Appointment of banks by FIRS as collecting agents for recovery of alleged tax liabilities

KPMG in Nigeria
Issue 2.5 | February 2019

The Federal Inland Revenue Service (FIRS) recently issued Letters of Substitution, pursuant to Section 49 of the Companies Income Tax Act (CITA) 2004 and Section 31 of the Federal Inland Revenue Service Establishment Act (FIRSEA) 2007, to banks in Nigeria ("the Substitution Banks" or "SBs"), appointing them as tax collecting agents for certain listed customers ("affected companies") maintaining bank accounts with such banks. The FIRS, in the said Letters of Substitution, alleges that the affected companies have breached their tax obligations by failing to pay tax to the FIRS, as and when due, and provided the SBs with an indication of a specific amount owed by each said company. The SBs were directed to set aside the indicated sums and pay such over to the FIRS in full or partial payment of the alleged tax debt. Furthermore, the FIRS demanded that the banks should not execute any mandates on those accounts without its prior approval.

A number of taxpayers concerning whom similar Letters of Substitution were issued by the FIRS in 2018, suffered the consequence of being unable to access their bank accounts for paying salaries or making routine transactions until the "freeze" order imposed by the FIRS was lifted. Indeed, the first time that many affected companies knew of the existence of these Letters of Substitution was typically when bank mandates were rejected by their bankers.

The FIRS also demanded the SBs to provide the companies' (and their subsidiaries') detailed bank statements and financial records, and records of all principal officers of the companies. The FIRS based its actions on the provisions of Sections 28 and 29 of the FIRSEA.

Background

Sections 31 of the FIRSEA and Section 49 of CITA allow the FIRS to appoint any person, by notice in writing, to be an agent of a taxpayer, where such person is in custody of any money belonging (or due) to the taxpayer. The appointed agent may be required by such notice to pay any tax "payable" by the taxpayer to the FIRS out of the taxpayer's money in his custody.

The FIRSEA and CITA provide that any appointment made by the FIRS under these sections of the law would be "*subject to the provisions of the tax legislation with respect to objections and appeals*". Section 69 of CITA allows a taxpayer to object to a disputed assessment within thirty (30) days from the date of service of the notice of assessment. Section 77(3) of CITA further provides that the collection of tax, in any case where notice of an objection or appeal has been given by a taxpayer, shall remain in abeyance until such objection or appeal is determined.

> Nothing in the CITA or FIRSEA authorises the FIRS to impose a freeze order on a taxpayer's bank account beyond the amount of tax proven to be due and payable by that taxpayer. The requirement directed to banks not to honour mandates from taxpayers over and above the tax amount supposedly proven by FIRS to be due and payable is without foundation and goes too far.

Matters arising

1. It is not clear from the provisions of the FIRSEA or CITA relied upon by the FIRS that its power of substitution is expected to be exercised without notice to the affected taxpayers. Indeed, it seems reasonable that no tax would be due from a taxpayer *ex parte* or at the sole discretion of the tax authority. At least, a tax assessment would first have been issued either on a self-assessment basis by the taxpayer, or by the FIRS in exercise of its powers to issue a deemed income tax assessment in default of a self-assessment (or a tax audit-related assessment following an audit exercise). The tax assessment must have become final and conclusive before a tax payment can be said to be due and payable by a taxpayer.

   The burden should, expectedly, be on the FIRS to prove to the SBs that a tax assessment issued against each

taxpayer has, indeed, become final and conclusive prior to issuance of the Letter of Substitution. The FIRS makes no effort in its Letter to "prove" or provide any reasonable basis for the banks to conclude that tax payments are, indeed, due from the taxpayers listed therein.

2. The SBs are constituted by Section 49 of CITA and Section 31 of the FIRSEA to be agents of the affected taxpayers and required to act on their behalf. Clearly, the intention of the law is to preserve the tax due and prevent a taxpayer from dissipating its resources without settling its tax liabilities. This must be a measure of last resort or justified by extreme circumstances of a difficult taxpayer with acknowledged liabilities.

   The SBs, being agents to the taxpayer, owe a duty of care to their principal and not to the FIRS. The SBs, therefore, are exposed to risks, if they were to pay over the sums demanded by the FIRS and it should be established that no such liability (or less liability than the sum actually paid) was due from the taxpayer on whose behalf such payment was made. The Letter of Substitution does not include an indemnity to the SBs for this eventuality.

3. Sections 31(5) and 49(3) of the FIRSEA and CITA, respectively, provide that any notice issued by the FIRS to appoint a bank as an agent of tax collection would be subject to objections and appeals as though such notice were an assessment. Further, Section 36 of the 1999 Constitution of the Federal Republic of Nigeria guarantees a person's right to fair hearing in civil matters, which include taxation.

   Hence, the FIRS should allow for mechanisms whereby affected persons can object to and appeal against notices issued under the above-referenced provisions. Where a taxpayer disagrees with a notice issued by the FIRS, it is unclear if SBs (in their capacity as agents of the taxpayers) would be required to object to the FIRS on behalf of the customer, or if the taxpayer would be required to object to the notice directly. In our view, the latter option is more expedient.

4. The letters to the SBs leave them with 7 days within which to comply with the directives of the FIRS. This is contrary to the provisions of Sections 69 and 77(3) of CITA which permit a taxpayer a 30-day period of review and objection.

   Since the Letter of Substitution is to be treated as a tax assessment, it is important for due process to be observed, in which case SBs should be afforded sufficient time to notify their customers of their appointment. We hope that the FIRS will consider this and, in future, afford SBs the minimum statutory time within which to respond to their demand.

   SBs may need to develop an administrative framework for monitoring the status of responses by taxpayers as a basis for further engagement with the FIRS on their appointment. This is to avoid the risk of their customers' tax liabilities vesting permanently on them by virtue of Section 31(3) of the FIRSEA and Section 49(1) of CITA which makes the tax payment recoverable from the SBs in the event of their default to act. SBs may be caught between the devil and the deep blue sea in the circumstance of a taxpayer that disputes payment, and an FIRS that insists on payment. Tracking these matters and making regular reports to the FIRS within the time afforded by law may be the only way for the SBs to avoid incurring direct liability in these circumstances.

5. Nothing in the CITA or FIRSEA authorises the FIRS to impose a freeze order on a taxpayer's bank account beyond the amount of tax proven to be due and payable by that taxpayer. The requirement directed to banks not to honour mandates from taxpayers over and above the tax amount supposedly proven by FIRS to be due and payable is without foundation and goes too far.

6. Generally, a bank has a fiduciary obligation to maintain the confidentiality of its customers and their transactions, and to prevent third-party access to the customers' account information. The exceptions to this duty are in cases where the bank is required by law or a court of competent authority to make disclosure, and where the customer consents to the disclosure.

   We note that the FIRSEA and CITA allow the FIRS to request certain banking information (without breaching the bank's duty of confidentiality), such as names and addresses of new customers and specific individuals, and details of transactions above ₦5 million and ₦10 million for individuals and companies, respectively. However, these provisions, including relevant provisos, should not be interpreted to have given the FIRS the absolute power to demand all forms of customer information, including details of account balances, bank statements and other financial records of a company, its subsidiaries or principal officers; or power to direct when a bank may honour its customers' transaction requests.

   We think that the FIRS might be better served approaching a court of law for an enabling order providing it with authority to obtain such information as described in the Letter of Substitution.

To conclude, we note and salute the FIRS' objectives to bring delinquent taxpayers into the tax net and consequently increase the Federal Government's tax revenue. However, the current practice whereby the FIRS issues fiats to freeze taxpayers' bank accounts generally and to demand that SBs pay alleged outstanding tax liabilities from customers' bank balances without recourse to affected persons, is draconian. This will cast doubt on the Federal Government's drive to improve the ease of doing business in Nigeria, diminish the credibility of the Nigerian tax system, and erode investors' confidence in the Nigerian economy.

Taxpayers must also ensure that they fulfil their civic obligations by paying the right amount of taxes and filing relevant tax returns with the tax authorities, as and when due. This will place them in the right position to challenge any austere directive issued by tax authorities. In this regard, aggrieved parties should not shy away from seeking legal redress whenever they perceive that their statutory rights have been breached. This will, hopefully, ensure probity in tax administration in Nigeria and further contribute to our tax jurisprudence.

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