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NDDC vs. RSBIR: Whose Assets Can Be "Distrained" Under the Personal Income Tax Act?

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INTRODUCTION

The drive to raise tax revenue for the governments has led to the increasing use of the statutory power to "distrain" taxpayers' assets by the tax authorities as a tax payment enforcement device. As expected, there have also been cases of abuse of that power by the tax authorities. Thankfully, the courts have been helpful in making pronouncements on the scope of the statutory power to "distrain" taxpayers' assets[1]. In the recent case of *NDDC vs. RSBIR (NDDC)*[2], the Nigerian Court of Appeal, Port Harcourt Division ("the Appeal Court") was called upon to interpret the statutory provision on the persons whose assets can be seized under the distress enforcement procedure of the Personal Income Tax Act, 1977 (as amended) ("PITA"). The Appeal Court has in effect held that a State Internal Revenue Service ("SIRS") lacks the statutory power to "distrain", by an *ex parte* application, the assets of an employer for non-remittance or under-remittance of Pay-As-You-Earn ("PAYE") tax which the employer is obliged to deduct from its employees' emoluments.

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[1] In *GT Bank Plc. v. ESBIR* (2018) LPELR-46307, the Court of Appeal held that a SIRS can only distrain a taxpayer where the taxpayer fails to pay an assessed amount after a "final and conclusive" assessment.

[2] (2020) 3 NWLR (Pt. 1711) 371 (CA).

FACTS

The Rivers State Board of Internal Revenue ("RSBIR") by an Originating Motion *Ex-parte* had commenced an action against the Niger Delta Development Commission ("NDDC") at the High Court of Rivers State ("the High Court"). RSBIR sought (i) an order that NDDC owed Rivers State 50 Billion Naira by way of PAYE tax liabilities, withholding tax and other taxes for the period from 2012 to 2017 and (ii) the issuance of a warrant authorizing RSBIR to levy, distress and distrain any land and or any other property belonging to NDDC, and to seize the same for the recovery of the sum owed. The High Court granted all the reliefs sought by RSBIR.

NDDC appealed against the decision to the Appeal Court. The Appeal Court unanimously allowed the appeal. The Appeal Court held that PITA s. 104 cannot be evoked against an employer whose obligation is merely to deduct PAYE tax from employees' emoluments and remit the same to the relevant SIRS. In other words, the statutory power to distrain can only be enforced against a "taxable person", that is the employees, and not against the employer in the circumstances. The Appeal Court, however, declined to pronounce on the constitutionality of PITA s. 104.

RATIONALE AND IMPLICATIONS

The Appeal Court's decision in <u>*NDDC*</u> is predicated primarily on the reading of two key provisions in PITA, ss. 104 and 108. PITA s. 104 provides as follows:

"(1) [W]ithout prejudice to any other power conferred on the relevant tax authority for the enforcement of payment of tax due from ***<u>a taxable person</u>*** *that has been properly served with an assessment which has become final and conclusive and a demand notice has been served upon the person in accordance with the provisions of this Part of this Act, or has been served upon the person, then, if payment of tax is not made within the time specified by the demand notice, the relevant tax authority may, in the prescribed form, for the purpose of enforcing payment of tax due-*

(a) distrain the taxpayer….
(b) distrain ... of which the taxpayer is the owner…" (Emphasis supplied).

The Appeal Court resolved that the power to distrain under PITA s. 104 is restricted to the "*enforcement of tax due from a <u>taxable person</u>*." The question then is whether an "employer" whose obligation is to deduct PAYE tax from its employees' emoluments and remit the same to the SIRS qualifies as a "taxable person" under PITA. The answer is "no".

A review of the interpretation section of PITA shows that both terms — "*person*" and "*taxable person*" — were distinctly defined. But, only "*taxable person*" was referred to in PITA s. 104, the section empowering the SIRS to enforce tax payments by levying distress on taxpayers. PITA s. 108 defines "*taxable person*"

as "*any individual or body of individuals (including a family, any corporation sole, trustee or executor)* ***having any income which is chargeable with tax under the provisions of this Act***" (Emphasis supplied).

The reasoning of the Appeal Court in NDDC is sound. Distress enforcement in PITA should not be executed on the assets of persons other than taxable persons (*e.g.* companies, statutory corporations, *etc.*). First, none of these entities is an "*individual or body of individuals*". Second, their income is not "*chargeable with tax under [PITA].*" A company's income is chargeable "with" tax under the Companies Income Tax Act or the Petroleum Profit Tax Act, as the case may be, and not under PITA. As employers, companies and statutory corporations are merely agents of the SIRS authorized by law to deduct PAYE taxes and remit the same to the relevant SIRS for the account of their employees. There is no basis for a SIRS to resort to the procedure explicitly set out solely to enforce tax payment on a "taxable person" for the recovery of a sum that an employer has deducted or failed to deduct from the taxable person.

Again, the decision in NDDC is apposite to the earlier decision of the Appeal Court regarding the position of an employer *vis-a-vis* the PAYE tax of its employees. In *7up Bottling Co. Plc v LSIRB*[3], Appeal Court held that an employer is not a "taxable person" under PITA, but merely an agent of the tax authority to collect and remit PAYE tax dues and, as such, has nothing to do with the issues relating to assessments and objections to the assessments of a "taxable person" under PITA. NDDC has in effect logically extended this to the power to levy distrain.

It is noteworthy that PITA has set out the statutory remedies to address the situation where an employer has failed to (i) deduct tax from its employees' remuneration or (ii) properly account for the taxes deducted to the relevant SIRS. Distressing the employer's assets is not one of the remedies set out and thus cannot be used against the employer without statutory authorization. PITA s. 82 provides that:

"*in the event of failure by the employer to make the deduction, or properly to account therefor, the amount thereof together with a penalty of 10 percent per annum of the amount plus interest at the prevailing commercial rate* ***shall be recoverable as a debt due by the employer to the relevant tax authority***." (Emphasis supplied).

The amount that the employer failed to deduct or has deducted but failed to account for is recoverable as a debt attracting interest of 10% *per annum.* Debts are not ordinarily recoverable by an *ex parte* application to distrain the debtor's assets. An employer could also be liable for criminal prosecution for failure to file PAYE tax returns of its employees within the stipulated timeline (PITA s. 81(3)).

[3] (2000) 3 NWLR (Pt. 650) 565.

The Appeal Court in *NDDC* has thus construed PITA ss. 104 and 108 liberally by holding that only a "*taxable person*" can suffer distress. The decision is a welcome development. It has clearly defined the ambit of PITA s. 104 regarding the persons whose assets may be distrained for personal income tax. There are increasing cases of abuse of the power to distrain by the tax authority. An application to levy distress is made *ex parte*[4]. The party against whom it is directed, thus, has no opportunity to challenge the same before the order has been made and/or possibly enforced with the attendant consequences. Since the exercise of the power to distrain can affect the proprietary interest of the person whose assets are distrained, it should be strictly restricted to the person named in the statute.

CONCLUSION

Based on the foregoing, any employer whose assets have been unjustly distrained by a tax authority pursuant to an order of the court may now appeal against such order or consult its professional advisers in order to ascertain the correctness or otherwise of such distress order.

[4] PITA s. 104(4).

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