

**EXAMINING**

# **THE CONSTITUTIONALITY**

**OF ORDER V RULE 3 OF THE FEDERAL HIGH  
COURT (FEDERAL INLAND REVENUE SERVICE)  
PRACTICE DIRECTIONS 2021**



"... Where a **Respondent** intends to challenge an Assessment served on him, he shall pay half of the assessed amount in an interest yielding account of the Federal High Court, pending the **determination of the application.**"



## INTRODUCTION

1. On 31<sup>st</sup> May, 2021, the Chief Judge of the Federal High Court of Nigeria, Honourable Justice John Terhumba Tsoho, in exercise of the powers conferred on him by Order 57 Rule 3 of the Federal High Court (Civil Procedure) Rules 2019, issued the **Federal High Court (Federal Inland Revenue Service) Practice Directions, 2021 ("the Practice Direction")** which came into effect on the 1<sup>st</sup> of June, 2021.
2. The Practice Direction essentially provides directions on the mode through which the Federal Inland Revenue Service (FIRS) could approach the Federal High Court for the purposes of enforcing tax assessment can either concede to the FIRS assessment or challenge the said assessment.
3. The narrow prism through which the Practice Direction is x-rayed in this essay is the far-reaching provisions of **Order V Rule 3 of the Practice Direction**, which provides thus:

**"Where a Respondent intends to challenge an Assessment served on him, he shall pay half of the assessed amount in an interest yielding account of the Federal High Court, pending the determination of the application."**

4. Given that the Practice Direction applies to both criminal matters and civil causes in relation to tax issues before the Federal High Court of Nigeria, there has been outcry especially by taxpayers on the validity and constitutionality of the above excerpted provision. It is this validity and constitutionality of the said provisions that this work seeks to examine.

## OTHER SIMILAR PROVISIONS

5. Based on the principle that payment of tax is compulsory, there is no doubt that the controversial provisions of the Practice Direction were made to mirror earlier tax-related legislations such as **Paragraph 15(7) of the Fifth Schedule to the Federal Inland**



**Revenue Service (Establishment) Act (FIRSEA) 2017**, which provides as follows;

“(7) At the hearing of any appeal, if the representative of the Service proves to the satisfaction of the Tribunal hearing the appeal in the first instance that:

- a) the appellant has for the year of assessment concerned, failed to prepare and deliver the Service returns required to be furnished under the relevant provisions of the tax laws mentioned in paragraph 11;
- b) the appeal is frivolous or vexatious or is an abuse of the appeal process; or
- c) it is expedient to require the appellant to pay an amount as security for prosecuting the appeal.

the Tribunal may adjourn the hearing of the appeal to any subsequent day and order the appellant to deposit with the Service, before the day of the adjourned hearing, an amount, on account of the tax charged by the assessment under appeal, equal to the tax charged upon the appellant for the preceding year of assessment or one half of the tax charged by the assessment under appeal, whichever is the lesser plus a sum equal to ten percent of the said deposit, and if the appellant fails to comply with the order, the assessment against which he has appealed shall be confirmed and the appellant shall have no further right of appeal with respect to that assessment.”

6. Another tax-related Rules which makes similar provisions like that of the Practice Direction under consideration is **Order 3**

**Rule 6 (a) of the Tax Appeal Tribunal (Procedure) Rules, 2021 (“TAT Rules 2021”)**, which states thus:

“6. For an Appeal against the Service or relevant tax authority under Rules 1 and 2 of this Order, the aggrieved person shall-

- (a) Pay 50% of the disputed amount into designated account by the Tribunal before hearing as security for prosecuting the appeal.”

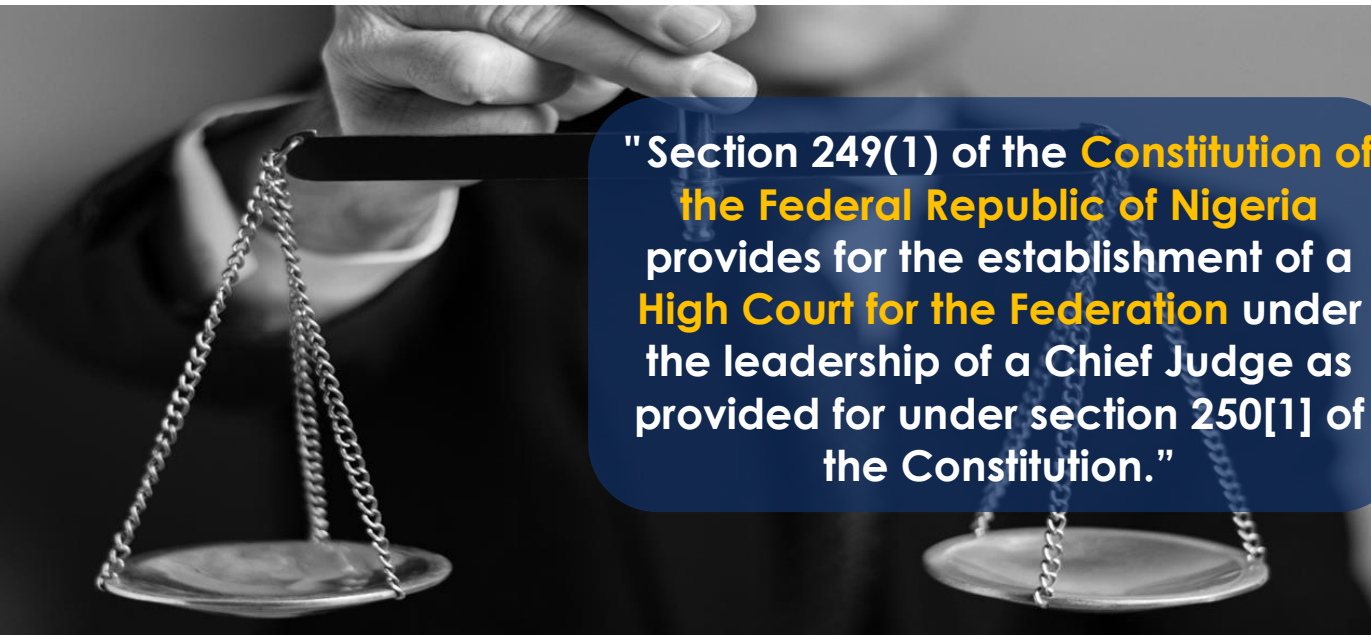
7. The relevance of the highlighted provisions of similar tax-related legislations to this essay is that reference would be made to Court pronouncements on the validity or otherwise of the said provisions. The reasoning of the Court in these cases will aid in appreciating how the provision of the Practice Direction under consideration may be applied especially in the light of constitutionally guaranteed rights and provisions.

## THE PRACTICE DIRECTION VIS-À-VIS THE CONSTITUTION

8. In Nigeria, practice directions are administrative directives issued by the heads of courts to regulate procedural matters and ensure the efficient administration of justice. They provide guidance on the conduct of proceedings, case management, and other procedural aspects, but they should not override or contravene existing legislation and must be consistent with the delegating power as stated in **FBIR v. Halliburton (WA) Ltd (2014) LPELR- 24230**.

9. The authority to issue practice directions is typically derived from the constitutional powers vested in the heads of courts. For instance, **Section 6(6)(b) of the 1999 Constitution of the Federal Republic of Nigeria (as amended)** empowers the Chief Judges of the various courts to make rules for the practice and procedure of their respective courts, as long as these rules are not inconsistent with any existing law.

**250[1] of the Constitution. Section 254 of the Constitution** further provides that subject to the provisions of any Act of the National Assembly, the Chief Judge of the Federal High Court may make rules for regulating the practice and procedure of the Federal High Court. This section clarifies that the rules of practice and procedure of the Federal High Court are subordinate to the provisions of any Act of the National Assembly.



**"Section 249(1) of the Constitution of the Federal Republic of Nigeria provides for the establishment of a High Court for the Federation under the leadership of a Chief Judge as provided for under section 250[1] of the Constitution."**

10. However, it is important to note that practice directions as delegated legislation must be consistent with the provisions of substantive laws, including statutes and regulations. They should not modify or alter or extend the substantive rights and obligations of parties or contravene constitutional principles. **Section 249(1) of the Constitution of the Federal Republic of Nigeria** provides for the establishment of a High Court for the Federation under the leadership of a Chief Judge as provided for under **section**

11. The provisions of the Practice Direction under consideration having covered for both civil and criminal matters as noted in Order 1, Rule 1 of the Practice Direction, is juxtaposed with the **Section 36(5) of the 1999 Constitution (as amended)**. This section of the Constitution provides that every person accused of a criminal offence shall be presumed innocent until proven guilty. Thus, treating a tax assessment by the FIRS or any other relevant tax authority as correct by compelling taxpayers to pay half of the

assessment before their objections are heard runs afoul of the presumption of innocence as well as stifles the taxpayer's constitutional right to a fair hearing. See the case of ***Effiom v. Enebong (2013) LPELR-20420 (CA)***.



12. In **Suit No: FHC/L/CS/1082/19-Registered Trustees of Hotel Owners and Managers Association of Lagos v. A.G Fed & Anor (Judgment delivered on 8<sup>th</sup> May 2020 per Hon. Justice Faji** the Court while considering a challenge on the provisions of the TAT Rules, held that the provisions of an Act cannot be modified by an enactment of the executive arm of

government. The **TAT Rules** being an enactment of the Minister of Finance cannot modify the provisions of the enabling Act, be it directly, or through the backdoor of subsidiary legislation.

13. This reiterates the fact that the Practice Directions being a subsidiary legislation cannot amend, erode, supersede, expand, or extend the provisions of the 1999 Constitution. As held by the court in ***UNILAG v. Aigoro SC 32/1984, [1985] 16 (pt. 1) NSCC 88*** a Practice Direction has no power to introduce a new provision not contained in the Rules; cannot introduce a provision inconsistent with the Rules or any Law and cannot give provisions or explanations on a new subject not contemplated by the Rules or other existing Law.
14. The same can be said of the Practice Direction under consideration when placed side by side with the Constitution of the Federal Republic of Nigeria.

#### **HOW ALIGNED IS THE PRACTICE DIRECTION WITH THE CONSTITUTION AND OTHER SUBSTANTIVE LEGISLATION?**

15. Arguments in support of the controversial provisions of the Practice Direction as well as other such similar tax-related provisions are either that such provisions will help to reduce the incidence of tax evasion and increase compliance with tax laws or that it will reduce the workload of the courts and discourage frivolous litigation. As compelling as the above arguments may seem, it does not remove the fact that the



powers of the FIRS to compel the taxpayer to pay objectionable tax assessment have been arbitrarily widened. This appears to impede the constitutionally guaranteed right to fair hearing in Section 36(1) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 and violates the principles of access to justice and presumption of innocence both recognized by the Nigerian Constitution and international human rights laws.

16. Additionally, provisions such as these if not challenged by taxpayers will definitely encourage arbitrary assessments and tax collection, which may thereon result in the violation of the taxpayers' rights. Below are some of decided cases where similar provisions of the Practice Direction were considered.
17. In **Multichoice Nigeria Limited v. FIRS - AT/LZ/CIT/062/2021** the Tribunal, while ruling that MultiChoice Africa Holdings failed to comply with Order 3 Rule 6 of the TAT Rules 2021, held that the payment of the statutory deposit is a condition precedent to triggering its jurisdiction to hear the appeal. The Tribunal went ahead to order the appellant to comply with the provision by making the required deposit before the adjourned date of hearing. The appellant was also ordered to file an affidavit verifying the payment.
18. A balance was however struck in **Emenite Limited v. FIRS - TAT/SEZ/012/2021** where the Tax Appeal Tribunal in the South East Zone recently made a ruling that the Order 3 Rule 6(a) of the Tax Appeal


Tribunal (Procedure) Rules, 2021 are in conflict with the provisions of **Paragraph 15 (7)(c) of the Fifth Schedule to the Federal Inland Revenue (Establishment) Act 2007 (as amended)**. As a result, the Tribunal refused to compel the appellant, Emenite Limited, to pay 50% of the disputed tax assessment as a security deposit before the hearing of its appeal. Specifically, the TAT ruled that a taxpayer would only be ordered by the TAT to pay the security deposit required under **Paragraph 15(7)(c) of the Fifth Schedule to the FIRS Act** where the FIRS is able to establish to the satisfaction of the TAT any of the 3 (three) conditions stipulated in **Paragraph 15 (7) (c) of Fifth Schedule to the FIRS Act**, namely, that: (a) the appellant has for the year of assessment concerned, failed to prepare and deliver to the Service returns required to be furnished under the relevant provisions of the tax laws (b) the appeal is frivolous or vexatious or is an abuse of the appeal process (c) it is expedient to require the appellant to pay an amount as security for prosecuting the appeal.

19. Also, in **First Bank of Nigeria Ltd v. Taraba State Board of Internal Revenue, 2021 delivered on 30<sup>th</sup> November, 2012 by Tax Appeal Tribunal North East zone** the court held that the payment of a security deposit is not a condition precedent to the hearing of a tax appeal and any tax authority requiring of deposit under paragraph 15(7) of the Act must prove the existence of at least one of the conditions stipulated in the Act.

20. Furthermore, this issue was well settled, and given Judicial approval in ***Investment Holdings Limited v. FIRS (2022) 66 TLRN 52*** ("IHS v FIRS") the Tribunal provided clarity on the proper interpretation of the applicable provisions of paragraph 15(7) of the Fifth Schedule to the FIRS (Establishment) Act 2007 (as amended) (the "FIRS Act") and Order III Rule 6(a) of the TAT (Procedure) Rules 2021 (the "TAT Rules"). The TAT held, in those pivotal cases, that the security deposit requirement for the prosecution of tax appeals to the Tribunal is not mandatory under the FIRS Act and that the provisions of Order III Rule 6(a) of the TAT Rules are not enforceable against taxpayers.

## CONCLUSION

21. Taxpayers are encouraged to utilize all opportunities to apply to the striking down of the provision of the Practice Direction especially in the light of the provisions of the Constitution.
22. The requirement for taxpayers to fulfil certain conditions before being heard may appear progressive, but it still remains inconsistent with a fair hearing. We therefore urge that the Honourable Chief Judge issue a Practice Direction that reflects constitutional tenets and principles.



"... the **security deposit requirement** for the prosecution of tax appeals to the Tribunal is **not mandatory under the FIRS Act** and that the provisions of Order...."

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