

ENFORCEMENT PROCESSES AND EXPERIENCE ENGAGING THE TAX APPEAL TRIBUNAL (TAT).

This discussion will be focused on the following areas:

- i. Definition of key terms
- ii. Various modes of enforcement available to the LIRS by the enabling Statute.
- iii. Enforcement Processes under Debt Recovery
- iv. Enforcement processes under Criminal Prosecution
- v. Enforcement processes of offences and penalties
- vi. Issues and Challenges with these enforcement procedures
- vii. Recommendations; and
- viii. Conclusion.

1. What is Enforcement?

The word 'Enforcement' is simply the act of giving force to or executing or carrying out a task using a particular method.

This paper will focus on the methods of executing or carrying out statutorily provided modes of compelling payment of tax liabilities that are available to the LIRS.

2. VARIOUS MODES OF ENFORCEMENT AVAILABLE TO LIRS BY THE ENABLING STATUTES

2.1 *Enforcement processes for recovery of tax liabilities through civil actions:*

Distrain

Distrain simply means to squeeze, press, embrace, constrain or oppress. In legal terms it ***means to force someone to do something by seizing their property; or to seize someone's property in place of, or to force payment of a debt.***

Distrain has also been held to mean sealing of premises. See the Judgment per Kasim J as he then was in ***First Bank v AG Anambra State & Anor.***¹ that the provisions of section 96 PITA 1993 gives power to the RTA to distrain for non-payment of tax.

Distrain as a means of enforcement of payment of tax is clearly provided for in Section 104 of the Personal Income Tax Act (PITA), 2004 as amended. The provision empowers the relevant tax Authority to seize the property or goods of a taxpayer for non-payment of tax and such goods would either be delayed for specific period of time in order for the taxpayer to pay the outstanding debt or the goods would be sold by the RTA in order to recover the debt owed to the State.

Conditions Precedent before an order of Distrain can be granted.

The issuance of a Warrant of Distrain presupposes the fulfilment of the following conditions precedent. They are:

- i. the tax liability must be due²;

¹ Vol. 4 ALL NTC P 437 at P 447

² Ibid; see also Abiola Sanni: Power to Distrain under section 104 PITA– Any Scope for the Magistrate Court? What possible alternative exists? Presented at LIRS Training tagged: Tax Simulation Feb, 2017.

- ii. enforcement must be against a taxable person;³
- iii. the taxable person must have been served with an assessment⁴;
- iv. it must have become final and conclusive;⁵
- v. the liability must have remained unpaid at the expiration of the notice period⁶
- vi. the relevant tax authority must have authorized an officer by a letter of authority⁷;
- vii. goods distrained may be kept for 14 days before the relevant tax authority exercises its right of distraint.⁸.

The enforcement provision of Distrain provided for in section 104 PITA⁹ also has its backing in the Constitution.¹⁰ Section 44(2) (a) CFRN¹¹ provides:

- (1) 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 purposes prescribed by law that, among other things
 - (a) Requires the prompt payment of compensation; therefore, and
 - (b) 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 that part of Nigeria.
- (2) Nothing in subsection (1) of this section shall be construed as affecting any general law.
 - (a) for the imposition or enforcement of any tax, rate or duty.

After the agency has complied with the provisions of section 104(1) PITA, it follows the following procedures in obtaining the order of court viz:

- prepare a Court Process i.e., Motion Exparte.
- Accompanied by an affidavit and a written address.
- Gets a date for the moving of the application.
- Upon grant, it applies to for a certified True Copy (CTC) of the order.
- Obtains the authority of the Chairman of LIRS in writing.
- Apply for the assistance of Law Enforcement agents to accompany in the execution process.
- Proceed to the scene of execution i.e., taxpayer's premises.
- Show the taxpayer a copy of the Order granted ex-parte against it.

³ See Section 108(1) PITA supra; 7up Bottling Co. Plc. V LSIRSB (2000)3 NWLR (pt. 650)565, 605 at paragraph B, 618, paragraph A (Court of Appeal) cited in Ibid no. 34.

⁴ Ibid no. 45; Supra no. 48 at page 3

⁵ Ibid; Mohammed Bashir-Tanko, Tax Law Enforcement: Practice and Procedure.

⁶ Ibid

⁷ Mohammed Bashir-Tanko, Tax Law Enforcement: Practice and Procedure, page 3

⁸ Ibid

⁹ 2004 as amended

¹⁰ Ibid no. 46

¹¹ CFRN 1999 supra.

- Either receives a cheque for the amount due or.
- Seal the premises of the taxpayer until the amount paid is due.
- Upon sealing, the taxpayer comes to the office for reconciliation and re-opening of sealed premises after having paid the amount due together with the cost of levying distraint.

It is noteworthy to state categorically that the constitutionality and validity of Distraint cannot be over-emphasized. The Court had given this pronouncement in the case of *Independent Television/Radio v Edo State Board of Internal Revenue*.¹²

DISTRAINT UNDER SECTION 15 HOTEL OCCUPANCY AND RESTAURANT CONSUMPTION (HORC) LAW 2009.

- The Supreme Court had given constitutional validity to the HORC law, when it held that the State House of Assembly only has the legislative powers under **section 4(7) of the Constitution of the Federal Republic of Nigeria (CFRN), 1999** as amended to legislate on matters that are not within the Exclusive and Concurrent Legislative List.
- It is on this premise that the State House of assembly promulgated the HORC law in 2009. Section 15 of the law empowers the State to charge 5% consumption tax on foods, drinks etc. consumed in hotels, restaurants, bars, Inns, Motels etc and the occupation of hotels and event centres.
- The procedure is simply the same with the procedure under section 104 of PITA except that the Warrant to levy distress is issued by the Executive Chairman.

RECOVERY OF TAX AS DEBT OWED THE STATE PURSUANT TO S.78 PITA

SUMMARY SUMMONS AT THE MAGISTRATE COURT

- Section 78 of PITA empowers the RTA to recover tax liabilities as a debt due to the State, before any court of competent jurisdiction and these courts include the Magistrate Courts where the liability is not above its pecuniary jurisdiction.
- This Section is utilized by LIRS through Summary Summons before the Magistrate Courts pursuant to Order 3 of the Magistrates Court Rules 2009 and Order 60 Of the Lagos State High Court (Civil Procedure) Rules 2019.
- A successful judgment of the Court can be used as a garnishee against the Bank accounts of the taxpayer amongst other consequential orders of the court that can be enforced in any of the modes of enforcing monetary judgment under the Sheriff and Civil Processes Act.

¹² (2014)LPELR-23215 (CA), VOL. 9 ALL NTC p.421

- The pandemic followed by the ENDSARS protests with the severe damages occasioned on the courts and the ongoing JUNSUN strike, have all dealt severe blows on our enforcement exercises through the judiciary.

RECOVERY ACTIONS AND EXPERIENCE AT THE TAX APPEAL TRIBUNAL

- The Tax Appeal Tribunal (TAT) was established pursuant to Section 59 (1) of the FIRS Establishment Act 2007. The TAT was set up by the Federal Government to adjudicate on all tax disputes arising from operations of the various Tax Laws as spelt out in the Fifth Schedule to the FIRS (Establishment) Act 2007, amongst which is the Personal Income Tax Act 2004 (as amended).
- Tax Appeal is an important component of the tax system and the new tax policy offers a step by step objection and appeal process which gives the complainant an opportunity to explore other dispute resolution mechanisms before gaining access to the regular court system. According to the Establishment Act, both the tax payer and relevant tax authority can initiate the appeal process.
- A person aggrieved by an assessment or demand notice made upon him by the Service or aggrieved by any action or decision of the Service under the provisions of the tax laws administered by the Service may appeal against such action, decision, assessment or demand notice within a period of 30 days. On the other hand, The Service, if aggrieved in relation to any person in respect of any provisions of the tax laws, can also file an appeal at the appropriate zone of the Tribunal.
- It is the expectation of all stakeholders that the establishment of the TAT would reduce the incidence of tax evasion, ensure fairness and transparency of the tax system, minimize the delays and bottlenecks in adjudication of tax matters under the traditional court system, improve the tax payers' confidence in our tax system, provide opportunity for expertise in tax dispute resolution, provide avenue for effective involvement of parties, focus on facts rather than legal technicalities and promote early and speedy determination of matters without compromising the principle of fairness and equity.

PROCEDURE

- The procedure is for the Appellant to file a Notice of Appeal accompanied with statement on oath of the witness, list of documents and list of witness. Once the processes are served on the respondent and they have filed their respondent's reply, the appeal is set down for hearing.
- The normal procedure of trial in court of record will apply at the tribunal and written addresses will be filed and adopted.

LIRS' ACHIEVEMENTS AT TAT

- The tribunal has been able to achieve substantial success since its establishment. The Agency currently has 12 matters pending at different stages at the tribunal that are yet to be concluded. However, based on the records of previous matters instituted between the period of October 2015 till date (it should be noted that the Tribunal was not constituted for 2 years from October 2016 to November 2019), the Agency has recovered substantial outstanding liabilities of over N1.5 Billion from about 30 taxpayers.
- Presently, the agency is about to file appeals against 50 or more erring taxpayers with tax liabilities ranging from the sum of N500,000.00 to over N50 million before the TAT for the purpose of recovering the tax debts due to the government.
- The tribunal has also been able to give landmark decisions such as.
 - Liability for penalty and interest in Shell Nigeria Exploration and Production Company Limited.

JUSTIFICATION FOR INSTITUTING ACTIONS AT TAT

The positive prospects of instituting tax recovery matters at the TAT are as follows:

1. Flexibility: The procedure at the TAT is flexible and not as rigid as normal courts. The tribunal strives to achieve substantial justice devoid of technicalities.
2. Time Frame: the tribunal is very time conscious, and it strives to conclude appeals brought before it within a reasonable time frame.
3. Expertise: Every panel of the tribunal is presided by a seasoned and experienced tax lawyer with the support of professional tax practitioners. This allows for sound and well-informed rulings and judgments by the TAT.
4. Impartiality: The composition of the tribunal panels is a good mix of individuals that have worked both in public and private sectors.
5. Short Cause List: The tribunal unlike regular courts have fewer matters in its kitty.
6. ADR: The tribunal encourages out of court settlement of appeals thereby creating better relationship between the taxpayers and the tax authority.

ENFORCEMENT PROCEDURES UNDER CRIMINAL PROSECUTION

FAILURE TO FILE RETURNS

The Legal directorate also compels enforcement of tax infractions through Criminal Prosecution of non-filers of statutory Returns, these are taxpayers who fail to file their Annual tax Returns at the stipulated period of every relevant year or who fails to file statutory monthly Returns/Schedules of payments.

- **PROSECUTION OF INDIVIDUALS:** Section 41 PITA makes it an obligation for all individual taxable persons to file their tax returns on or before the 31st March of every relevant year, failure to do so is an offence and this invokes the power of the agency to issue a best of judgment assessment under section 54 (3) PITA and subsequently sue for failure to file and pay the amount due to the State in line with the Administration of Criminal Justice Law of Lagos State.
- **PROSECUTION OF COMPANIES:** Section 81(2) PITA mandates all employers of labour to file Returns of all emoluments paid to their employees on or before the 31st of January of every relevant year.
- Failure to file within the stipulated time is a criminal offence which makes the employer liable upon conviction to a fine of N500,000 in the case of a Company and N50,000 in the case of an Individual.
- Criminal information is filed in court against such defiant taxpayer and prosecuted in line with the Administration of Criminal Justice Law of Lagos State, defaulters are then made to pay the penalty upon conviction.
- Failure to appear in court on the date of hearing would result in the issuance of a bench warrant for arrest.

PROSECUTION OF HIGH NETWORTH INDIVIDUALS (HNWI), ENTERTAINERS AND COMPANIES FOR TAX EVASION

- High Net worth Individuals are individuals who can be categorised as the rich class in the society. The known assets, estate and flamboyant lifestyles of these individuals or entertainers are amongst the various factors considered before classifying them as HNWI or Entertainers.
- These set of individuals fall into two major categories, those that do not file tax Returns in line with section 41 PITA or pay taxes and those who file incorrect returns S. 95 PITA and also pay inadequate taxes as against their true income from all sources as stipulated by the law. A Best of judgment assessment (BOJ) is usually issued against these categories of individuals and when they fail to resolve with the Agency, criminal prosecution for tax evasion is then initiated against them at the High Court of the State in line with the Administration of Criminal Justice Law.
- Where a taxpayer files in an incorrect Returns to the agency, he will be liable to a fine of N20,000 and doubled the amount of tax undercharged upon conviction.
- **False Returns:** where the taxpayer or his agent files in a false Returns for the purpose of Obtaining a reduced tax liability, he shall be liable upon conviction to a fine of N50,000 or N500,000 in the case of an individual or company respectively or a term of imprisonment of not more than 6 months. S. 96 PITA.

- All the above offences are enforced by filing a Charge or Information at the magistrate Court or High Court of the State respectively and its procedures are in total compliance with the Administration of Criminal Justice Law of Lagos State.

The Agency has some pending cases in Court against non-filers and it will be filing more criminal charges against taxpayers that failed to file their Returns for year 2020 as soon as the courts resume from the JUSUN strike.

SOFT ENFORCEMENT

The agency in a bid to encourage Alternative Dispute Resolution (ADR) or better still reduce the rigours and cost of litigation encourages other means of amicable resolution of tax cases and only proceeds to Court where it ends in a deadlock. Some of the ADR measures include:

- Writing of letters of intention to either levy Distrain or prosecute depending on whether the action is civil or criminal in nature.
- Exploring amicable settlements by calling taxpayers to come forward and settle their liabilities even after writing letters of intention. In some cases, payment plans are scheduled and agreed with the taxpayer thereby making it easy for them to defray the liabilities.

ISSUES AND CHALLENGES OF THE ENFORCEMENT PROCEDURES

Issues and challenges faced include:

- Non-prioritizing revenue matters by the judiciary, revenue cases are lumped with regular cases thereby creating a huge bottleneck in the timely treatment of tax matters. For instance, despite the very high incidences of tax evasion in the country, our tax jurisprudence cannot boast of just five convictions for tax evasion and Garnishee Orders against the bank accounts of tax evaders.
- Lack of proper data, the Directorate needs to provide good evidence before the courts in order to ground criminal convictions, however, this is not obtainable in a lot of cases.
- The custodial and the pecuniary penalties in the Personal Income Tax Act are not stiff enough, these penalties are no longer fit for purpose, they don't serve for deterrence in the present environment. They should be urgently amended to reflect the present realities and trends.
- Enforcement of tax laws does not only reside in the tax Authority, see provisions of S.85 (4)

RECOMMENDATIONS

- Enhanced judicial processes for better expeditious adjudication of tax cases and the continuous trainings of judicial officers in tax appreciation.
- Constant review of tax laws to meet current trends

CONCLUSION

According to Benjamin Franklin, death and Taxes are the only two things certain in life. Without fear or Coercion, laws would never be obeyed by anyone. If it were possible also, no one would want to pay tax but for the attachment of sanctions and penalties, man is compelled to comply.

LIRS therefore, through its legal directorate has been able to achieve so much because it ensures it acts within the ambits of the law, explore other settlement options other than litigation and still seeks to improve more with the support of stakeholders.