

FHC affirms FIRS as the primary authority empowered and vested with statutory duty for assessment, collection and enforcement of company tax in Nigeria



KPMG in Nigeria

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On Monday, 16 January 2023, the Lagos Division of the Federal High Court (FHC or "the Court") held, in *Wheatbaker Investment and Properties Limited (WIPL or "the Company" or "the Plaintiff") and Economic and Financial Crimes Commission (EFCC or "the Commission") & Federal Inland Revenue Service (FIRS or "the Service") (herein referred to as "the Defendants")*, that the EFCC does not have the legal and statutory right to assess or enforce the collection of taxes on behalf of the Federal Government of Nigeria (FGN).

The FHC also affirmed that the FIRS is the only body empowered and vested with the statutory duty to assess, collect and enforce company tax in Nigeria.

Facts of the case

WIPL was incorporated as a private limited liability company under the Companies and Allied Matters Act, Cap. C.20, Laws of the Federation of Nigeria, 2004 to provide hospitality services to the public while EFCC is an agency of the FG empowered to conduct investigations and prosecute all economic and financial crimes of individuals, corporate bodies or groups in Nigeria.

On 1 December 2020, the Commission invited the Company for an investigation meeting based on intelligence it received alleging economic sabotage and tax evasion by the Company on taxes remitted to the FIRS. During the meeting, the Commission interrogated the Company's representatives and staff members in search for evidence of the alleged tax evasion. Following the meeting, the EFCC unilaterally computed and assessed the Company to an additional tax liability of ₦481,568,726.66 for the relevant years.

The Company responded that the computation of additional assessment for the years already audited by the FIRS was outside the Commission's statutory jurisdiction.

However, the EFCC disregarded the Company's objection and argued that it received intelligence alleging that the Company was involved in economic sabotage and tax evasion which it found worthy to investigate. The Commission further maintained that it had the statutory powers to conduct investigations and prosecute all economic and financial crimes in Nigeria to determine the extent of financial loss and such other losses by the government, private individuals, or organizations.

Following the impasse, the Company commenced a suit against the Defendants at the FHC wherein it raised the following issues before the Court for determination:

1. *Whether having regard to the provisions of Section 8 of the Federal Inland Revenue Service (Establishment) Act, 2007 (FIRSEA) and Section 2(1) of the Taxes and Levies (Approved List for Collection) Act, 1998 (TLA), it is the legal and statutory responsibility of the EFCC to undertake the assessment, enforcement, and collection of taxes on behalf of the Federal Republic of Nigeria*
2. *Whether having regard to Section 8 of the FIRSEA and Section 2(1) of the TLA, it would*

not amount to an illegality and double jeopardy to allow the Defendants subject the Plaintiff to the same process of assessment, collection, and enforcement of tax.

3. Whether having regard to the fact that the statutory powers for assessment, collection, and enforcement of tax (including the general and specific powers for the administration of tax) in Nigeria has been statutorily vested in the FIRS under Section 8 of the FIRSEA, the EFCC can legally exercise the same powers and whether the said powers can be delegated to or be exercised by the EFCC.
4. Whether it is not ultra vires its powers, and usurpation of the powers of the FIRS for the EFCC to question or harass the Plaintiff or any of its agents, privies and representatives under any guise with regard to the assessment, enforcement and collection of tax.
5. Where issues 1 to 4 above are resolved in favour of the Plaintiff, whether the Plaintiff is entitled to be protected against any further harassment by the EFCC.

Upon determination of the issues above, the Plaintiff sought the following reliefs:

1. A declaration that the FIRS is the only body empowered and vested with statutory duty for assessment, collection and enforcement of company tax in Nigeria
2. A declaration that it is illegal for the EFCC to assume the statutory powers for the assessment, collection and enforcement of payment of taxes in Nigeria contrary to the combined provisions and effects of Section 8 of the FIRSEA and Section 2(1) of the TLA.
3. A declaration that any attempt by the EFCC to subject the Company to any form of tax assessment for the purpose of computing and enforcing payment of tax is ultra vires its powers under the relevant laws of tax administration in Nigeria.
4. A declaration that the EFCC's interrogation of the Company's representatives on 13 January 2021 and 27 January 2021 and the subsequent assessment and computation of

new and/or additional tax against the Company for any period whatsoever is illegal and unconstitutional.

5. An order of injunction restraining the EFCC and its agents, privies and representative from any further interrogation, harassment, intimidation or coercions of the Company and its agents into accepting the EFCC's assessment and enforcement of tax after the Company has complied with its tax obligations through the FIRS.
6. General damages in the sum of ₦10 million against the EFCC.

WPL's argument

The Plaintiff argued that the powers vested in the EFCC by the EFCC (Establishment) Act, 2004 are for the enforcement of all economic and financial crimes and cannot be extended or expanded under any guise to include the power to undertake the assessment, collection and enforcement of taxes payable by companies to the federal government. The Company noted that the power to assess, collect and enforce company tax is the exclusive reserve of the FIRS as provided under Section 8 of the FIRSEA.

The Company supported its position with the provision of Section 2(1) of the TLA, which states that, "Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria 1979 (now 1999) as amended, or any other enactment or law, no person, other than the appropriate tax authority, shall assess or collect, on behalf of the government, any tax or levies listed in the Schedule to this Act, and members of the Nigerian Police Force shall only be used in accordance with the provision of the tax laws". Section 4 of the TLA defines a tax authority as:

- a. The Federal Board of Internal Revenue, the State Board of Internal Revenue and the Local Government Revenue Committee; or
- b. A ministry, Government department or any other Government body charged with responsibility for assessing or collecting the particular tax.

Thus, any attempt by the EFCC to exercise the power vested in the FIRS under the guise of an investigation is illegal, unconstitutional and amounts to an unlawful invasion of the Company's rights.

EFCC's argument

The Commission argued that it is a special creation of the law with statutory powers to investigate economic and financial crimes, arrest and apprehend perpetrators of such crimes, in line with Sections 6, 7, 13 and 46 of the EFCC (Establishment) Act.

The Commission explained that the Company was invited based on intelligence it gathered in carrying out its functions and argued that the Company ought to have honoured its invitation and provided all requested documents. Therefore, according to the EFCC, the suit was only a ploy by the Company to shield itself from investigation and possible prosecution by the Commission and urged the FHC to dismiss the case.

FIRS' argument

The FIRS argued in support of the Plaintiff. Specifically, the FIRS noted that the EFCC acted beyond its statutory powers and authority by making further assessment and enforcement of payment of additional taxes against the Company. Further, the FIRS noted that the statutory responsibility for tax administration, including assessment and enforcement of company taxes, falls within its exclusive purview of responsibility and that it did not delegate same to the EFCC.

Issue for determination

Based on the arguments submitted by the parties, the Court adopted a sole issue for determination, which was:

"The true interpretation of the provisions of Section 8 of the FIRSEA and Section 2(1) of the TLA, over who between the FIRS and EFCC has the statutory mandate and responsibility to undertake the assessment, enforcement and collection of taxes on behalf of the FGN."

FHC's decisions

After considering the arguments of the parties involved, the FHC held that:

1. Based on the provisions of Section 8 of the FIRSEA and Section 2(1) of the TLA, the powers to assess, collect and enforce taxes in Nigeria are statutorily vested in **only** the FIRS. While Section 8(e) of the FIRSEA empowers the FIRS to collaborate with the relevant law enforcement agency for the purpose of enforcing compliance with the provisions of the FIRSEA, the FIRS did not call for any collaboration, delegation or donation of its responsibilities to the EFCC in the instance case.

The Commission acted *ultra vires* its statutory mandate and powers by assessing the Company to additional tax and attempting collection and enforcement of the tax on behalf of the FGN. Therefore, the acts and decisions of the EFCC are illegal and without any lawful basis.

2. The EFCC expanded outside its statutory mandate under the EFCC (Establishment) Act as it failed to lay before the court any evidence or complaints to show that the Company was involved in any tax evasion or fraud to have prompted its letter of invitation and interrogation of the Plaintiff. Therefore, the findings of the Commission remain a ruse and contain no evidence of reasonable ground for any investigation.
3. The EFCC's decision to assess the Company to additional tax for periods already audited by the FIRS amounted to double jeopardy and was unfair, illegal and unconscionable.

The FHC also declined to admit as evidence a letter dated 25 February 2021 written by the acting chairman of the EFCC to the FIRS on the issue and FIRS' response of 19 April 2021 on the basis that they were written weeks after the case had commenced, in line with Section 83(3) of the Evidence Act, 2011.

Based on the above, the FHC resolved issues 1 to 4 in favour of the Company and granted an order of injunction sought by the Company under relief 5. The FHC also awarded general damages in the sum of ₦500,000 against the EFCC and ₦200,000 as the cost of action against the EFCC.

Commentaries

Increasingly over the years, taxpayers have been inundated with tax investigations and reviews conducted by various agencies of government, other than the FIRS, to assess their level of tax compliance and/ or enforce collection of alleged additional taxes on behalf of the FGN. In most cases, the investigations/ reviews are conducted in respect of accounting periods that have already been audited by the FIRS. This leaves taxpayers uncertain and open to harassment, which causes disruption to their business activities given that years already audited and closed by the FIRS can be reopened for review by other government agencies under the guise of investigation. Therefore, the FHC judgment is a welcomed development in Nigeria's tax administration landscape. The judgement also delineates the responsibilities of the FIRS and effectively puts a stop to the incessant tax investigation exercises conducted on taxpayers by other agencies of government such as EFCC and Revenue Mobilisation Allocation and Fiscal Commission.

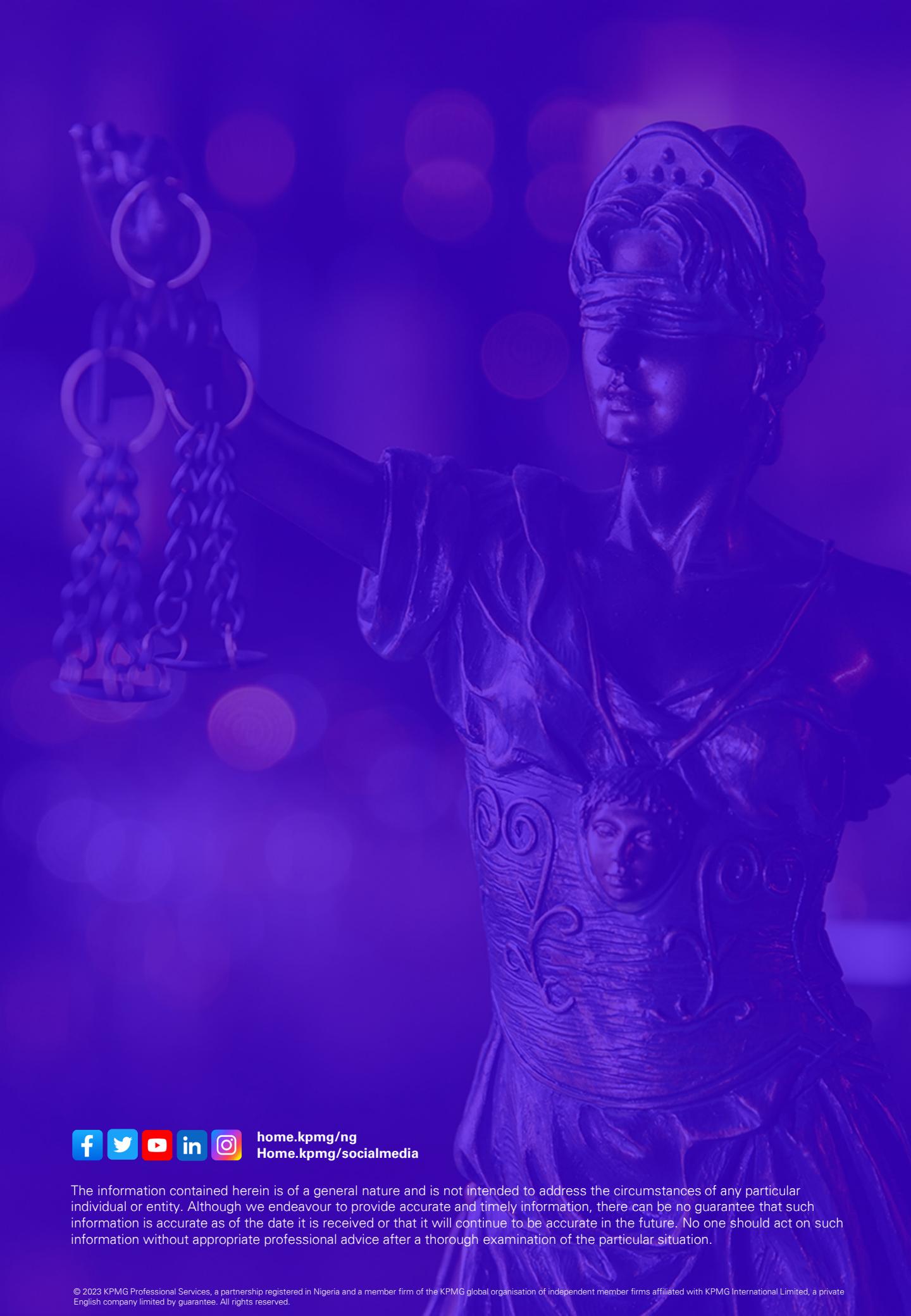
The judgement also aligns with Section 22 of Finance Act, 2021, which amended Section 68 of the FIRSEA to reaffirm FIRS' authority as the primary agency of the government responsible for the administration, assessment, collection, accounting, and enforcement of the taxes and levies due to the FG. Interestingly, Section 22 of Finance Act, 2021 also makes it an offence for any agency or body of government to administer, collect, account, and enforce taxes and levies due to the FG unless the Minister of Finance, on approval of the National Assembly, authorises same. The implication is that no other Federal Government body can legally conduct tax compliance (especially tax audit) exercises on companies in Nigeria.

Finance Act, 2021 further provides for collaboration between the FIRS and other Federal Government bodies for the purpose of

enforcing compliance with tax and levy collection in Nigeria. It also mandates any person or Federal Government bodies that become aware of any incidence requiring tax investigation, enforcement, or compliance, in the course of performance of its functions to refer same to the FIRS for necessary action and/ or collaboration. Therefore, while the EFCC is charged with investigating and prosecuting all forms of economic and financial crimes, including *tax evasion* as provided under Section 46 of the EFCC (Establishment) Act, the evidence obtained during such investigation must be referred to the FIRS for action as it is outside of its statutory mandate to assess and enforce tax collection on companies.

One of the canons of taxation is certainty. The canon of certainty dictates how much a taxpayer should pay, when the tax should be paid, how the tax should be paid and the appropriate authority to administer the tax. The amendment introduced by Section 22 of Finance Act, 2021 sought to provide clarity to taxpayers on this by reaffirming the authority of the FIRS as the primary tax agent of the FGN for tax purposes. Consequently, the FHC judgement underscores the importance of this principle and upholds the sanctity of the provisions of the law regarding the responsibilities of the various agencies of government.

It is hoped that the judgement will discourage the pervasive and recurring practice by government agencies to act outside their statutory mandate and provide impetus to taxpayers to challenge any unlawful invasion of their rights by unauthorised government agencies.



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