice Directions, 2021

Introduction

On May 31, 2021, the Federal High Court (*the "Court"*) issued a practice direction titled the: **Federal High Court of Nigeria (Federal Inland Revenue Service) Practice Directions, 2021** (the "**Practice Directions**") with June 1, 2021 as the effective date.

Contemporary debates on the constitutionality, legality and propriety of some of the provisions of the Practice Directions continue to generate concerns among taxpayers, taxable foreign entities, and the general public.

The Chief Judge of the Federal High Court of Nigeria is empowered, pursuant to Order 57 Rule 3 of the *Federal High Court (Civil Procedure) Rules, 2019*, to make practice directions for the Federal High Court; on matters arising from tax administration/enforcement as well as matters affecting the Federal Inland Revenue Service ("**FIRS**"). The Practice Directions are intended to apply to both criminal and civil tax matters that come before the Court with the primary objective of promoting effective case management and expeditious determination of tax related cases before the Court. The Practice Directions also seek to ensure seamless settlement of tax debt or liability between disputing parties, as well as the facilitation of electronic systems for filing, servicing and conducting proceedings in tax-related matters.

This article discusses two critical issues raised by the Practice Directions.

Power of the FIRS to access Taxpayer's records



Order III (2)c of the Practice Directions expressly grants the FIRS powers, pursuant to an *ex-parte* order, to access taxpayer's books, documents, servers, billing systems, bank accounts, including those stored in a computer; in digital, magnetic, optical and/or electronic form for the purposes of tax assessment, collection, and remittance. From the text of the Practice Directions, it appears that an application for the issuance of *ex-parte* order(s) is required where a taxpayer has refused to grant access to the FIRS. This provision has generated reactions from the public, particularly operators in the data processing and technology sector.

While this initiative may serve as a recognition of technological innovation and its application to organisational processes and systems, business enterprises, corporate organisations and other entities operating in the Nigerian market have raised concerns; about possible data privacy and security breaches which may result from the exercise of the powers afforded the FIRS, in this regard.

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Essentially, Nigerian data protection and cybersecurity regime prohibits unauthorised and unlawful intentional access by any person, into the whole or part of the computer system or network of another person or an organisation. The *Cybercrimes (Prohibition, Prevention, etc.) Act, 2015* (the “**Cybercrimes Act**”) criminalises intentional trafficking by any person or organisation, in any password or similar information through which a computer may be accessed without lawful authority, if such trafficking affects public, private and or individual interest within or outside Nigeria.

However, with the provisions of Section 51 of the Finance Act 2020 and Order III (2)c of the Practice Directions, it is unlikely that any technological operation deployed by the FIRS to accessing the computer system or network of a taxpayer, in line with the new regime, can be tagged “Unlawful Access” under the Cybercrimes Act. More so, under the provisions of the *Nigeria Data Protection Regulation 2019*, issued by the National Information Technology Development Agency (“**NITDA**”), data processing carried out without the requisite consent of a data subject will nonetheless be regarded as “Lawful Processing”; where the processing is necessary for compliance with a legal obligation to which the data controller is subject, or it is necessary for the performance of a task carried out in the public interest or in exercise of official public mandate vested in the data controller. In the circumstance, the FIRS is the data controller.

Notwithstanding the above, it is our considered view that the FIRS, in the exercise of its powers pursuant to the Practice Directions, should strive to ensure that sensitive personal data and corporate/trade secrets

of individual and corporate taxpayers alike are not compromised or made vulnerable to public abuse. The FIRS, as a public institution, has an ongoing obligation to comply with the provisions of the *Guidelines for the Management of Personal Data by Public Institutions in Nigeria (2020)*, issued by NITDA, which reinforce international conventions and constitutional provisions prohibiting arbitrary interference with the privacy, family, home or correspondence of any person, or unlawful attacks upon a person’s honour and reputation. The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is also constitutionally guaranteed in Nigeria.

Challenge of Tax Assessments by Taxpayers



Order V (3) of the Practice Directions provides that, a taxpayer who intends to challenge a tax assessment issued by the FIRS before the Court, is required to pay half of the assessed amount in an interest-yielding account of the Court, as a condition precedent to entering appearance.

Understandably, this provision is intended to discourage tax evasion and frivolous litigation that may undermine the FIRS’ tax collection efforts.

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However, it is arguable that the **blanket and unqualified requirement** for every appellant to pay half of the assessed amount in all cases before the Court, is not in tune with applicable statutory specifications and may, ultimately, fetter the right of an aggrieved taxpayer to object and challenge a disputed tax assessment.

The circumstances (described in the subsequent paragraph) where a taxpayer who is challenging a tax assessment may be required to pay part of the disputed tax assessment, have been clearly stated in the Fifth Schedule to the *Federal Inland Revenue (Establishment) Act of 2007*¹ (“**FIRS Act**”). In our opinion, the statutory provisions regarding the circumstances cannot be validly amended by the Practice Directions.²

Specifically, under the Fifth Schedule to the FIRS Act, an appellant is only required to pay either half of the tax assessment under appeal or an amount equal to the assessment issued in the preceding year of assessment or any amount considered to be appropriate security for the action, where in the course of hearing, the FIRS has been able to prove to the satisfaction of **the Tribunal hearing the appeal in the first instance** that: (i) the appellant/taxpayer has failed to prepare and file the appropriate tax returns required under the relevant tax statute, for the concerned year of assessment; (ii) the appeal is frivolous or vexatious or an abuse of court process or; (iii) it is expedient to require the appellant to pay an

amount as security for prosecuting the appeal.³

In each of the circumstances described above, the appeal may be adjourned to a later day to allow the appellant pay the appropriate deposit to the FIRS, before continuation of the proceedings or hearing.⁴

Based on the forgoing statutory provisions, we believe that payment of half of a disputed tax assessment or any amount of deposit whatsoever, should not be made a condition precedent to filing or entering appearance in an appeal, but should only be conditional upon a specific and satisfactory proof of certain facts by the FIRS, as enumerated under the Fifth Schedule to the FIRS Act. We also believe, that the payment of deposit out of a disputed tax assessment, is made applicable to a Tribunal hearing a tax appeal in the first instance, in other words, the Tax Appeal Tribunal (“**TAT**”) established under the Fifth Schedule to the FIRS Act. Such payment or deposit should ordinarily not apply to appeals from the decisions of the TAT brought before the Court.

Conclusion

Practice Directions are generally administrative regulations, intended to guide the procedure of the Court and litigants seeking to settle their disputes. Whilst the new FIRS-connected Practice Directions appear laudable for its aims of easing the adjudication of tax disputes in Nigeria, it raises concerns among individuals and business

¹ See paragraph 15 (7) of the Fifth Schedule to the FIRS Act.

² By the provisions of Section 61 of the FIRS Act, the power to make rules and regulations that are necessary or expedient to giving full effect to or for the due administration of the provisions of the FIRS Act, resides in the Board of the FIRS; which exercises the power with the approval of the Minister of Finance. In addition, the FIRS Act with its Schedules, is an enactment of the federal parliament and as such, only the National Assembly can validly amend, add to or subtract from any of its provisions.

³ See specifically, paragraph 15 (7)(a) of the FIRS Act

⁴ See paragraph 15 (7)(b) of the FIRS Act.

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organisations about the privacy and security of sensitive personal data and business secrets. It is also viewed by a significant part of the taxpaying public, as erecting monetary barrier against the ability of taxpayers to redress wrongful tax assessments. In a situation where the FIRS issues a taxpayer wrongful assessment, such a taxpayer would be required, under the new regime, to first pay half of such wrongful assessment before attaining the right to be heard by the Court to challenge the assessment. This poses a challenge to taxpayers who would rather deploy capital to their operations, as against depositing it in the account of the Court pending the determination of a tax dispute.

Overall, the Practice Directions remain an extant procedural instrument and apply to all civil and criminal tax disputes brought before the Court. It is hoped that the identified contentious issues will be revisited by the appropriate authorities, in order to

achieve a seamless and effective tax administration system that considers and has the buy-in of all stakeholders; in line with the thrust of the *National Tax Policy 2017*. It is also important that the new statutory powers of the FIRS are exercised cautiously and properly, so as to prevent unending litigation resulting from data privacy and security breaches.

The Grey Matter Concept is an initiative of the law firm, Banwo & Ighodalo.

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