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I am also of the opinion that it is not an immediate option to reconstitute the LPDC according to Laws of Federation 2004, as the provisions of the Act are *impari materia* with the Legal Practitioners Act 1975 (relating to the Discipline of Lawyers) and this had been held to be unconstitutional in *LPDC v Chief Gani Fawehinmi*.

Conclusion

While this may look very gloomy for the march towards self regulation and the discipline of lawyers within the profession and indeed the administration of justice in Nigeria, we are however reassured like every good Christian, that not every obituary may necessarily result in final burial (as the Power of Resurrection still exists).

This position can still be remedied if the critical stakeholders within the Legal Profession as a matter of National Emergency; (the Hon. Attorney General, the Nigerian Bar Association, the Body of Benchers and most importantly the National Assembly and the Executive arm of Government) rise up to this challenge and amend the Legal Practitioners Act, to reflect the critical amendments of Decree 21 of 1994, or, by the enactment of a new LPA, taking into consideration the concerns in the *Gani Fawehinmi's* case.

Any other action to purportedly bring alive the Decree 21 of 1994 without a recourse to the National Assembly may be an exercise in futility, as the operative word in the Supreme Court decision in the *Akintokun's* case was that Decree 21 had been repealed by implication by the LFN 2004.

While (with respect) one may not agree with the reasoning behind the decision in the *Akintokun's* case especially (1) on the interpretation placed on the Laws of the Federation of Nigeria 2007 on the issue of inadvertence/ omissions with the 2004 LFN compilation by the Law Reform Committee, and (2) the decision that laws can be repealed by implication which may seem to conflict with the Supreme Court's earlier decision in *Joseph Ibadapo vs. Lufthansa Airlines*,¹⁵ where the Supreme Court held that Statutes cannot be repealed by implication, the *Akintokun's* case is the law today, until the Legal Practitioners Act is amended and/or the Supreme Court has another opportunity to revisit the issue of discipline of lawyers in Nigeria, the Nigerian Bar Association President cannot do much given the present circumstances to address the concerns of the Chief Justice of Nigeria and indeed the public perception of Lawyers.

INVESTIGATING TAX CRIMES AND PROTECTION OF HUMAN RIGHTS IN NIGERIA⁴

Abstract

Enforcement is a fundamental imperative of a good tax system as it constitutes a benchmark for measuring the standard for effective tax administration. It encapsulates surveillance, search and seizure among others. The two concepts are valuable in the detection of tax crimes. The essentiality of the duo in tax enforcement and the fact that their operations may interfere with human rights of tax payers recognized by the Constitution make them attractive to scholarly scrutiny. Therefore, this paper analyzes their legal frameworks and nature within the context of the constitutional jurisprudence with the view to finding out the available safeguards to them. The paper finds that the absolute nature of section 37 of the Nigerian 1999 Constitution as amended creates a general right of immunity for surveillance against the collective rights of the public. Therefore, it recommends a proviso to the section to accommodate lawful justification for surveillance. It further suggests the need for effective safeguards to be imposed by law as against mere administrative policy.

1.1 Introduction

Tax is a means of providing government with regular, dependable and continuous source of revenue. It is a compulsory exaction of money by the government for public purposes⁵. To ensure optimal revenue generation tax requires efficient enforcement mechanism which is a fundamental imperative of a good tax system because it constitutes a bench mark for measuring the standard for effective tax administration.

Before any enforcement instrument is applied on a targeted tax payer, his tax affairs and planning must have been placed under keen watch and thorough investigation by tax administrators. Certainly, their operations usually interfere with existing fundamental human rights of tax payers already recognized by the Constitution. Therefore, in view of the fundamental nature of investigation in tax enforcement, which by extension includes surveillance, search and seizure, this paper analyzes their legal frameworks within the purview of various Nigerian tax statutes. It also examines their nature under the tax enforcement system and the available safeguards to them in order to avoid unnecessary encroachment on tax payers' human rights.

Conceptual Clarifications

Tax investigation is a pre-requisite component to enforcement. It is a critical process which involves in-depth examination of accounts, books and transactions for the purpose of detecting tax fraud and evasion. It is a one-off exercise conducted into the affairs of a tax payer upon reasonable suspicion of element of tax delinquencies¹. It is a thorough examination into the tax affairs of a tax payer suspected to be involved in tax fraud; negligence, making incorrect returns, false statement and returns among others. The suspicion envisaged here is the apprehension or imagination of the existence of tax fraud or element of it based only on inconclusive or slight evidence or possibly even no evidence at all. It is worthy of mention that it is not every suspicion that can engender tax investigation. The suspicion must be reasonably borne out of available evidence and must premised on particularized and,

Objective basis supported by specific and articulable facts for suspecting a tax payer of tax fraud². Broadly speaking, the crux of tax investigation is to secure maximum possible voluntary tax compliance through a balanced programme of audit and surveillance. It aims principally at recovery of taxes; imposition of penalties to serve as deterrence to prospective tax evaders and to educate tax payers on the need to discharge their tax obligations promptly³. It involves two principal stages which are surveillance and search and seizure.

Surveillance involves close observation on a particular tax payer in the hope of gathering information useful as material evidence. The tax authority can achieve this by employing different techniques to obtain information about a particular tax payer but curious mind may want to know if this may not make the tax authority culpable for encroaching on the right to privacy of such individual. Although the FIRS (Establishment) Act 2007 and other tax statutes do not state any particular technique of surveillance to be used by the tax authority but it may involve breaking into a tax payer's home and rifling through his personal effects. It may also involve the use of bugging devices like concealed microphone used for recording conversations and the interception of communications by way of telephone tapping or any other various kinds⁴. Whichever modes it takes, surveillance may manifest in various types. It may be directed, intrusive and covert human intelligence sources. Surveillance is directed if it is undertaken for the purpose of a specific operation to obtain private information about a person. The private information envisaged herein includes any information relating to a tax payer's private business. The information may reveal actual tax crime committed or anticipated tax crime to be committed by a taxpayer. Surveillance is intrusive if it is carried out in relation to anything taken place on any residential or business premises or involves the presence of an individual on the premises such as a paid informer or some who is concealed. Covert human intelligence sources may be informants, agents or undercover officers⁵. Any of these types may be used by the relevant tax authority provided their purpose is for the prevention and detection of tax crime.

Juridical Basis for Tax Investigation

The Federal Inland Revenue Service (Establishment) Act 2007 and all other relevant tax laws have copious provisions that empower the relevant tax authorities to arrest and conduct tax investigation leading to either civil or criminal prosecution⁶. To actualize this, the FIRS is mandated to employ special purpose tax officers to assist any relevant law enforcement agency in the investigation of any offence under the Act⁷. Notwithstanding anything to the contrary in any other enactment or law, the service has the power to investigate or cause investigation to be conducted to ascertain any violation of any tax law whether or not such violation has been reported to the service⁸. This imbued the authorized tax investigator/auditor with the leverage to have free access at all

¹ A.W Bradley *et al*, *Constitutional and Administrative Law* (4th edition: Pearson Longman, England, 2007), at 517.

² *Ibid* at 517.

³ *Ibid* at 517.

⁴ *Ibid* at 517.

⁵ *Ibid* at 517.

⁶ *Ibid* at 517.

⁷ *Ibid* at 517.

⁸ *Ibid* at 517.

reasonable times to all lands, buildings, places, books and documents in the custody of a perceived tax evader for the purpose of inspecting any of those items relevant for the purpose of collecting any tax¹⁰. In other words, nothing can preclude the Federal Inland Revenue Service from verifying by tax audit or investigation into any matter relating to any return or entry in any book, document, accounts including those stored in a computer, digital or magnetic, optical or electronic media as may from time to time, be specified in any guideline by the service¹¹. It is a common knowledge nowadays that corruption is a bane afflicting all facets of development in Nigeria. Tax proceeds are being diverted by members of the political and economic class by way of corrupt enrichment. Many are living above their legitimate incomes. The enactment of the FIRS (Establishment) Act in 2007 is a watershed as it introduces surveillance on targeted tax payer and his properties¹².

By virtue of section 35(2) of the FIRS (Establishment) Act 2007 the Service has the power to cause investigation to be conducted into the property of any taxable person if it appears to the Service that the lifestyle of the person and extent of the properties are not justified by his source of income. This provision approves interference with the property of such taxable person and undercover operations on his lifestyle. These can only be possible if the relevant tax authority mounts secret surveillance and conduct search on the business activities of a target tax payer. The relevant tax authority may source the information from an employee or former employee of a tax payer without breaching the right of the tax payer to confidential information. A clear authority in this regard is *Initial Services Limited v. Putterill & Anor*¹³ where a laundry company's sales manager resigned. When he left he took with him documents from the company's file. These he delivered to newspaper reporters, to whom he also gave information about the company's affairs. The newspaper published an article exposing the fraud allegedly committed by the laundry company which misleads the public. The laundry company alleged that it was an implied term of the first defendant's contract of service that during his employment and after its termination he should not disclose to strangers confidential information relating to the company obtained by him in the course of or as a result of such employment. The first defendant (Retired Sales Manager of the company) alleged among others that the company increased their charges sometimes in July, 1976 and that the

increased charges were calculated to bring in approximately 17,000 pounds more revenue and that notwithstanding the profit so calculated, the company issued a circular stating that the increased charges were mainly to offset the selective employment tax, thus misleading the public. The court held that:

In the employment of every servant there is implied obligation that he will not, before or after his service, disclosed information or documents which he has received in confidence. It is imposed by law. But it is subject to exceptions... where the master has been guilty of a crime or fraud... it extends also to any misconduct of such a nature that it ought in the public interest to be disclosed to others... There is no confidence as to the disclosure of iniquity¹⁴.

In other words, the exception should extend to crimes, frauds and misdeeds both the ones actually committed as well as those in contemplation, provided always and essentially too that the disclosure is justified in the public interest¹⁵. Tax crime is required to be disclosed in the public interest and no confidence can be prayed in aid to keep it secret.

Surveillance and Constitutional Right to Privacy

Although Nigerian tax laws do not make placing of someone under surveillance unlawful but there are circumstances where various types of surveillance may be unlawful. One of it is where the surveillance involves an interference with existing rights already recognized by the law¹⁶. Section 37 of the 1999 Constitution of Nigeria as amended guarantees and protects the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications. This constitutional provision accommodates no exception. In any event, it implies on the face value that tax payers who are to be victims of surveillance are protected from public attention to intrusion into or interference with their acts or

decisions. Can one then say that this provision of the constitution is absolute? To arrive at a correct answer, one must consider the fact that the power given to special purpose tax officers to detect and investigate tax crimes is contemporaneous with police power to detect and prevent crimes. It is a fundamental power essential to government. Tax crime is innocuous to the Nigeria. It is an iniquity and as such the right to privacy guaranteed under section 37 of the constitution should be considered with due regard to collective rights of others, collective security and common interest. The reason is because no private obligations can dispense with the universal one which lies on every member of the society to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare.¹⁷ In other words, interception of communication by way of surveillance though recognized as a patent invasion of individuals' privacy, it can and should occur only when it is properly justified¹⁸. Therefore, section 37 of the Constitution desires a provision to accommodate and permit the justifications. At least one can be persuaded by the authority of *Malone v. Commissioner of Metropolitan Police* (No. 2)¹⁹ where the central issue for determination was whether telephone tapping in aid of the police in their functions relating to crime is illegal in view of the explicit provisions of Articles 8 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. Article 8 of the Convention provides:

- (i) Everyone has the right to respect for his private and family life, his home and his correspondence;
- (ii) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 13 further provides that:

Everyone whose rights and freedoms as set forth in this convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in official capacity.

It was the contention of the Plaintiff's counsel that to tap a person's telephone conversation without his consent was unlawful because that person had rights of property in his words as telephone system, and so the tapping constituted interference with his property rights. In essence, the counsel rested his argument on the right of property, right of privacy and on the right of confidentiality.

The basic contention of counsel for the Defendant was to the contrary. This was that, apart from certain limited statutory provisions, there was nothing to make governmental telephone tapping illegal. That being so there is no general right to immunity from such tapping. In his well considered judgment, Sir Robert Megarry, VC, held:

One has to approach these matters with some measure of balance and common sense. The rights and liberties of a telephone subscriber are indeed important; but so also are desires of the great bulk of the population not to be the victims of assault, theft or other crimes. The detection and prosecution of criminals and the discovery of projected crimes are important weapons in protecting the public. In the nature of things it will be virtually impossible to know beforehand whether any particular telephone conversation will be criminal in nature. The question is not whether there is a conspiracy that the conversation tapped will be incriminating, but whether there is a crime.

tapping. If certain requirements are satisfied... there will plainly be just cause or excuse for what is done by or on behalf of the police.

Whatever it is, surveillance is valuable in the detection of tax crimes. However, there is need for effective safeguards to be imposed by law. What obtains in Nigeria on surveillance is mere administrative policy which is not only inadequate but cannot constitute a vibrant legal ground to challenge any illegality or irregularity relating to it. Therefore, there is need for juridical safeguards before the right to privacy or any human rights and freedoms can be secured to any taxable person. These are what the above quoted authority referred to as "certain requirements of law to be satisfied".

Safeguards of System of Surveillance

Although there is no known statutory authority particularly in Nigerian tax laws that has bearing directly in any way on safeguards to surveillance. However, the absence of any authority certainly does not establish that no such safeguards exist. After all there was a time when there were no precedents, and anything that could be done with precedents can equally be done without them²⁶. Therefore, if authority on a point is lacking, neither equity nor common law is incapable of filling the gap in a proper case²⁷. The European Court of Human Rights in *Klass v. Federal Republic of Germany*²⁸ had cause to determine a case that challenged absence of safeguards to government surveillance.

It was a case referred to the European court of Human Rights Commission in respect of an application by five German citizens against the Federal Republic of Germany under the convention. The complaint in the case was that a statute of the Republic which was called "the G10" was contrary to the convention in that, in permitting governmental surveillance of the post and telecommunications. The grounds of the complaint were that the statute did not oblige the authorities in every case to notify those concerned after the surveillance and that the statute excluded any remedy in the courts against ordering and executing surveillance. There was no challenge to the right of the state to carry out the surveillance. The challenge was as to the absence of the necessary safeguards²⁹. The German

court in resolving the matter laid down a series of power of surveillance. Adapting them to tax law particularly in the absence of any in Nigeria, the powers may be used in the following circumstances:

- a. There must be factual indications for suspecting a person of planning, committing or having committed certain tax crimes.
- b. No surveillance to detect tax crimes is permitted unless other methods of detection have no prospect of success or are considerably more difficult.
- c. An application for surveillance may be made in writing by an authorized officer of FIRS stating reasons for it on oath. The application envisaged herein is a judicial application i.e. Motion Ex-parte.
- d. The order for surveillance must be made by the court.
- e. Surveillance must cease when it is no longer necessary or the requisite conditions have ceased to exist.
- f. The person subjected to surveillance must be notified of it as soon as this will not prejudice its purpose.
- g. There must be avenue for the person to challenge its legality in court.

It should be noted that a person who suspects that he is under surveillance may apply to court. The court may require the tax authorities to supply information or produce documents, even if secret. This will enable the court to decide whether the information or documents may be used. Once notified of a surveillance, the person concerned may have the legality and conformity of the surveillance reviewed in an action for a declaration. He may sue for damages if he has been prejudiced or sue for the destruction or restitution of the documents³⁰. If all the safeguards mentioned here are observed, one can say there is adequate and effective guarantee against abuse.

Search and Seizure

The next stage after surveillance is search and seizure. The relevant tax authority is vested with the power to enter and conduct a search in respect of a trade, vocation, profession or business carried on in Nigeria by an individual or a company³¹. The tax authority must be satisfied that there is a reasonable ground for suspecting that an offence involving any form of total or partial non-disclosure of information or any irregularity in an offence in connection with or in relation to tax has been committed³².

Coupled with this, it must have formed the opinion that evidence of the offence or irregularity is to be found in the premises, the registered office or place of management of the trade, vocation, profession or business or in the residence of the principal officer, factor, agent or representative of the individual²⁷. The opinion and satisfaction of the relevant tax authority is not just conceptualized in the whims and caprices of the tax officer. The investigation and intelligence section of the relevant tax authority must bring to bear its honest and investigative skills and wills to entrap the individual concerned. In other words, the tax officer must have the fore knowledge of prima facie credible information regarding evasion of tax by the assessee.

The relevant tax authority may authorize any of its officers to enter, if necessary by force, the premises or place of management or residence of the said individual at any time from the date of authorization to conduct the search²⁸.

The phrase "at any time" does not suggest a blanket opportunity for the tax officer to conduct the search at odd times. The authority to enter and conduct search must be in the form contained in the precedent of the warrant in the eighth schedule of the Personal Income Tax Act. In that regard therefore, the search must be in the daytime.

Issuance and validity of search warrant

The authority given to tax officials to enter premises to conduct a search can only be carried out with warrant issued by Inland/Internal Revenue²⁹. The word "warrant" simply means a document issued by a person in authority under power conferred in that behalf authorizing the doing of an act which would otherwise be illegal³⁰. The person affected has the right to be satisfied that the power to issue it exists. It therefore means the warrant should contain a reference to that power. Who then has the power to issue search warrant? It is imperative to examine the provisions of two different tax laws in Nigeria.

While Section 36 (3) of FIRS Act, 2007 provides that for any tax officer to enter business premises to conduct search, he must be armed with the warrant issued by a judicial officer; section 53 (2) as well as Eight Schedule to Personal Income Tax Act, 2004 as amended provides that such a warrant

must be signed by the chairman of the Board of Internal Revenue. So also while this paper is comfortable with the position of the law under the FIRS Act, it is not with the one under the PITA as allowing the chairman of the Board of Internal Revenue to issue search warrant may be a flagrant usurpation of judicial power of the court. Going by the above definition of warrant, it has the same status with warrant of arrest under criminal proceedings or at best being a writ, it has to be a judicial order authorizing or directing a revenue officer to conduct search. In that regard, it is only a judicial officer and not executive or administrative officer that is qualified to issue it. This paper asserts that authorizing the chairman of Board of Internal Revenue to sign or issue the warrant portends danger as the power may be abused for political advantage especially in Nigeria where fiscal mechanism and political aspect are not treated as independent variables. Nevertheless, having been armed with the warrant, the tax officer can search, seize and remove any records, documents and anything whatsoever found therein³¹. He should bear in mind while on this tax drive that he is not on a mission to distraint, as the tax payer under this section is not in default of payment of tax yet. Therefore, anything whatsoever found in the premises envisaged by the Act are synonymous with records, files, documents, computer system or any other information storage system which the tax officer has reasonable cause to believe may be required for the purposes of arriving at a fair and correct tax chargeable on the individual or as evidence for the purposes of a proceedings in respect of offences of non-disclosure of relevant information to the tax authority³².

It is the view of this paper that the principles applicable to issue of search warrants under the criminal procedure code equally applied to searches and seizures made under tax laws³³. From the content of the precedent of warrant and authority to enter premises in Eight Schedule to the Personal Income Tax Act, the warrant has no prescribed life span. In other words, its validity is not affected, if not executed within the month or year of issue. It is equally not invalid only for non-indication of the nature of the things, which might be seized and removed. In other words it is not necessary that the warrant should specify particular books of account or document to be seized. A blank authorization to search and seize any papers that may be found is not bad in law. It cannot be expected that at the stage of search, there must be conclusive proof of the relevancy or usefulness of the materials seized. All that is necessary is that the tax

officer (s) must act honestly and believe, as reasonable persons, that that material would be relevant or useful. It may be that in a particular case, having regard to the magnitude of suspected evasion, a large quantity of material may have to be seized; that by itself does not make the search mala-fide²⁴. To require specification at the investigatory stage would be impracticable given the complexity of tax frauds and the different person who may be involved²⁵. More importantly that the Personal Income Tax Act and other tax laws in Nigeria do not prescribe that such a warrant must be in a particular form. It does not say that it must state that requirement for its issue has been complied with. If the warrants after stating to whom the warrants were addressed, had just stated that the persons named in it were authorized to enter and to search the premises named, there cannot be a ground on which their validity could have been successfully challenged²⁶. In other words the warrants cannot be successfully attacked on the ground that they do not sufficiently particularized the offences to which they refer²⁷.

It is equally a requirement of the law that the inventories of anything seized or surrendered under the authority of the warrant must be made known to the person appearing to be the custodian of those items seized if it is so required by that person²⁸. Before, during or after a warrant of search is or has been executed on a person, he may be called upon to attend interview before an officer of the relevant tax authority in connection with the activities of the trade or business of the person as would enable the relevant tax authority to arrive at a fair and correct tax liability of the person²⁹.

An individual on whom a warrant of search is served shall cooperate fully with any person (i.e. tax officer) authorized to conduct a search by allowing him easy access to the premises to be searched and to the items or documents that may be required for the investigation. Not only this, he must answer all questions and queries put to him in the course of the search, as well as to assist the investigation³⁰.

²⁴ See *A. Another v. Commissioner of Inland Revenue Ltd* (1980) 511 (P.S.), see also the case of *George Prasad v. I.R.C.* (1981) 118 (P.S.).

²⁵ See *Attorney-General v. Guardian Newspapers Ltd* (1959) 138 (P.S.).

²⁶ See *Attorney-General v. Guardian Newspapers Ltd* (1959) 138 (P.S.).

Warrants and tax payers' fundamental human right

After the relevant tax officer, applying his mind and giving serious thought and consideration, issues a warrant of search and seizure, can it be said that the act violates the assessee's fundamental human right to privacy?³¹ Can it also be said to have expropriated the assessee's property thereby infringes his right to own immovable property?³² The judicial authorities have different views on this issue. To some, though the integrity and privacy of man's house and of his place of business are important human right. However the right may be eroded by a number of statutes passed by the parliament in the belief presumably that this right of privacy ought in some cases to be overridden by the interest, which the public has in preventing evasion of the tax law. Some of these powers of search are reflections of the regime of heavy taxation³³. To others, to issue search warrants which are based on no more than suspicion is an unnecessary power, which dangerously encroaches on individual liberty. It can lead to disastrous results for persons who may be innocent of fraud³⁴. In the emphatic word of Lord Salmon in *JRC v. Rossminster Ltd*³⁵:

It is very much in the public interest that anyone who commits an offence involving any form of fraud in relation to tax, a very grave offence, should be brought to justice.

It is at least equally in the public interest that individual liberty should be protected by the judges who have the traditional right and duty to protect individuals from an abuse of power by the executive. Accordingly, it will be unlawful for any officer of the Inland Revenue or any member of the police to force his way into the home or business premises of any person and search for and seize any documents he might find there, even if he believed that there was reasonable ground for suspecting that an offence involving any form of fraud in relation to tax had been committed and that the document seized might be required as evidence for the purpose of proceedings in respect of the offence which he suspected.

However, the dictum of Lord Camden in *Lizick v. Carington*³⁶ settles the controversy. He said that

No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing. . . if he admits the facts, he is bound to show by way of justification, that some positive law has empowered or excused him.

LEGAL APPROACH TO COMPUTERS IN CYBERCRIME ENFORCEMENT IN A CHANGING WORLD*

Abstract

The dynamic nature of the world and the emergence of technological improvements in computers have paved the way for variety of devices with varying degrees of sophistication and complexity. Consequently, in determining the prosecution and guilt of cybercrime and computer related crime perpetrators in juxtaposition to the devices used in carrying out their acts, raises legal quagmire as to what should be regarded as "computers" or "computer systems". In this respect, an international instrument can play an important role in facilitating a global harmonization of what "computers" or "computer systems" are; domestic cyber policies and laws should conform to changing tides by constantly undergoing legislative amendments and judicial personnel ought to take judicial notice of modern technological advancement, must not shut her eyes to the mysteries of computers.

Introduction

Products and inventions have been made by man as a result of his infinite quest for knowledge. Due to the numerous nature of these inventions and the changes they bring to the society, it has become an odious task to keep pace with them. Computer is one of such unique inventions. The role of computers in our world today as well as its relevance to societal advancement cannot be over emphasized. The era of globalization has introduced myriad of concerns and developments in the growth of modern and sophisticated computers. Almost all facets of the society have been greatly affected by this new wave in technological advancement and