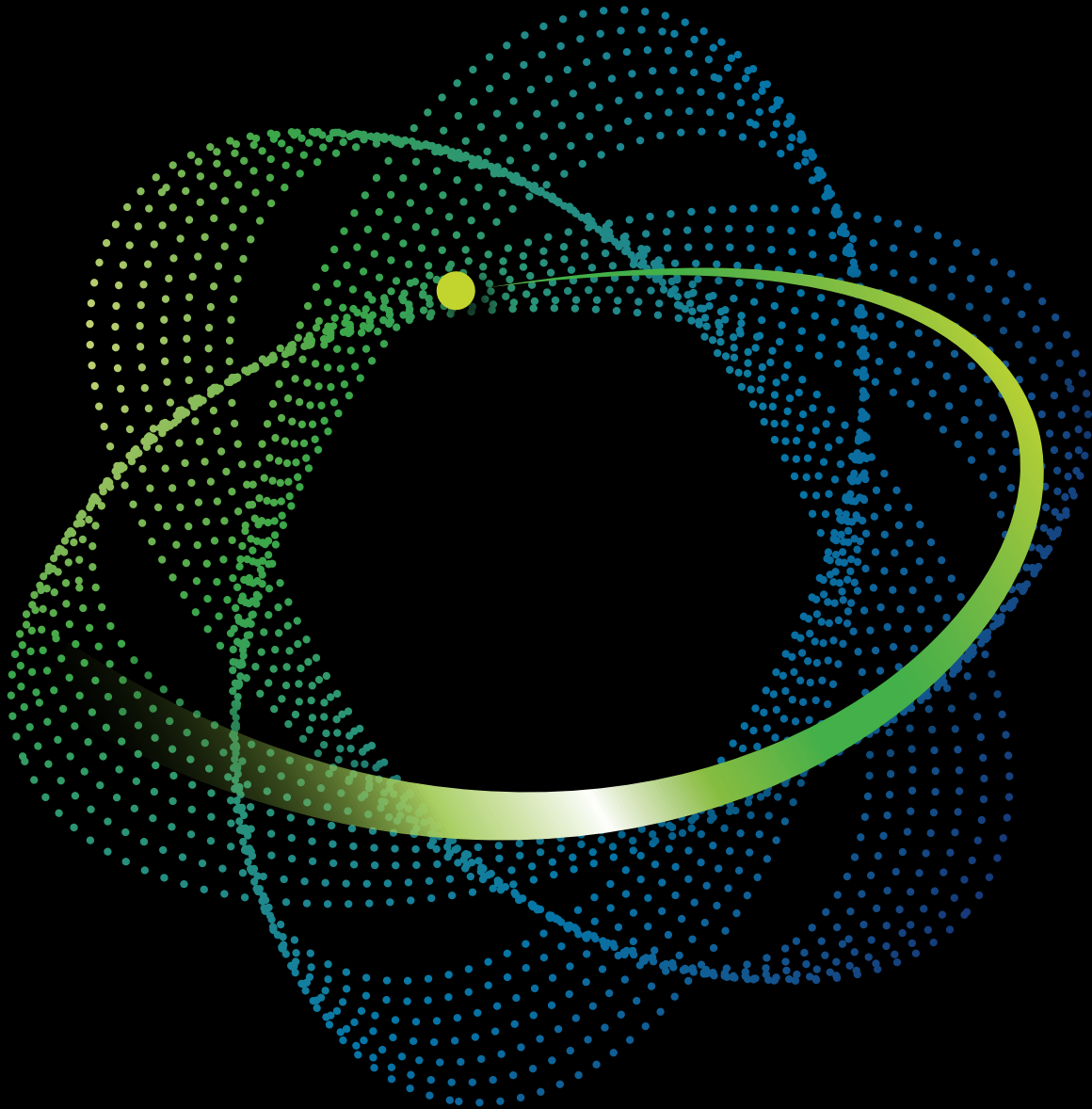


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**Federal High Court's
Practice Directions
for FIRS**



Introduction



Federal High Court of Nigeria Issues Practice Directions on Federal Tax Matters

The Chief Judge (CJ) of the Federal High Court (FHC) of Nigeria, in line with Order 57 Rule 3 of the Federal High Court (Civil Procedure) Rules, 2019 (FHC Rules) on 31 May 2021 issued Practice Directions. The Practice Directions¹ became effective on 1 June 2021 and relates to tax matters administered by Federal Inland Revenue Service (FIRS).



Background and objectives of the Practice Directions

The FHC rules provides directions, protocols and guidance for the judges and litigants in administration of justice. Primarily, a practice direction aims to ensure a swift, fair, and effective administration of justice, in this case, on tax-related disputes at the FHC. Among other objectives, the Practice Directions guide applications from the FIRS to the FHC and drives prompt settlement of tax debt between a taxpayer and FIRS. As part of the move towards digitization in FHC rules, the Practice Directions seek to promote the use of electronic filing and service systems for tax related disputes.



¹ Federal High Court (Federal Inland Revenue Service) Practice Directions, 2021

Highlights of the Practice Directions



We have highlighted the main issues identified in the Practice Directions below:

1 FIRS may file an ex-parte motion: FIRS can file an ex-parte motion (i.e. without the taxpayer's notice) requesting the judge to make an order against the taxpayer, pending the determination of the motion on notice. A 'motion on notice' is an application, as opposed to ex-parte motion, where the respondent is duly notified of the litigation. FIRS may file an ex-parte motion to secure any or a combination of the following orders:

- a Interim order of forfeiture of taxpayer's immovable property.
- b Interim order of freezing of taxpayer's bank account.
- c Order of access to taxpayer's books and records, where the taxpayer refuses to grant FIRS access.
- d Order of access to and/or seal the taxpayer's business premises, where the taxpayer refuses to grant FIRS access.

The ex-parte motion must be accompanied by an affidavit setting out the facts of the case and any of the following documents

- a copy of the notice of assessment served on taxpayer,
- b copy of the FIRS' tax audit or investigation notice requesting for access to the taxpayer's records,
- c copy of the warrant of distraint and/or access duly executed by the FIRS Executive Chairman, and
- d a written address (i.e. plea to the judge).

Where the judge is satisfied that the Practice Directions requirements have been met, the judge will grant FIRS' ex-parte application, on behalf of the Federal Government, pending the determination of the motion on notice. The judge is also mandated to give priority to motions by FIRS.

2 FIRS is required to file motion on notice to secure permanent order: FIRS is required to file a motion on notice (i.e. notifying the taxpayer), upon the grant of the ex-parte order, within 14 days of service of the interim order, requesting an absolute order for forfeiture of the taxpayer's immovable property or the assessed amount. The motion on notice must be supported by a written address and an affidavit setting out the facts and showing:

- a copy of the interim order, warrant of distraint and/or access duly executed by the FIRS Executive Chairman,
- b copy of the notice of assessment served on taxpayer, and
- c any other document requested by the FHC.

3 Dispute procedures for the taxpayer: Where a taxpayer, upon being served the motion on notice, wishes to oppose/challenge the same, the taxpayer is required to:

- a file a counter affidavit with written address/submission to the FHC within 14 days of service of the motion on notice. Where a taxpayer is constrained by time, the application for extension of time shall be considered subject to the rules on default of appearance² stipulated in the FHC Rules.
- b pay half of the assessed amount into an interest yielding account of the FHC, pending the determination of the application.

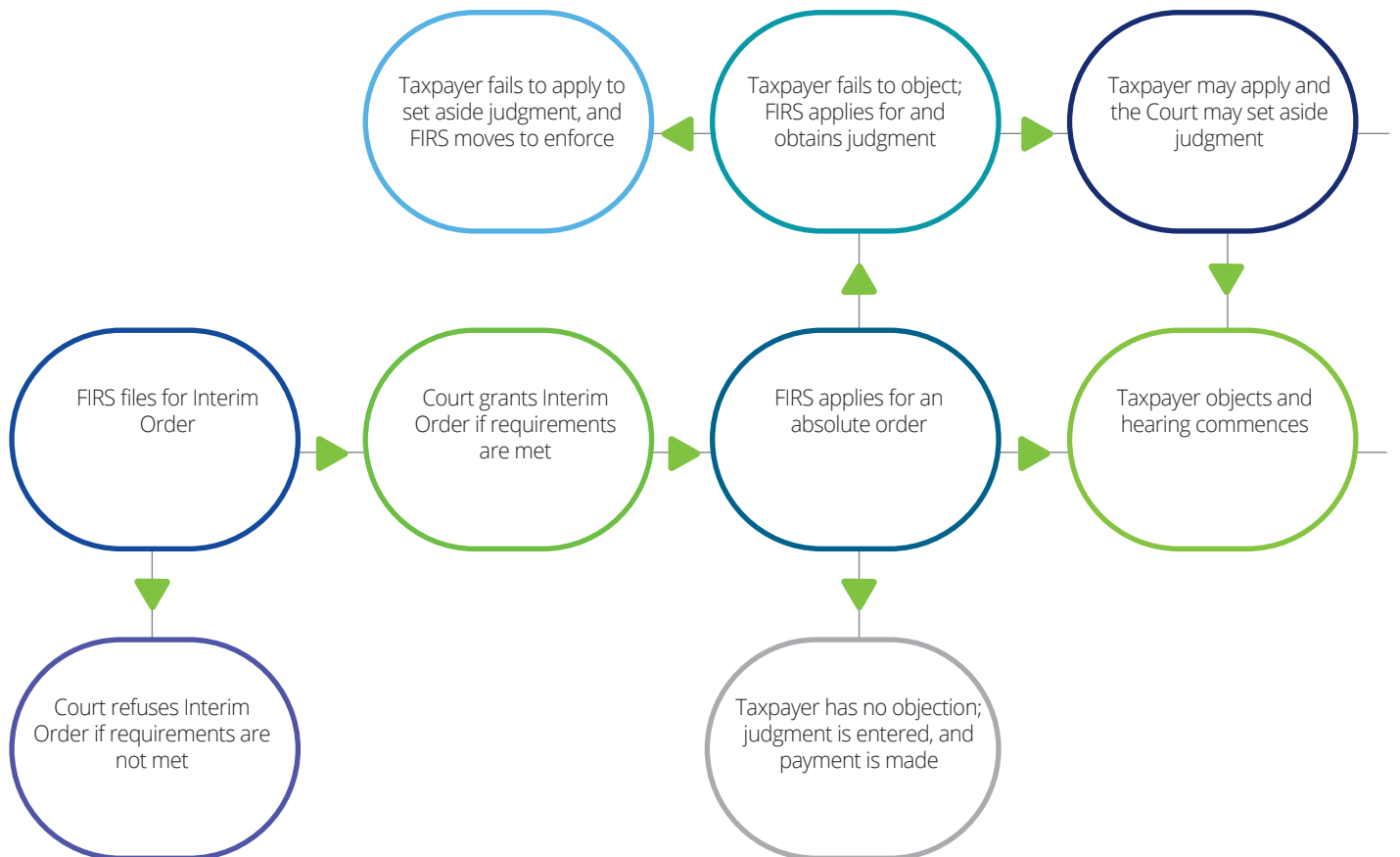
Where the taxpayer chooses not to contest the application of the FIRS, they shall file an application to pay the tax debt/liability into a designated bank account and request the discharge of the entire application.

4 E-filing and service of notices: Documents and applications may be filed electronically. Also, other e-filing provisions, as contained in the FHC Rules, will apply to tax matters. Furthermore, service of court processes and/or hearing notices by e-mail, WhatsApp or other means as may be directed by the Court will be regarded as duly served. The printouts of electronic service shall be sufficient proof of service.

2 As stated in Order 8 of the FHC Rules 2019, where the claim of FIRS is monetary and the taxpayer fails to appear, the FIRS can apply for judgment. This judgment may be set aside or varied if the taxpayer, within 14 days, applies to the Court for it to be set aside showing the following: (a) receipt of payment of penalty for default; (b) a good defence to the claim and (c) a just cause for the default. Where the claim is non-monetary and the taxpayer fails to appear, FIRS, upon producing evidence of service, will proceed with matter as if appearance was entered.



Below is a diagram depicting the FHC Practice Directions process



Key takeaways and recommendations



The key takeaways from the Practice Directions are as follows:

1

Possibility of enforcing assessments which are not final and conclusive: It is pertinent to note that the Practice Directions is a rule of procedure and as such, its provisions cannot override extant provisions of enacted laws, such as the Companies Income Tax Act (CITA) and the FIRS Establishment Act (FIRSEA). Therefore, where the provisions of the Practice Directions are inconsistent with enacted laws, it will be null and void to the extent of such inconsistency.

Section 33 of the FIRSEA and section 86 of the CITA only empower FIRS to distrain assets of taxpayers in respect of unsettled tax assessments which are final and conclusive. However, the Practice Directions does not include any requirement for the notices of assessments, supporting either the ex-parte motion or motion on notice, to be final and conclusive. This implies that FHC could compel taxpayers to forfeit their funds/properties to FIRS and/or to deposit 50% of the alleged tax liability, even where the assessment is yet to be final and conclusive. This is even more worrisome as the interim order must be granted without recourse to the taxpayer.

Based on the foregoing, any action by the FIRS to obtain a forfeiture or freezing order for an assessment that has been duly objected to by the taxpayer can be validly challenged. The Chief Judge of the FHC is advised to update the Practice Directions to align with the provisions of the tax laws.

2

Threats to ease of doing business in Nigeria: The Practice Directions allow FIRS to obtain orders to freeze accounts, confiscate immovable property, seal off premises and/or access business premises to search physical and electronic records, without notifying the taxpayer. The fact that business accounts can be frozen for a minimum period of 14 days and/or until the motion on notice is decided by the Court, appears to be a recipe to paralyze businesses. This situation may compel business owners to pay alleged tax sums without resolving the underlying contentions with the FIRS.

Based on the foregoing, FHC should consider permitting FIRS to file ex-parte motions only in cases of established crime, fraud, willful default, or negligence.

3

Fairness of conditions for taxpayers to initiate dispute motions: It is a cardinal principle that a tax system ought to be fair. The Practice Directions appear to overly favour applications brought by FIRS while it burdened taxpayers with stiff requirements where they disagree with FIRS' position/applications. For instance, the requirement to pay 50% of FIRS' alleged tax assessment is inherently unfair to taxpayers. This situation is aggravated by the lack of clarity on whether any interest accrued on the 50% upfront payment will revert to the taxpayer, where the court decides that no tax liability exists. In addition, a period of 14 days to object to the FIRS' motion on notice may be too short for the taxpayers to analyze FIRS' allegations and come up with its position.

A fair condition will be for FIRS to request only payment of the undisputed liability or to restrict the requirement for 50% of total assessment sum to only certain situations where it is expedient to do so, similar to the requirements of the Tax Appeal Tribunal (TAT)³. In addition, the grace period to object to the motion on notice should be extended from 14 to 30 days to align with similar provisions in the tax laws.

4

Provisions on e-filing and electronic service of motions: The Practice Directions permit a mere printout of the same to serve as sufficient proof of service. It is pertinent to note that Section 84 of the Evidence Act of 2011 requires a certificate of identification for electronic generated documents to be admissible. Therefore, the Practice Directions cannot override enacted laws and they need to align with these provisions. Hence, the Chief Judge of the FHC is advised to update the Practice Directions to align with the provisions of the Evidence Act 2011.

Furthermore, taxpayers are urged to ensure that email addresses and phone numbers in their records with the FIRS are accurate and up to date at all times to avoid situations of unattended service of court processes.

³ Per Paragraph 7 of the Fifth Schedule to the FIRS Establishment Act, the TAT may require payment of 50% of alleged liability where: taxpayers has failed to file related tax returns, appeal is frivolous or the payment is required as security for prosecution.

Conclusion

- ▶ FIRS may have in the past, faced difficulties in accessing taxpayers' records/premises, freezing taxpayers' bank accounts, or distraining taxpayers' immovable properties, thus, the need to introduce the Practice Directions. However, the Practice Directions like other changes to the tax administration landscape requires wide stakeholder consultation to ensure it is fair, does not pose threats to the ease of doing business and does not strangle the businesses activities FIRS seeks to tax.
- ▶ Another pertinent question is whether the FIRS can file motions with the FHC, under the Practice Directions, before filing an action or while an action is pending before the Tax Appeal Tribunal (TAT).
- ▶ While we urge the Chief Judge of the FHC to revisit the Practice Directions to balance the revenue drive of the Federal Government with the need for a fair, equitable and business enabling tax system; we encourage taxpayers to take note of the prevailing requirements and ensure adequate compliance.



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