
Jumping the tax gun?

How legitimate is the FIRS order to banks to freeze accounts of tax defaulters; what roles should banks play; and what recourse do taxpayers have?



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Did the FIRS jump the gun in directing banks to freeze accounts of taxpayers alleged to have defaulted in paying their taxes?

Did the banks jump the gun in obeying the order to freeze such accounts and should the taxpayer jump the gun to settle the alleged tax liabilities?

Where do we start?

According to Margaret Michelle, “Death, Taxes and Childbirth, there is no any convenient time for any of them”.

If you are reading this article then chances are that you have never been dead before and for many of us we will never experience childbirth. However it is difficult to disagree with Margaret Michelle. No one is really excited to part with their hard earned money to pay tax to government, not even civil servants who are paid with taxpayers’ money, or elected officials who have the rare privilege to manage taxpayers’ money or the tax officers themselves who are charged with the responsibility of enforcing and collecting taxes. So why is it so difficult to pay tax?

The definition of tax may provide some hints. Tax is any compulsory payment to government imposed by law for which there is no direct or proportionate benefit to the payer. Therefore the major difference between tax and other expenses incurred by a taxpayer is that the benefit derived from paying taxes is not a function of the tax paid hence people would rationally want to avoid paying taxes if possible.

Is the unconventional tax collection measure justifiable?

The Federal Inland Revenue Service (FIRS) recently commenced sending out letters to banks appointing them as tax collection agents for taxes considered payable by their named customers. In order to achieve this, the FIRS is directing the relevant banks to freeze the accounts of the taxpayers to prevent them from drawing funds from the accounts until the taxes have been fully settled.

Although there may be no convenient time to pay tax but the question is could there be a least inconvenient time and approach? Did the FIRS jump the gun in directing banks to freeze the accounts of taxpayers alleged to have defaulted in paying their taxes? Did the banks jump the gun in obeying the order to freeze such accounts and

should the taxpayer jump the gun to settle the alleged tax liabilities?

Does FIRS have powers to ask a bank to freeze accounts of a taxpayer?

The Federal Inland Revenue Services (Establishment) Act gives the FIRS powers to appoint any person as an agent of a taxpayer for the recovery of tax payable by the taxpayer from any money held by the agent on behalf of the taxpayer.

Section 31(1) provides that “The Service may by notice in writing appoint any person to be the agent of a taxable person if the circumstances provided in subsection (2) of this section makes it expedient to do so”. Subsection (2) provides that “The agent appointed under subsection (1) of this section may be required to pay any **tax payable** by the taxable person from any money which may be held by the agent ...”

In addition, subsection (4) empowers the FIRS to require any person to give information as to any money, fund or other assets which may be held by him for, or of any money due from him to, any person.

Similar provisions empowering the FIRS or States Board of Internal Revenue to appoint an agent exist under Section 49 of the Companies Income Tax Act (CITA), Section 50 of the Personal Income Tax Act (PITA), and Section 41 of the Value Added Tax Act (VATA).

When is the power exercisable?

The power granted to the tax authority under the various laws is to be exercised strictly under specific conditions. It does not confer the right on the FIRS or any tax authority to forcefully collect taxes that are under dispute or arbitrary tax assessments.

It is clear from the relevant provisions of the law that the power to appoint a tax agent only applies to a situation where there is (1) tax payable by the taxpayer and (2) the taxpayer has defaulted in paying.

A tax is ‘payable’ either when (1a) an assessment is undisputed or (1b) an assessment has become final and conclusive under the relevant provisions of the tax laws; and (2) the statutory time for payment has elapsed.

An assessment is undisputed where it results from a self-assessment by the taxpayer or where the taxpayer has specifically agreed to the assessment. On the other hand, a tax assessment can be

described as ‘final and conclusive’ where (1) the taxpayer fails to object within the time allowed by the law; or (2) the assessment has been determined by a competent court/tribunal and the taxpayer has not appealed within the time specified in the law.

Is the agent bound by the appointment?

The appointment, like any decision of the tax authority, can be challenged by the agent. Section 31(5) of the FIRS Establishment Act says “the provisions of this Act with respect to objections and appeals shall apply to any notice given under this section as if such notice were an assessment”. Section 31(3) of FIRS Establishment Act provides that “Where the agent defaults, the tax shall be recovered from him”.

The combined effect of the above provisions is that while the agent is obliged to comply with the directive, the agent is not to simply obey the order without questions. Although not specifically stated in the law, some logical questions to ask the tax authority in writing before acting include:

- 1) Evidence that the tax is payable, that is, the taxpayer has agreed to the assessment and it is not under dispute
- 2) Where the taxpayer has not agreed, then evidence to show that the tax has become final and conclusive
- 3) Confirmation that the time limit allowed by the law within which the tax must be paid has elapsed

Although section 50 of CITA provides an indemnity for the agent where it acts under the appointment of the FIRS, it will be irresponsible for an agent to oblige the appointment without first taking reasonable steps to establish that the tax is payable. It is also important to note that other than CITA, there are no similar indemnification provisions in the other laws hence the need to be diligent to avoid undesirable consequences.

What options are available to the taxpayer?

It is important for taxpayers to pay attention to their tax affairs and discharge their tax obligations as and when due on a consistent basis. This includes timely objection to tax assessments and proper documentation of correspondences with the tax authorities. In the event of an unwarranted

order to freeze a taxpayer's bank accounts, necessary actions may include the following:

- Request for a copy of the directive and supporting evidence of tax payable provided to the agent by the tax authority. This will enable the taxpayer provide a balanced perspective or fill in the gaps where the tax authority has only provided selected information.
- Support the agent in raising an objection to the letter of substitution. While the law does not expressly provide for this, there is good chance that a court would accept this approach on the basis that the taxpayer will ultimately suffer the tax liability and hence should have a right to be involved in the objection.
- Obtain a restraining order from the court to prevent the freezing of bank accounts and take legal action where necessary to prevent any unlawful distraint of their assets.

What is the way forward?

The power of substitution is a very important tool for the tax authority in recovering unpaid taxes especially from tax evaders. It is similar to a 'garnishee order' in many countries where the court may direct a third party (the agent) that owes money to the judgement debtor (the defaulting taxpayer) to instead pay the judgement creditor (the tax authority).

This power must however be exercised with caution and in accordance with the law to avoid negative impact on the business environment and ease of paying taxes. Even where the tax authority has powers to deem tax payable under certain conditions as specified in the law, this power is not to be exercised arbitrarily.

On the part of taxpayers, it is extremely important to attend promptly to all tax matters including assessments and keep appropriate records of their tax affairs. The days of tax matters being neglected without consequences are over for good.

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