

## **AMENDED FEDERAL HIGH COURT TAX PROCEDURE RULES IN NIGERIA: NEED FOR FURTHER REFORM\***

### **Abstract**

*Recently, the Chief Judge of the Federal High Court assented to a practice direction for quick dispensation of tax matters. However, the high court action has been provoking constitutional conundrum as the controversial rules have been stoking investment apathy and inclemency in our business milieu. This paper analyses the new judicial rules/practice directions and the powers of the Chief Judge to have made the extant rules. It further examines the legal framework of the rules in relation to effective case management system and determination of tax related matters. It also outlines the implications of the Practice Direction to administrative remedy of tax matters. The paper will rely the Federal High Court (Federal Inland Revenue Service) Practice Direction 2021 (referred to as Practice Direction 2021), including books, journal articles, newspapers, and internet. This paper also suggests laudable/plausible reforms.*

### **1.0 Introduction**

Taxation is a compulsory due or duty paid by the citizens of any given nation into the vault of government for addressing fiscal policies and social security of the entire citizenry<sup>1</sup>. As a matter of citizen's obligation tax payment is compulsory having statutory foundation and enforcement with criminal sanction against the defaulters<sup>2</sup>. It is the major source of revenue generation to government of every clime<sup>3</sup>. Tax collection is the duty of government via its agency with statutory creation and obligation to perform all matters relating to tax administration<sup>4</sup>. Being an important instrument in facilitating fiscal policy objectives and its direct synergy with investment drive of economy, tax administration should follow the part of justice and equitable appreciation of trending economic and transaction status as promoted by international best practices.

Recently, the Honorable Chief Judge of the Federal High Court of Nigeria John Terhemba Tsoho, signed and issued on 1<sup>st</sup> June, 2021 the Federal High Court (Federal Inland Revenue Service) Practice Direction 2021 (referred to as Practice Direction 2021). This has led to enquiries from Taxpayers, Tax Practitioners and Legal experts in

---

\* **Bolarinwa Levi Pius**, Lecturer in the Department of Private Law, Federal University Oye-Ekiti, Ekiti State, Nigeria. Email: levibolarinwa@gmail.com; levi.bolarinwa@fuoye.edu.ng; Mobile: (+234)-8182928678 and **Professor A.A. Adedeji**, Dean, Faculty of Law, Obafemi Awolowo University, Ile Ife, Osun State. Mobile: (+234)-8033587877

<sup>1</sup>Taxation: Definition, Importance, Purpose and Type available at

<https://www.britannica.com/topic/taxation> and accessed on 29 October 2021

<sup>2</sup>MT Abdulrazaq, "Civil Actions under the Nigerian Income Tax Act" available at <https://www.google.com/search?q=criminal+sanctions+against+tax+defaulters&oq=criminal+sanctions+against+tax+defaulters&aqs=chrome..69i57j33i160.34055j0j9&sourceid=chrome&ie=UTF-8> , accessed on 29 October 2021

<sup>3</sup> Ibid

<sup>4</sup> Section 8 (a-d) of the Federal Inland Revenue Service Act 2007

the field of Taxation on what the Practice Direction 2021 seeks to achieve, its legal backing and its implications. The search for answers to these enquiries is the underlying reason for the research conducted in the paper. This work seeks to appraise the general provisions of the Practice Direction, examine the Legal framework of the Practice Direction, outline the implications of the Practice Direction to the Nation, to Federal Inland Revenue Service and to the Taxpayer. Also, to examine the limitations or challenges affecting the effective application of the Practice Direction and proffer recommendations as a way forward.

The legislative power of making laws for the Federal Government of Nigerian is vested in the National Assembly by virtue of Section 4 of the 1999 Constitution (As Amended) on. However, no matter how effective the Legislature in Nigeria can be, it cannot legislate on all rules required for the effective functioning of Government in all sectors, agencies or departments of Government. Therefore, the valuable time of the legislature can be saved by delegating its power to the Executive and Judicial Authority as the case may be through the “Subsidiary Legislature”. The Subsidiary Legislation has become the trend in all democratic countries,<sup>5</sup> Nigeria is not an exception. Records in most Countries have shown that of the total legislative output in a country, only a small portion is made directly by the Legislature, and by far the larger portion of it emanates from administrative authorities through Subsidiary Legislature. These authorities frame such legislation under powers conferred on them by the Legislature (the legal frame work).

The National Assembly in Nigeria, for instance, while framing a Statute, usually confines itself to enunciating the general principles and policies relating to the subject-matter in question, and delegates to some agencies the power to legislate further and fill in the details. This technique is used extensively as there are no statutes enacted by the Legislature which do not delegate some power of legislation to an administrative agency.<sup>6</sup>

The Federal High Court (Federal Inland Revenue Service) Practice Direction 2021 is an example of Subsidiary Legislature from Judicial Authority. A Practice Direction can be described as a written explanation of how to proceed in a particular area of Law in a particular Court.<sup>7</sup> The purpose of the Practice Direction 2021 is to deal with the order or manner of conducting proceedings in Civil and Criminal trials that concern tax matters before the Federal High Court of Nigeria.

---

<sup>5</sup> Section 33 (6) of the Federal Inland Revenue Service (Establishment) Act

<sup>6</sup> Section 34(1) of the Federal Inland Revenue Service (Establishment) Act

<sup>7</sup> Paragraph 16(2) of the 5<sup>th</sup> Schedule of Federal Inland Revenue Service (Establishment) Act

## 2.0 Analysis of Judicial Practice Directions

In English law, a **Practice Direction** is a supplemental protocol to the Rules of Civil and Criminal Procedure in the Courts<sup>8</sup>,

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.

It is an official announcement or declaration by the court laying down rules as to how it should function. The English Civil Procedure Rules contains a large number of practice directions which give practical advice on how to interpret the rules themselves. Also, individual courts and judges may make their own practice directions, especially in specialist types of proceedings such as in patent court. A famous resemblance of practice statement occurred in 1966 when the House of Lords in United Kingdom declared itself able to depart from its own precedent decisions in order to achieve justice. Practice directions are made by the courts under a jurisdiction usually called “inherent”. ... Now, the UK Civil Procedure Act of 1997 envisages that a rule of court, instead of providing for something, may refer to directions, actual or to be made: directions covered by this do have statutory authority. It is a binding order that do not go through legislative processes. A Practice Direction is approved by the judges and is a direction (binding order) of the court. The cited definition received an interpretive equivalence of the Nigerian Supreme Court in the case of *Buhari v INEC*<sup>9</sup> where the Court said,

as the name implies, direct the practice of the Court in a particular area of procedure of the Court. A Practice Direction would be described as a written explanation of how to proceed in a particular area of law in a particular Court. ...” The Court went further to also define ‘Practice’ as “...the form, manner and order of conducting and carrying on suits or prosecutions in the Courts through their various stages according to the principles of law and the rules laid down by the respective Courts.

Practice directions and practice statements are rules of procedure established for specific courts. Typically, they are handed down by, or with the concurrence of, that

---

<sup>8</sup>Practice Direction-Wikipedia, available at <https://www.google.com/search?q=In+English+law%2C+a+Practice+Direction+is+a+supplemental+protocol+to+the+Rules+of+Civil+and+Criminal+Procedure+in+the+Courts&oq=In+English+law%2C+a+Practice+Direction+is+a+supplemental+protocol+to+the+Rules+of+Civil+and+Criminal+Procedure+in+the+Courts&aqs=chrome..69i57.4345j0j9&sourceid=chrome&ie=UTF-8>

<sup>9</sup> (2008) 19 NWLR Part 1120 Page 246 also reported as (2008) LPELR-814(SC) page 1 at 37 – 39 See also the case of *Oraekwe & Anor v. Chukwuka & Ors* (2010) LPELR-9128(CA) page 1 at 28 – 29.

member of the judiciary with overall responsibility for the court in question. So, for instance, practice directions pertaining to the Criminal Division of the Court of Appeal would be issued by the Lord Chief Justice in the UK jurisdiction while the President of the Court of Appeal issues same for the Appeal Court in Nigeria. The civil procedure rules contain a 'practice direction on practice directions'. This states, in addition to the above, that the Lord Chancellor may nominate any person to create practice directions for county courts.

The courts' power to make practice direction is usually attributed to their inherent jurisdiction to control their own proceedings,<sup>10</sup> as to which Lord Blackburn said, in a frequently cited passage<sup>11</sup> that,

From early time (I rather think, though I have looked at it enough to say, from the earliest times), the Court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable ground, so as to be able to control the seamless principles of the proceedings to guarantee justice to parties in matters before the courts.

It is a trite and the custom of any court of competent jurisdiction to establish a viable, seamless procedure, guide or principle to enhance its administration justice. The path and condition for guaranteeing justice is very sensitive and delicate. Hence, very court should have a direction to control its procedures and do same in the interest of justice unfettered.

The extant Practice Direction took effect on June 1, 2021 and is aimed at ensuring the expeditious disposal of tax related matters before the Federal High Court. This Insight examines the provisions of the Practice Direction and highlights the significance of the Practice Direction in ensuring the effectiveness of tax litigation before the Federal High Court. Order 1 of the Practice Direction highlights the objectives and scope of applicability of the Practice Direction. The Order provides that the Practice Direction shall apply to both tax related civil and criminal matters before the Federal High Court subject only:<sup>12</sup> to the directions of the Chief Judge. The objectives of the Practice Direction include:

---

<sup>10</sup> Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems, 23 reprinted in *The Reform of Civil Procedural Law and other Essays in Civil Procedure* (1982) 221 (to which future references are made)

<sup>11</sup> Practice Direction (Criminal Proceedings: Consolidation) [2002] 1 W.L.R. 2870 of 08 July 2002 (as amended) is varied so that all references to paragraph 10.1 of Practice Direction (Court of Appeal (Civil Division)) [1999] 1 WLR 1027; [1999] 2 All ER 490 are to read as references to paragraphs 5 – 13 of this Practice Direction.

<sup>12</sup> Order 1 (1) Federal High Court (Federal Inland Revenue Service) Practice Directions, 2021

- a. to ensure an effective case management system and an expeditious determination of tax related matters;
- b. to encourage the settlement of tax debt or liability between disputing parties;
- c. to provide directions on applications form the FIRS;
- d. to promote the use of electronic filings and service systems and proceedings in tax related matters

Order 2 makes provision for the place of commencement. The Practice Direction provides that an application shall be filed at the Judicial Division from which a claim emanates further to the provision of Order 2 Rule 1 (2) of the Federal High Court (Civil Procedure Rules)<sup>13</sup> of the Court which provides that,

Any suit relating to – (a.) taxation of a company and of any other body established or carrying on business in Nigeria and of any other person subject to Federal taxation shall be commenced and determined (i) in the judicial division of the Court in which the headquarters or the principal office of the company or body is situate, and (ii.) where a person resides or carries on substantial part of his business, in the case of a person subject to Federal taxation (b) recovery of revenue, penalty and forfeiture, and also any action against a public officer, shall be commenced and tried in the judicial division of the Court 2 in which the cause of action arose <sup>14</sup>.

Where however, an application is instituted in a wrong judicial division, the Practice Direction provides that this is to be dealt in accordance with the provisions of Order 1 Rule 3 of the Federal High Court (Civil Procedure Rules) 2019 which provides that: “where a suit is commenced in any other judicial division of the Court than that in which it ought to have been commenced, it may, notwithstanding, be tried in the judicial division in which it has been commenced, unless the Court otherwise directs or the defendant pleads specifically in objection to the jurisdiction before or at the 3 time when he is required to state his answer or to plead in the cause”<sup>15</sup>.

This Order makes stipulations for the FIRS to comply with when seeking for orders of forfeiture of immovable properties, freezing of bank account (s) of an alleged defaulting taxpayer<sup>16</sup>. The Order is also applicable when the FIRS is seeking for orders of access to the company books/ records and is relevant for seeking access to or 5

---

<sup>13</sup> The Federal High Court Rules of 2019 which is the extant rules guiding its procedural or adjectival proceedings.

<sup>14</sup> Order 2 Rule 1(2) Federal High Court (Civil Procedure) Rule 2019; Order 2 Rule 1 Federal High Court (Federal Inland Revenue Service) Practice Directions, 2021

<sup>15</sup> Order 2 Rule 3 Federal High Court (Civil Procedure) Rule 2019.

<sup>16</sup> *ibid*; Order (3) (1)

sealing of the company<sup>17</sup>. Order 3 Rule 1 in the first instance requires for the FIRS to apply for an initial interim order via a motion *ex parte*. This means the FIRS does not need to put the taxpayer on notice and accordingly needs not serve the motion on the opposing party. Furthermore, the Motion is to be supported by an Affidavit. The Affidavit is required to disclose the facts giving rise to the need for an interim order of the Court and is to be accompanied with necessary document captured in the Practice Direction.

The importance of an interim application for forfeiture is evidenced in the primacy a judge of the Court is to give such an application. Under the Practice Direction, a judge 6 is to accord priority to such application. Upon the hearing of the interim order, a judge if satisfied will grant the relief as claimed and the FIRS will be required to file a Motion on Notice within 14 days after the service of the interim order on the party (s) 7 thereby affected. This Motion on Notice shall seek for the interim order to be made absolute.

On mode of entering appearance, there seems to be a fundamental constitutional issue. To enter appearance for the hearing of the applications, a Respondent has 14 (fourteen) days' notice, after the service of the processes on him, to respond to the Motion<sup>18</sup> by delivering to the Registrar a Counter Affidavit and Written Address. However, if the Respondent is not contesting the application, he shall file an application for leave to pay into a designated account the debt to discharge the application<sup>19</sup>. One of the most controversial issues that have arisen since the issuance of the Practice Direction is the constitutionality or otherwise of the provisions of Order 5(3) of the Practice Direction. Order 5(3) of the Practice Direction requires a person challenging a tax assessment served on him to pay half of the assessed amount in an interest yielding account of the Federal High Court, pending the determination of the application.

### **3.0 The Constitutionality of the Chief Judge to Have Made the Extant Practice Direction**

It is contended by legal scholars and tax experts that this provision offends the provision of section 36 of the Constitution of the Federal Republic of Nigeria 1999, as it seems to suggest the liability of a party before being proved or determined. Pending the determination of this important issue, it is trite to explain that a Practice Direction is merely a direction on the way and manner a rule of court should be complied with, observed, or obeyed<sup>20</sup>. The effect of this provision is that the payment of half of the assessed amount may be prejudicial to the Respondent. This practice further erodes the

---

<sup>17</sup> Ibid

<sup>18</sup> *ibid*; Order 4 (3),

<sup>19</sup> *ibid*; Order 5 (3),

<sup>20</sup> *Obumseli v. Uwakwe* (2009) 8 NWLR (Pt. 1142) 55; *University of Lagos v. Aigoro* (1984) 11 SC 152

principles of the constitution which vest presumption of innocence on a party. Requiring a party to pay half the amount suggest the nullification of this presumption.

It has been argued that by making the Practice Direction, the CJ has acted *ultra vires* his powers especially when considered considering the provisions of the grundnorm,<sup>21</sup> which vest legislative powers on the National Assembly. More precisely, Item 59 of the Exclusive Legislative list provides for taxation of incomes, profits and capital gains, thereby making it a subject of federal legislation. Notably, by the principle of delegated legislation, constitutionally recognised body are empowered to delegate their responsibilities to other agencies and bodies, albeit such delegation can only be effective where there is an enabling statute<sup>22</sup>.

Furthermore, these responsibilities cannot be sub-delegated. By their nature, Practice Directions are made to clarify court procedure or rules<sup>23</sup>. In the case of *Oraekwe v. Chukwuka*<sup>24</sup> the Court of Appeal held that:

Practice directions, as the name implies, directs the practice of the court in a particular area of procedure of the court. A practice direction is also a written explanation of how to proceed in a particular area of law in particular court – practice directions have the force of law in the same way as rules of court. Rules of court include practice direction. Practice directions will, however, not have the force of law if they are in conflict with the Constitution or the statute which enables them

The question, then is, what is the relevant enabling law upon which the Chief Judge made the Practice Direction/ Law? The Federal High Court Act 1973, which appears to be the extant enabling law, provides<sup>25</sup> that:

The Chief Judge may, with the approval of the National Council of Ministers, make Rule of Court for carrying this Act into effect, and in particular and without prejudice to the generality of the foregoing for all or any of the following purposes and matters: (a) Regulating the practice and procedure of the Court including all matters connected with the forms to be used and the fees to be paid ...

---

<sup>21</sup>Section 4(3) and item 59 and paragraph 2(b) of the Parts I & III of the 2nd Schedule of the Constitution of the Federal Republic of Nigeria 1999.

<sup>22</sup> *Phoenix Motors Limited v. N.P.F.M.B* (1993) 1 NWLR (Pt. 272) 718

<sup>23</sup> *Okoro v. Delta Steel Co. Limited* (1990) 2 NWLR (Pt. 130) 87

<sup>24</sup> (2012) 1 NWLR (Pt. 1280) 169

<sup>25</sup> Section 44(1) of the Act

Accordingly, to the extent that the Practice Direction falls under the matters expressly delegated under the required enabling legislation and the conditions have been fulfilled (the consent of the National Council of Ministers have been obtained to make the Rules) then, it may be regarded as valid, where it is determined that it does not, then it may be invalid.

#### **4.0 Practice Direction in Relation to Effective Case Management System**

Practice Directions are generally guidelines that have the force of law, and are expected to direct the form, manner and order of adjudication in the Courts, according to the principles of law and the rules set forth by the respective courts. Notwithstanding that Practice Directions have the force of law, they are ranked the lowest in terms of authority under the Nigerian hierarchy of jurisprudence. As such, the validity of a Practice Direction is upheld only to the extent that the provisions of such Practice Directions were made within the parameters of the relevant laws.

Furthermore, Practice Directions lack the legal capacity to expand, introduce or provide guidelines outside the scope of its enabling statutes, thus, where there is a conflict between a Practice Directions and its enabling statutes (in this instance, the tax laws i.e., the Companies Income Tax Act (CITA) and the Federal Inland Revenue Service Establishment Act (FIRSEA)), or the Nigerian Constitution, the Practice Directions would cease to have the force of law to the extent of any such inconsistency. There is an overreaching hurdle of the inconsistency of the extant practice direction on case management system. The powers of the Federal High Court to adjudicate and enforce the Practice Direction would usually hit the brick wall of jurisdiction challenge by the respondent/dissatisfied tax litigant to frustrate the proceedings in the interest of tax justice system.

Wherever, the constitutional powers of the court are in issue, such would continue to negatively affect seamless administration of justice. In the case of commercial disputes/issues businesses and investments would be at the standstill and this is inimical to the kinesis or progress of commerce.

#### **5.0 The Implications of the Practice Direction to Administrative Remedy of Tax Matters**

It is important to note that certain provisions of the Practice Direction, such as the application for an interim order of forfeiture on immovable property, the requirement for a taxpayer to settle half of the contested tax liability into an interest yielding account, among others, are not provided for within the present laws i.e., the Federal Inland Revenue Service Act or the Companies Income Tax Act. Therefore, it may be necessary for the Federal Inland Revenue Service to engage with stakeholders prior to implementing the Practice Direction, to avoid issues that could result in increased disputes and/or litigation, if the Practice Direction was to be implemented in its current

state. Administrative or bureaucratic hurdle could ensue if the Practice Direction was to be implemented since tax officers are not kitted with appropriate legal/subsidiary instruments to enforce the direction.

Although the overall objective of the Directions, which is to make for the speedy dispensation of justice in tax and tax related matters, is commendable, the Directions is fraught with provisions that are at variance with extant tax laws, particularly the FIRS Establishment Act (FIRSEA) and the Companies Income Tax Act (CITA). For example, the Directions make provision for the interim forfeiture of the immovable property of a taxpayer upon an application by the FIRS and for the freezing of the taxpayer's bank accounts. It is however important to note that neither CITA nor the FIRSEA allows the FIRS to bring an application for the interim forfeiture of the taxpayer's property or freezing of taxpayer's account whether as a prelude to filing a substantive action or for any reason. Thus, there are concerns that the foregoing provision of the Directions is not valid since it is not based on any of the tax laws.

Likewise, the Directions mandate a taxpayer to pay half of the contested tax liability into an interest yielding account as a condition precedent to challenging the FIRS' application for interim Orders, which is also not provided for in any of the tax laws. Additionally, there are no directions as to the ultimate beneficiary of the accrued interest on the payment made on account and this is an area that needs to be clarified. In any case, the requirement is at variance with the provisions of the relevant tax laws, which do not make provision for payment of half or any amount of the contested tax liability as a condition precedent to challenging a tax assessment.

## **6.0 Recommendations**

This paper has therefore recommended the following suggestions to phase out or reduce the challenges the tax authority may face under this Practice Direction:

- a. the tax authority should liaise with the Chief Judge of the Federal High Court and relevant judicial authority to repeal the practice direction as made by the Chief Judge and then re-enact the same contents through the delegated powers of the Minister of Finance after expunging the draconian half payment clause. All that is needed is penalty/default fee;
- b. the tax authority of the FIRS should liaise with and apply to the President of Court of Appeal and Chief Justice of the Federation for the issuance of Court of Appeal (FIRS) Practice Direction and Supreme Court (FIRS) Practice Direction to provide for speedy determination of appeals in tax matters. This will ensure the fast conclusion of appeals in tax matter;
- c. the tax authority should organize a training for all its in-house lawyers on this practice Direction to familiarize themselves with it;

- d. the Federal High Court should organize training for all Federal High Court Judges group by group, over time on the necessity and objective of the practice direction so that the Practice Direction will not be frustrated;
- e. the tax authority should create extensive awareness on the provision of the practice direction amongst its staff, taxpayers and journalists;
- f. the tax authority should sacrifice and print some copies of the amended Practice Direction suggested and also liaise with all the state branch Chairmen and chairpersons of NBA to include the Practice Direction in their training for their lawyers during their weekly or monthly Meetings;
- g. The tax authority needs to articulate and clearly define for taxpayers the available internal administrative mechanism for resolutions of tax matters to encourage taxpayers to make use of them for the interest of both parties instead of always rushing to the Court;
- h. The tax authority should critically examine if there is anything that can affect the effective implementation of this Practice Direction and come up with necessary amendment to the relevance Tax legislation through the Finance Act 2021 to remedy such factors or limitation.

## **7.0 Conclusion**

The Practice Direction seeks to enhance the efficient and effective enforcement of taxes by the FIRS by providing a framework through which there can be speedy dispensation of tax disputes. However, there are questions concerning the constitutionality of some of its provisions, the issue is so fundamental that its declining effect on commerce and investment may continue to worsen the already volatile and harsh economic situation in Nigeria. It is anticipated that the Practice Direction will be amended in compliance with the international best practices so that it can phase out or reduce the instances of irregularity in enforcement by the FIRS and provide clarity to the taxpayer that seeks to defend or object to such enforcement steps.