

THE POWER TO DISTRAIN FOR NON-PAYMENT OF PERSONAL INCOME TAX IN NIGERIA: AN APPRAISAL

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Abstract

Tax authorities have certain statutory powers to recover outstanding taxes from tax payers. One of such is the power to distrain a taxpayer's properties for non-payment of tax. The drive to raise revenue for the Government and the need to compel citizens to pay tax has led to the use of the statutory power to distrain tax payers' assets by the relevant tax authorities. The power to distrain is an expedient means of enforcing payment of tax. The tax authorities have always relied on the relevant provisions of the tax laws that make provisions for the power to distrain for non-payment of tax, to seize the properties, goods and chattels of tax defaulters; so as to compel them to pay tax or have their properties, goods and chattels sold to raise revenue for the State. Though statutorily provided, the power to distrain for default to pay tax has raised some constitutional questions, particularly with regards to the right to fair hearing as provided for by section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). Most of the statutory provisions on the power to distrain for non-payment of tax provide for the mode of application for distrain to be done *ex parte* specifically to High Court Judge sitting in chambers. This has been construed to mean a violation of the tax payers right to fair hearing as the procedure do not comply with the principle of *audi alterem partem*. This paper is a critical examination of the power to distrain for non-payment of personal income tax in Nigeria, with special reference to Anambra State. It also examines the constitutionality or otherwise of the power to distrain the property of tax defaulters by the relevant tax authorities. The paper examines the constitutionality of the procedure for the grant of an order of distrain, particularly as it affects the taxpayers' right to fair hearing. The paper makes recommendation on how to realize the tax authority's objectives of tax realization without violating the taxpayer's rights.

Keywords: Distrain, Income Tax, Revenue, Government, Property, Authorities

1. Introduction

Tax is a compulsory extraction of money by a public authority for public purposes; it includes any duty, levy, or revenue accruable to the Government in full or part¹. It is an involuntary fees levied on individuals or corporation and enforced by a government entity in order to finance government activities.

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¹ Section 2 Anambra State Revenue Administration Law 2010

To distrain simply means to seize someone's property in order to obtain payment of money owed. Distrain in this context is the seizure of personal property of the tax defaulter to enforce payment of income taxes, to be followed by its public sale if the taxes are not voluntarily paid.² It means the seizure of the tax payers property by the tax authority until the tax payer settles the outstanding tax or the tax authority sells off the properties to settle the tax if the tax payer refuses to pay up.

2. Constitutional Provisions on the Right to Own Property

The Constitution of the Federal Republic of Nigeria, 1999 (as amended) (the 1999 Constitution) guarantees the right of citizens to own property and also provide that such property shall not be possessed or acquired compulsorily. The Constitution³ provides that no moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purpose prescribed by a law that among other things requires the prompt payment of compensation thereof and gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in the part of Nigeria.⁴

Despite the aforementioned provision, the Constitution⁵ further provides thus:

- 'Nothing in subsection (1) of this section shall be construed as affecting any general law-
- a. For the imposition or enforcement of tax, rate or duty;
 - b. For the imposition of penalties or forfeiture for breach of any law, whether under civil process or after conviction for an offence....'⁶

The Constitution by this provision⁷ already provides for an exception to a citizens' property to be compulsorily possessed under a law for the enforcement of tax.⁸ In furtherance of this, the relevant Personal Income Tax laws in Nigeria made various similar provisions spelling out the powers of the tax authority to distrain for non-payment of tax⁹.

However, despite this provision some courts have looked at the unconstitutionality of the power of distrain.

² Section 104 (4) of the Personal Income Tax Act 2011

³ Section 44(1) of the 1999 Constitution

⁴ *ibid*

⁵ Section 44 (2) of the 1999 Constitution

⁶ *ibid*

⁷ *ibid*

⁸ *ibid*

⁹ Section 104 Personal Income Tax Act 2011; section 42 Anambra State Revenue Administration Law 2010

3. Power to Distrain for Non-Payment of Tax

The relevant tax laws¹⁰ made provision for the power to distrain for non-payment of tax. It provides that without prejudice to any other power conferred on the relevant tax authority for the enforcement of payment of tax due from a taxable person, where an assessment has become final and conclusive and a demand note has, in accordance with the provisions of the Act, been served on the taxable person or the person in whose name the taxable person is chargeable, and payment of the tax is not made within the time limited by the demand note, the relevant tax authority may, in the prescribed form for the purpose of enforcing payment of the tax due distrain the tax payer by his goods or other chattels, bonds or other securities and 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.¹¹

For the purpose of levying a distress, the tax collector must obtain a warrant of distress from the authorized officer of the relevant tax authority. The tax collector armed with the warrant of distrain will then apply to a High Court Judge sitting in chambers for an order of distrain. The requirement of applying to a High Court Judge sitting in chambers is to provide some sort of checks and balance on the tax authority, as it will create an opportunity for it to be preceded by a judicial inquiry that will satisfy the Judge that the requirements for its issue have been met. Otherwise it may be a violation of the tax payer's right to property.

4. Distrain can Only be Carried Out on the Assets of a Taxable Person

The relevant tax law¹² provides for the distrain for non-payment of tax to be carried out on taxable persons. The tax authority can only distrain where the taxable person has been served with an assessment which has become final and conclusive and the relevant tax authority has also served the tax payer with a demand notice which the tax payer has refused to pay.

In *NDDC v RSBIR*,¹³ the Court of Appeal Port Harcourt division interpreted the statutory provision on the persons whose assets can be seized under the distress enforcement procedure of the Personal Income Tax Act. The Court of Appeal held that a State Internal Revenue Service lacks the statutory power to distrain by an *ex parte* application the assets of an employer for non-remittance or under-remittance of the pay as you earn tax which the employer is obliged to deduct from its employees emoluments. The taxable person for Pay as you earn tax is the employee and not the employer, flowing by the definition of a taxable person under the relevant laws.¹⁴

¹⁰ Section 104 (1) Personal Income Tax Act 2011; section 42 (1) Anambra State Revenue Administration law 2010

¹¹ *ibid*

¹² Section 104 Personal Income Tax Act 2011 ; section 42 Anambra State Revenue Administration Law 2010

¹³ (2020) 3 NWLR (pt. 1711) 371(CA)

¹⁴ Section 108 Personal Income Tax Act;

A taxable person is an individual or body of individuals (including a family, any corporation sole, trustee or executor) having any income which is chargeable with tax under the provisions of this Act.¹⁵ A taxable person is an individual or body of individuals, family, corporation sole, trustee or executor or a person who carries out in a place an economic activity, a person exploiting tangible property for the purpose of obtaining income therefrom by way of trade or business or person or agency of government acting in that capacity.¹⁶

The Court of Appeal in *NDDC V RSBIR*¹⁷ held that section 104 of the Personal Income Tax Act cannot be evoked against an employer whose obligation is only to deduct Pay as you Earn tax from employee's emolument and remit the same to the relevant tax authority. The statutory power to distrain can only be enforced against a taxable person, that is the employee and not the employer in the instant case. The Court of Appeal declined to pronounce on the constitutionality of section 104 of the Personal Income Tax Act.

From the foregoing, the distraint of the properties of companies or other employers for non-remittance of Pay As you Earn deduction is totally wrong.

5. Form and Procedure for Distrain

The authority to distrain shall be in such form as the relevant tax authority may direct, and that authority shall be sufficient warrant and authority to levy by distress the amount due.¹⁸ For the purpose of levying any distress for non-payment of tax, an officer duly authorized by the relevant tax authority may apply to a Judge of the State High Court sitting in chambers under oath for the issue of warrant; and the Judge may authorize such officer in writing, to execute any warrant of distress.¹⁹ The Judge may on application made *ex parte* authorize such authorized officer in writing to execute any warrant of distress and if necessary, break open any building or place in the daytime for the purpose of levying such distress and he may call to his assistance any police officer and it shall be the duty of any such police officer when so required to aid and assist in the execution of any warrant of distress and in levying the distress.²⁰ The person to whom the authority to distrain is granted may distrain upon all the goods, chattels and effects belonging to the debtor wherever the same may be found in Nigeria.²¹

¹⁵ *ibid*

¹⁶ Section 2 Anambra State Revenue Administration Law 2010

¹⁷ *supra*

¹⁸ Section 104 (2) Personal Income Tax Act 2011; section 42 (2) Anambra State Revenue Administration law 2010

¹⁹ Section 104 (3) Personal Income Tax Act 2011; section 42 (3) Anambra State Revenue Administration law 2010

²⁰ Section 104 (4) Personal Income Tax Act 2011; section 42 (4) Anambra State Revenue Administration law 2010

²¹ Section 104 (7) Personal Income Tax Act 2011; section 42 (8) Anambra State Revenue Administration law 2010

The distress taken may at the cost of the taxable person, be kept for fourteen days and at the end of that time if the amount due in respect of the tax and the cost and charges of and incidental to the distress are not paid, they may be sold at any time thereafter.²² The proceeds from the sale shall in the order of priority be used to pay the cost or charges of and incidental to the sale and keeping of the distress and disposal and then pay the amount due in respect of the tax; and the balance if there is any shall be paid to the taxpayer on demand being made by him within one year of the date of the sale.²³ The power to distrain for non-payment of tax does not authorize the sale of an immovable property without an order of a High Court made on application in such form as may be prescribed by rules of court or by the Sheriffs and Civil Process (Judgement Enforcement Rules).²⁴ The provision of section 104 of the Personal Income Tax Act is *impari materia* to the provision of section 42 of the Anambra State Revenue Administration Law 2010.

6. Condition Precedent that must be met for an Issuance of a Warrant of Distress

The law provides for a condition precedent before the warrant of distrain can be issued. It is a requirement of law that before the issuance of a warrant of distress, demand notice must have been served on the tax payer; assessment must be final and conclusive and the tax payer has defaulted in the payment of the tax assessed by the tax authority.²⁵ The power to distrain becomes exercisable only when assessment raised against the taxpayer becomes final and conclusive; that is when the tax payable has been decisively determined and no valid objection or appeal has been lodged against the assessment within the prescribed time prescribed by the law,²⁶ and no further notice has been given of a further appeal against a decision of the Appeal Commissioner or a Judge.²⁷ Another condition for levying of distress is a prior demand, which is essentially compulsory; where an assessment is made without demand for a return of income, such an assessment is made without jurisdiction and would therefore be *ultra vires*, null and void.²⁸ The demand note must be served on the tax payer and such demand note will specify the time limit within which the tax payer is expected to comply and the time stipulated must have lapsed.²⁹ This means that the issuance of a demand notice is a condition precedent, then waiting for the time allowed in the demand notice to lapse is

²² Section 104 (5) Personal Income Tax Act 2011; section 42 (5) Anambra State Revenue Administration Law 2010

²³ Section 104(6) Personal Income Tax Act 2011; section 42 (6) Anambra State Revenue Administration Law 2010

²⁴ Section 104 (8) Personal Income Tax Act 2011 ; section 42(7) Anambra State Revenue Administration Law, 2010

²⁵ Section 104(1) Personal Income Tax Act 2011; Section 42(1) Anambra State Revenue Administration Law 2010

²⁶ Section 66 Personal Income Tax Act 2011;

²⁷ Seyi-Ojo- Fundamental Principles of Nigerian Tax, Sagribra Tax Publications, Lagos, 2003,p 23

²⁸ FBIR v Rezcallah & Sons Ltd (1962) 1 All N.L.R 1 @ 9

²⁹ *Gibbs v Stead* (1828) B & C 528

also a condition precedent. Both conditions are intended to protect a taxpayer by affording him the opportunity to state his income. An assessment that does not fulfill the conditions is made without jurisdiction and therefore is null and void.

The importance of the condition precedent was buttressed in the case of *Guaranty Trust Bank v Ekiti State Board of Internal Revenue*,³⁰ here the Ekiti State Board of Internal Revenue in 2015 wrote letters to Guaranty Trust Bank requesting for certain documents including ledgers and customer account details to enable it audit and investigate the Bank's remittance of withholding tax on interests. Sequel to the failure of Guaranty Trust Bank to submit the requested documents, Ekiti State Board of Internal Revenue filed an *ex-parte* application at the Ekiti State High Court seeking among other things an order to distrain the Bank's premises and property for failure to submit the requested documents. The High Court ruled in favour of the Ekiti State Board of Internal Revenue by granting the order sought. Guaranty Trust Bank aggrieved by the decision of the High Court, appealed against the decision of the High Court to the Court of Appeal. The issue for determination before the Court was the question of whether the Ekiti State Board of Internal Revenue had followed the proper procedure contained in the Personal Income Tax Act. The Court of Appeal ruled in favour of Guaranty Trust Bank and set aside the order of the Ekiti State High Court. The Court of Appeal held that the Ekiti State Board of Internal Revenue had not followed the proper procedure; and further held that an *ex parte* application for an order for distrain can only be issued against a taxpayer where the tax payer has failed to comply with a final and conclusive assessment communicated to the taxpayer by the demand notice within the specified time, based on the combined provision of sections 55, 58 and 104 of Personal Income Tax Act 2011. Ekiti State Board of Internal Revenue did not follow the proper procedure as the condition precedent before the application for distrain was not met. The Court of Appeal further held that granting an *ex parte* application to distrain in the absence of a final and conclusive assessment communicated to the taxpayer would amount to denying the taxpayer of the constitutional right to fair hearing.

Thus any distraining order made pursuant to section 104 of the Personal Income Tax Act, which is *impari materia* to section 42 of the Anambra State Revenue Administration Law 2010, in the absence of a final and conclusive assessment issued to the taxpayer is invalid and may be set aside on appeal. It is also worthy to note that where a taxpayer has raised an objection timeously in compliance with the provision of the law,³¹ such assessment cannot be said to be final and conclusive. It is after the condition precedent has been met that an *ex parte* application for issue of warrant for distrain as provided by the law, can be pursued.

³⁰ (2018) LPELR- 46307 (CA)

³¹ Section 58 of the Personal Income Tax Act 2011;

7. The Power to Distrain for Non Payment of Tax: Constitutional Issues

The main constitutional issue arising from the power to distrain for non-payment of tax is as it affects the right to fair hearing. The Constitution³² provides that where a person's civil rights and obligations are determined, such a person is entitled to fair hearing. The right to fair hearing is hinged on the twin pillars of justice vis a vis *nemo judex in causa sua* and *audi alterem partem* which means 'do not be a judge in your own case' and 'hear from both sides.'

The relevant tax laws³³ provides for the requirement that an *ex parte* application be brought to a High Court Judge for a grant of an order for distrain. The mode for the application for an order of distrain has been argued to be a gross violation of the tax payers' right to fair hearing as provided for by the Constitution³⁴.

The Court in *Guaranty Trust Bank v Ekiti State Board of Internal Revenue*³⁵ further held thus:

from the foregoing, it seems to me that, by the omission of the steps provided in section 55, the Appellant would appear to have been denied the opportunity to be heard before the grant of orders 2 and 3 as contained in the ruling of the court, for distrain upon any land, premises or place of business and any moveable goods, chattel and any kind of property of the Appellant, with respect. Fair hearing, first and foremost involves and means at least in civil cases that both sides be given an opportunity to present their own side of the story. It means that each side is entitled to know the case that is being made against it and be afforded an opportunity of a reply. It therefore lies in the procedure followed in the determination of a matter and not whether or not the decision is correct. This right is fundamental and guaranteed by section 36 of the 1999 Constitution of the Federal Republic of Nigeria. Breach of it vitiates proceedings and renders it null and void as occasioning miscarriage of justice.³⁶

The courts have held that applying for an order of distrain by an *ex parte* application, shuts out the taxpayers and breaches the constitutional right of fair hearing; and any statutory provision which provides for such is null and void. The Court in *Chief G.O Igbinedion CFR v Edo State Board of Internal Revenue*,³⁷ where the Court of Appeal held that the provision of Edo State Revenue Administration Law which empowered the EBIR to apply for an order to distrain taxpayers by an *ex parte* motion as unconstitutional, null and void.

³² Section 36 of the 1999 Constitution of the Federal Republic of Nigeria

³³ Section 104 (3 & 4) of the Personal Income Tax Act 2011 ; section 42 (3 &4) of the Anambra State Revenue Administration Law 2010

³⁴ Section 36 of the 1999 Constitution of the Federal Republic of Nigeria

³⁵ *supra*

³⁶ *supra*, per E.O Williams-Dawodu, J.C.A

³⁷ (2017) VOL 265 LRCN 69 at 85-86

The danger inherent in the grant of an *ex parte* application for distraint was well buttressed in the case of *Access Bank v Edo State Board of Internal Revenue*,³⁸ where the Edo State Board of Internal Revenue served Access Bank with a demand notice for the sum of Forty Two Million Naira only as withholding tax on interest. Access Bank admitted a tax liability of Eight Million Naira, objected to the demand notice and paid the uncontested sum of Eight Million Naira, and was duly issued with a receipt. Subsequently, the parties were unable to reach an agreement on the outstanding tax liability. The Edo State Board of Internal Revenue in line with the provision of the law on the power to distraint applied to the Edo State High Court to distraint Access Bank to recover the Forty Two Million Naira tax liability, which the court of first instance granted. Access Bank then appealed against the order of the High Court to the Court of Appeal. The Court of Appeal held that by not disclosing that Access bank had paid an undisputed liability of about Eight Million Naira, thereby misleading the Court to grant an order of distraint for the full sum of forty two million Naira. Also the Court of Appeal held that the Edo State Board of Internal Revenue had not properly served Access Bank with a notice of assessment, therefore the condition precedent for distraint was not met. The Court then held that an *ex parte* application for an order of distraint shuts out the tax payer and is therefore a violation of the constitutional right to fair hearing; and any statutory provision that provides for an *ex parte* mode of application for distraint is null and void.

Also in *Chief G.O Igbinedion CFR v Edo State Board of Internal Revenue*,³⁹ the Court of Appeal similarly declared the provision of the Edo State Revenue Administration Law which empowered the Edo State Board of Internal Revenue to apply for an order to distraint the tax payer by an *ex parte* application as unconstitutional, null and void.

8. Conclusion

The relevant tax authorities no doubt have the power to seize the properties of a tax payer for non-payment of tax. However in exercising this power, the tax authorities must be careful as not to infringe or violate the rights of tax payers, especially the fundamental rights enshrined in the Constitution.⁴⁰ Distraint as an instrument to enforce tax is regulated by rules and procedure. The rules are prescribed by the law and are meant to be strictly followed to avoid encroachment on the fundamental human rights of the taxpayers. Despite the constitutional provision that limits the right of citizens for the purpose of tax enforcement, there is still need to amend the relevant tax laws to be in line with the constitutional provision on the right to fair hearing. There is need for the power to distraint to be properly regulated and amendment of the relevant tax laws made where necessary to accommodate the tax payers' rights, especially the taxpayers' right to fair

³⁸ (2018) LPELR -44156 (CA)

³⁹ (2017) vol.265 LRCN 69 at 85-86

⁴⁰ Chapter IV of the 1999 Constitution

hearing. While the power to distrain helps in compelling and enforcing payment of tax, caution must be taken as not to violate the tax payers' rights.