

**THE CONSTITUTIONALITY OF THE POWER TO  
DISTRAIN FOR NON-PAYMENT OF TAX: INDEPENDENT  
TELEVISION/RADIO V. EDO STATE BOARD OF  
INTERNAL REVENUE IN PERSPECTIVE**

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**Abstract**

The realization of the power to distrain as an expeditious means of enforcing payment of tax has undoubtedly increased the tempo and drive for revenue generation by different tiers of government in Nigeria. The apathy many Nigerians (including corporate bodies) show towards payment of tax coupled with the increase in government spending presumably led tax authorities and their advisers to dust up tax statutes to find legitimate ways of shoring up revenue accruing to the Federation and the States, including Local Governments. This renewed effort, is however, not without perceived abuses, thus raising concerns in some quarters over the desirability or otherwise of retaining the power to distrain in our tax statutes. This paper looks critically at the recent decision of the Court of Appeal, Benin Division in the case of *Independent Television/Radio v. Edo State Board of Inland Revenue*, on the constitutionality or otherwise of the power to distrain the property of tax defaulters. The paper also examines the issue of fair hearing as it relates to the procedure laid down by the relevant statute to enforce payment. Finally, the paper proposes ways of achieving the tax authority's objectives without encroaching on the tax payer's rights.

**Introduction**

Enforcement remains a problem in the administration of tax. The often cited factors for this are weak legislation, slow pace or overwork of Tax Appeal Commissioners and seemingly slow pace at which tax cases in court are handled.<sup>1</sup>

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<sup>1</sup> Awosan, E.A., Tax System and Administration in Nigeria p.175 (being a memorandum to the Study Group of Nigeria Tax System and Administration) in Report of Study Group on Nigeria Tax System and Administration, 1991, Lagos cited by Agbonika, J.A.C, Problems of Personal Income Tax in Nigeria, Ababa Press Ltd, 2012, 380.

The above observation may have impelled the legislature to broaden the powers of the relevant tax collection authorities by empowering them to exercise the power to distrain. This was done by amending the relevant provision of the Personal Income Tax Act<sup>2</sup>. The power to distrain is one of the powers statutorily conferred on the tax authority to enforce payment of tax due to it from tax defaulters.

What then does it mean to distrain? The Black's Law Dictionary defines it as "to force a person by the seizure and detention of personal property to perform an obligation or to seize goods by distress". It defines distress as the "seizure of another's property to secure the performance of a duty"<sup>3</sup>.

### **The Origin of the Power to Distrain at Common Law**

The power to distrain has its origin at Common Law. In an article titled "The Abolition of Distress and the new statutory regime of CRAR", Shea, Caroline<sup>4</sup> examined the historical background of distress, why change was deemed necessary and a critical appraisal of the new statutory regime in the United Kingdom. According to her "distress is an ancient remedy whereby the goods of a tenant in arrears were liable to be seized by the landlord in order to pressurize the tenant into paying overdue rent. The doctrine arose from earliest times at common law as a necessary incident to every rent-service. Even ancient commentators disclaim knowledge of its precise source: "from whenever the name or ... the notion came, the remedy obtained so early in our law, that we have no memorial of its origin with us". (Gilbert, *The Law and Practice of Distresses and Replevin* (3<sup>rd</sup> ed; 1994) p.2)<sup>5</sup>.

Sequel to the public outcry over the exercise of the power, the Law Commission in its report of 1991 "decided that distress

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<sup>2</sup> S. 29 of the Personal Income Tax (Amendment) Act 2011 amended S. 104 of the Principal Act by substituting therefor a new S. 104.

<sup>3</sup> Garner, B.A, *Black's Law Dictionary*, 9<sup>th</sup> edition, (st. Paul, MN, West, 2009) 542.

<sup>4</sup> [www.falcom.chambers.com](http://www.falcom.chambers.com) – accessed on April 12, 2016 at 11.33 pm.

<sup>5</sup> *Ibid*, p. 1.

was a thoroughly bad thing and total abolition was proposed<sup>6</sup>. The Law Commission said that distress was “wrong in principle because it offers extra-judicial debt enforcement remedy in circumstances which are, because of its intrinsic nature, the way in which it arises and the manner of its exercise, unjust to debtors, to other creditors, and to third parties”.<sup>7</sup>

Four characteristics of distress to which particular objection was taken were identified. Firstly, the levying of distress affords priority to landlords over creditors. Secondly the availability of the remedy renders third party goods vulnerable. Thirdly distress causes harshness as a result of the limited opportunity for the tenant to challenge the landlord’s claim, the scope for the rules of distress to be abused, the unexpected intrusion into a tenant’s property and the possibility of the sale of goods at an undervalue. Fourthly, distress involves disregard of the tenant’s circumstances, which demonstrates its general lack of recognition of a modern approach to debt enforcement.<sup>8</sup>

Government’s response to the above criticisms was the passing of Tribunals, Courts and Enforcement Act 2007. Under S.71 of the 2007 Act, “the common law right to distrain for arrears of rent is abolished”, except in Scotland. The new regime provides for limited circumstances in which a “landlord under a lease of commercial premises” may “take control of goods to recover rent payable under the lease”. This is referred to in S. 72(2) of the Act as “Commercial Rent Arrears Recovery” (CRAR)<sup>9</sup>.

The history of the introduction and application of the power to distrain to tax matters at common law appears hazy. However, distraint was adopted into the United States common law from England. The application of the power to distrain by the federal government for collection of taxes dates back to the year 1791

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<sup>6</sup> Ibid, p. 2.

<sup>7</sup> Ibid, pp. 2 – 3.

<sup>8</sup> Ibid, p. 3.

<sup>9</sup> Ibid, p. 5.

according to the U.S Supreme Court in the case of *Phillips v. Commissioner*<sup>10</sup>.

The law, which unequivocally establishes the application of the power to distrain to tax matters in the United Kingdom, is the Tax Management Act 1970, (an Act to consolidate certain of the enactments relating to income tax, capital gains tax and corporation tax, including certain enactments relating also to other taxes). Section 61(1) (2) (3) (4) and (5) of the Act provides:

- (1) if a person neglects or refuses to pay the sum charged, upon demand made by the collector, the collector shall, for non-payment thereof, distrain upon the lands, tenements and premises in respect of which the tax is charged, or distrain the person charged by his goods and chattels, and all as the collector is hereby authorized to distrain.
- (2) for the purpose of levying any such distress, a collector, may, after obtaining a warrant for the purpose signed by the General Commissioners, break open, in the daytime, any house or premises, calling to his assistance any constable. Every such constable shall, when so required aid and assist the collector in the execution of the warrant and in levying the distress in the house or premises.
- (3) a levy or warrant to break open shall be executed by, or under the direction of, and in the presence of the collector.
- (4) a distress levied by the collector shall be kept for five days, at the cost and charges of the person neglecting or refusing to pay.
- (5) If the person aforesaid does not pay the sum due, together with the costs and charges, within the said five days, the distress shall be appraised by two or

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<sup>10</sup> 283, U. S. 589, n.5 (1931), available at <https://en.wikipedia.org>. Accessed 25/8/2015.

make inhabitants of the parish in which the distress is taken or by other sufficient persons, and shall be sold by public auction by the collector for payment of the sum due and all costs and charges. The cost and charges of taking, keeping, and selling the distress shall be retained by the collector, and any over plus coming by the distress, after the deduction of the costs and charges and of the sum due, shall be restored to the owner of the goods distrained.

The above provisions are very similar to the provisions under the extant Nigerian law. One of the duties of every citizen is to declare his income honestly to appropriate and lawful agencies and pay his tax promptly<sup>11</sup>. The power to distrain for non-payment of tax is one of the vehicles for enforcing the constitutionally guaranteed duty of citizens to pay tax where there is a default.

**A Brief Examination of the Provisions of Section 104 of the Personal Income Tax Act (PITA) and Section 86 of the Companies Income Tax Act (CITA) on Power to Distrain**

Section 29 of the Personal Income Tax (Amendment) Act 2011 has substituted a new section 104 for the old section 104 of the principal Act (PITA).<sup>12</sup> It now has eight subsections as opposed to the six subsections under the old section 104 of the Personal Income Tax Act not only spells the exercise of the power to distrain but also the procedure for the exercise of same by the relevant tax authority to enforce payment of tax due to it from a defaulting tax payer.

Section 104(1) of the Act provides:

Without prejudice to any other power conferred on the relevant tax authority for the enforcement of payment of tax due from a taxable person that has been properly

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<sup>11</sup> S. 24(f) of The Constitution of the Federal Republic of Nigeria 1999 (as amended).

<sup>12</sup> Personal Income Tax Act Cap P8 LFN 2010 (hereinafter PITA).

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 tax payer by his goods, other chattels, bond, or other securities; or
- (b) distrain upon any land, premises or places in respect of which the tax payer is the owner and subject to the provisions of this section, recover the amount of tax due by sale of anything distrained.

The conditions precedent to the exercise of the power to distrain for non-payment of tax under the above subsection are:

#### **1. Service of Notice of Assessment.**

Under section 57 of Personal Income Tax Act (PITA) notice of assessment must be served on the tax payer by the relevant tax authority. The mode of service of the notice of assessment has been expanded by the amendment of the Principal Act (PITA) by section 13 of the Personal Income Tax (Amendment) Act 2011 (PITAA) by the insertion of the words “or courier service or electronic mail” immediately after the words “registered post”. According to Elegido, J. M., assessment is the process by which the tax liability of a taxpayer is qualified.<sup>13</sup> It

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<sup>13</sup> Elegido, J. M., “Void Assessments to Income Tax in Nigeria” J. A. L. 32, No. 1 (1988). 45 cited by Umenweke, M. N., Tax Law and its Implications for Foreign Investments in Nigeria, (Enugu, Nolix Educational Publications, 2008, 246.

involves the computation of the tax payable by the taxpayer using judgment by the tax authority.<sup>14</sup>

Section 68 of the Companies Income Tax Act<sup>15</sup> deals with service of the notice of Assessment on corporate Bodies. However, section 86(1) of CITA omits service of notice of assessment on a taxpayer as a condition precedent to the exercise of the power to distrain by the relevant tax authority. It is submitted that the omission is not fatal because of the provision of the above section on the subject. In the case of *Fashogbon v. Layade*<sup>16</sup>, the Court of Appeal, Ibadan Division said:

From the steps that must be taken before the tax payable is evolved, to argue that serving notice of assessment on the tax payer is not part of the procedure under the Decree is unthinkable. It is like staging a Romeo without a Juliet. On the realm of the law to say that the tax payer whom by operation of the Personal Income Tax Decree is legally indebted to the tax authority is not entitled to be informed of the assessment of the income tax payable would be an imposition, an arbitrary act that affects his civil right and therefore, impinges upon his right to fair hearing under section 36 of the Constitution of the Federal Republic of Nigeria, 1999. That leads me to the conclusion that assessment of income tax payable on taxable income is an essential requirement of the Personal Income Tax Decree and proof of service upon the tax payer of the notice of assessment as prescribed by section 56 therefore is a *sine qua non* for establishing liability for non-payment of income tax under the Decree.

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<sup>14</sup> Edjeba, A. E., "A Critical Examination of Offences and Penalties under the Federal Inland Revenue Service (Establishment) Act 2007", UBJBL Vol.1, No.1 (2013), 88.

<sup>15</sup> Companies Income Tax Act Cap C21 Laws of the Federation of Nigeria, 2010 (hereinafter CITA).

<sup>16</sup> [1999] 11 NWLR (Pt. 628) 543 at 551-556.

In *Federal Board of Inland Revenue v. Joseph Rezcallah & Sons Limited*<sup>17</sup> The Supreme Court held that the request to render a return is a condition precedent to assessment; the waiting for the time allowed in the request to pass is also a condition precedent; both conditions are intended to protect a person by affording him an opportunity of stating his income and other relevant matters; and an assessment which does not fulfill either of those conditions is made without jurisdiction, and is null and void.

## **2. Assessment Must Be Final and Conclusive**

In law, an assessment is deemed to be final and conclusive as regards the amount of the chargeable income when there is no valid objection or pending appeal against it. This is in agreement with section 76 of the Companies Income Tax Act (as amended). Paragraph 13(3) of the fifth schedule to the Federal Inland Revenue Service (Establishment) Act 2007<sup>18</sup> provides that where a notice of appeal is not given by the appellant as required under sub-paragraph (1) of this paragraph within the period specified, the assessment or demand notices shall become final and conclusive and the service may charge interests and penalties in addition to recovering the outstanding tax liabilities which remain unpaid from any person through proceedings at the tribunal.

## **3. Service of Demand Notice**

The position of the law under section 104(1) of PITA and section 86(1) of CITA appears to be that after an assessment had become final and conclusive, a demand notice must be served on a tax payer as a condition precedent to the exercise of the power to distrain under the aforesaid laws. It must be stated that non-payment of tax within the time limited by the demand notice activates the power of the relevant tax authority to distrain.

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<sup>17</sup> 2010 2 TLRN 59, 61 ratio 2.

<sup>18</sup> Federal Inland Revenue Service (Establishment) Act Cap F36 Laws of the Federation of Nigeria 2010 (hereinafter the FIRS Act).



#### **4. Payment of Tax Must Have Been Due**

Central to the question of enforcement of payment of tax is the issue of due date. A notable exception to the above principle is the controversial provisional assessment under section 77(1) of CITA. Section 77(1) of CITA provides:

Notwithstanding any other provision of this section, every company shall, not later than three months from the commencement of each year of assessment, pay provisional tax of an amount equal to the tax paid by such company in the immediately preceding year of assessment in one lump sum.

A legal scholar has submitted that the provisions of section 77(1) CITA are ridiculous and mischievous and runs foul of all the principles of law..., especially the issue of service of statutory notice on the payment before a tax debt can be due.<sup>19</sup>

Section 77(2) CITA and the proviso to same appears to have cleared the legal fog over when payment of tax by a company could be said to be due. Section 77(2) of CITA provides that:

Tax charged by any assessment which is not or has not been the subject of an objection or appeal by the company shall be payable (after the deduction of any amount to be set-off for the purposes of collection under any provision of this Act) at the place stated in the notice of assessment within two months after service of such notice upon the company.

The provisos to the above subsection are to the effect that payment of the balance of tax which expires two months after the 14<sup>th</sup> day of December must be made the same day, where the assessment notice is served on the company within the approved period of payment of provisional tax, the tax shall be paid within two months

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<sup>19</sup> Umenweke, M. N., *Tax Law and its Implications for Foreign Investments in Nigeria*, Enugu, Nolix Educational Publications, 2008.

after the end of the approved period, but if such period of two months expires after the 14<sup>th</sup> day of December within the year of assessment, then the payment of any balance of such tax may be made the same day and finally the time within which payment is to be made may be extended.

The focus of this paper on the due date for payment of tax under PITA is on remittances of PAYE to the relevant tax authority, the major reason for the institution of the case against the appellant in this case at the lower court. Sections 74 and 81 of the Personal Income Tax Act (PITA) are important provisions on the subject. Section 18 of the Personal Income Tax (Amendment) Act 2011 has substituted a new section 74 for the old section 74 of the Principal Act. Section 74(1) of PITA provides:

Any person or body corporate who being obliged to deduct tax under section 69, 70, 71 or 72 of this Act, fails to deduct, or having deducted, fails to remit such deductions to the relevant tax authority within thirty days from the date the amount was deducted or the time the duty to deduct arose, shall be liable to a penalty of an amount of 10 percent of the tax not deducted or remitted in addition to the amount of tax not deducted or remitted plus interest at the prevailing monetary policy rate of the Central Bank of Nigeria.

Section 20 of the Personal Income Tax (Amendment) Act 2011 amended section 81 of the Principal Act by inserting a new section 81(2) which is to the effect that every employer shall be required to file a return with the relevant tax authority of all emoluments paid to its employees, not later than 31<sup>st</sup> January of every year in respect of all employees in its employment in the preceding year.

It is submitted that section 74(1) of PITA which sets the due date for payment of tax deducted to the relevant tax authority is aimed principally at ensuring that corporate bodies are accountable for withholding tax and tax deducted from the emoluments of employees. On the other hand, the provision of section 81(2) of PITA is designed to forestall defrauding the

government through under-remittance or non-remittance' of tax deducted from employees emoluments to the relevant tax authority under the PAYE system.

### **Implementation Procedure**

The procedure for the exercise of the power to distrain are stated under section 104 of PITA as follows:

#### **(i) Application for the Issuance of Warrant**

Section 104(3) of PITA provides that for the purpose of levying any distress under this section, an officer duly authorized by the relevant tax authority shall apply to a Judge of a High Court sitting in Chambers, under Oath for the issue of a warrant under this section.

The rationale for the inclusion of the phrase “an officer duly authorized” in the above provision seems to be the need to shield the process from unscrupulous and unauthorized persons who may want to abuse the court process either for personal gains or for sinister motives.

#### **(ii) Exparte Application to Execute Warrant of Distress**

An authorized officer may on an application made exparte, under section 104(4) of PITA, apply to a Judge to execute any warrant of distress and, if necessary, break open any building or place in the daytime for the purpose of levying such distress and he may call to his assistance any police officer to aid and assist in the execution of any warrant of distress and in levying the distress.

#### **(iii) Custody of the Distress Taken**

Under section 104(5) and (6) of PITA, the owner of the distress taken is at liberty to retain them for 14 days, otherwise they may be sold, if the amount due in respect of tax and incidental charges are not paid within the period. However, after the recovery of the tax liability, the residue, if any, shall be payable to the owner of the things distrained or to the appropriate court where the owner cannot be traced within 30 days of such sale.

**(iv) The Extent of Powers of Distress**

Section 104 (7) of PITA provides that in exercise of the powers of distress conferred by the section, the person to whom the authority is granted under sub-section (3) of this section may distrain upon all goods, chattels and effects belonging to the debtor wherever the same may be found in Nigeria.

**(v) Limitation on the Power to Distrain**

Section 104(8) of PITA operates as a limitation on the power to distrain. Under the subsection, an immovable property cannot be sold without an order of a court of competent jurisdiction.

As laudable as the provisions of section 104(7) and (8) of PITA are, equivalent provisions are not contained in section 68 of CITA. The Personal Income Tax Act (as amended) is at the heart of the discourse because the issue that gave rise to the suit at the lower court was the allegation that the Appellant did not remit to Edo State Government deductions from the emoluments of its employees under the PAYE system, a matter that falls under the purview of the Act.

**Facts of Independent Television/Radio v. Edo State Board of Internal Revenue.<sup>20</sup>**

The Respondent, Edo State Board of Internal Revenue commenced an action against the Appellant before the High Court of Edo State by a motion *ex parte* praying the court for an order to distrain upon the land, premises or place of business of the Appellant and an order to distrain against any movable goods, chattel, bond property belonging to it in satisfaction of the liability established against it as final and conclusive taxes due to the Respondent. The court granted the Respondent's prayers in satisfaction of the tax liability in the sum of N12,882,596.43 established against the Appellant as final and conclusive taxes due to the Respondent on behalf of Edo State Government.

The Appellant responded on the same day by filing a motion to unseal its place of business, among other reliefs. The

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<sup>20</sup> (2015)12 NWLR Pt. 1474 pp 442 - 494.

motion was taken and argued on 06/12/2012 and the trial judge in his ruling ordered, among others, the Appellant to pay the sum of N12,882,596.43 into the coffers of the Treasury of Edo State Government. The Motion on Notice filed on 9/11/2012 for an order discharging the ex parte order obtained by the Respondent and all other pending applications were adjourned to 22/01/2013.

On 9/11/2012, the Appellant filed a motion on notice praying the court for an order discharging the ex parte order obtained by the Respondent and same was fixed for hearing by the court to 20/11/2012. The respondent filed a counter-affidavit on 20/11/2012 in response to the Appellant's motion for discharge of the ex parte order. The Appellant's counsel sought adjournment in order to respond to the counter-affidavit and the court adjourned the hearing of the application to 6/12/2012. The Appellant later filed a reply to the Respondent's counter-affidavit on 23/11/2012. On 30/11/2012, the Respondent filed a further counter-affidavit. On its part, the Appellant filed a motion on 4/12/2012 praying the court to set aside the respondent's further counter affidavit. On 5/12/2012, the Respondent through its officers visited the Appellant's premises and sealed it up in the early hours of the day.

On the same day the Appellant filed a motion to unseal its place of business, among other reliefs. The motion was taken and argued on 06/12/2012 and the trial judge gave his ruling while the two pending motions were adjourned to 22/01/2013. In the ruling of 6/12/2012 the trial court ordered that:

- (1) The defendant/applicant pay the sum of N12,882,596.43 as contained in the order of court made on 2/11/2012 into the coffers of the Treasury of Edo State Government.
- (2) Upon the presentation of a receipt of such payment, the claimant, that is Edo State Board of Inland Revenue shall forthwith unseal and open the premises of the Defendant/Applicant.
- (3) If upon the determination of the defendant's application filed on 9/11/2012, the issues are resolved in the

defendant's favour, the said sum of N12,882,596.43 or any part thereof shall be refunded or paid over to the defendant within 48 hours of the ruling and receipt of the order by the claimant and/or Edo State Government.

The Motion on Notice filed 9<sup>th</sup> November 2012 and all other applications were adjourned to 22<sup>nd</sup> January 2013.

The Appellant being dissatisfied with the ruling, appealed against same to the Court of Appeal, Benin Division. The Appellant formulated the following issues for determination in the appeal:

1. Whether the refusal of the trial judge to hear and determine the appellant's motion on notice dated and filed 9<sup>th</sup> November 2012 and motion dated and filed on 4<sup>th</sup> December 2012 respectively occasioned a miscarriage of justice and denial of fair hearing;
2. Whether the learned trial judge has the jurisdiction to adjudicate on the matter;
3. Whether the learned trial judge was right in making the order for payment of the sum of N12,882,596.43 (Twelve Million, Eight Hundred and Eighty-two Thousand, Five Hundred and Ninety-six Naira, Forty-three kobo) *suo motu* without calling on parties to address him on the issue and/or refused to pronounce on issues canvassed before him; and
4. Having regard to the totality of the documents before the learned trial judge, whether the learned trial judge was right in making an order of payment of the disputed amount in issue to the respondent.

On its part, the Respondent also formulated four issues for determination in the appeal as follows:

1. Whether there was a refusal by the learned trial judge to hear and determine the appellant's motion dated and filed on 9/11/2012 and 4/12/2012 respectively and occasioning the miscarriage of justice;

2. Whether the learned trial judge indeed lacked jurisdiction to adjudicate the matter;
3. Whether the order for payment of the sum of N12,882,596.43 (Twelve Million, Eight Hundred and Eighty-two Thousand, Five Hundred and Ninety-six Naira, Forty-three kobo) was not incidental to the consideration of motion exparte dated 5/12/2012 and argued by Appellant's counsel on 6/12/2012 and therefore proper; and
4. Whether in the circumstance of this case, the order for payment by the learned trial judge was appropriate.

After critically examining the issues distilled by both counsel for the determination of the appeal, the Court of Appeal identified the following issues:

1. Whether the learned trial judge lacked jurisdiction to adjudicate on the matter.
2. Whether in the circumstances of this case, the learned trial judge was right in making the orders made on 6/12/2012 which said orders are the subject of this appeal;
3. Whether section 104 of the Personal Income Tax Act Cap. P8, Laws of the Federation as amended in 2011 is unconstitutional; and
4. If the answer to the above is answered in the negative, what is the proper implementation procedure to be adopted?<sup>21</sup>

Because of the specialized and complex nature of taxation, particularly as touching the appeal, the Court of Appeal invited both Counsel and some senior counsel as amici curiae to address it on issues 3 and 4 which were taken together by the Court. For the purpose of this review, issues 3 and 4 will form the thrust of this exercise as they encapsulate the legal reasoning's on which the judgment was predicated.

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<sup>21</sup> Per Ogunwuniju JCA at page 463 Paragraphs F – H.

### **The Constitutionality of the Power to Distrain for Non-Payment of Tax**

The approach adopted in the examination of this aspect of the paper is three-pronged. The first part examines the constitutional provisions relating to the topic. The second part is a critical analysis of the views expressed by counsel to the parties and some senior counsel invited by the Court of Appeal as amici curiae. The third part is an examination of the position of the court.

According to the Court, enforcement of tax no doubt affects the right of the individual to own property, right to privacy and freedom from compulsory acquisition of property as entrenched in Sections 37, 43 and 44 of the constitution.<sup>22</sup> The said sections provide as follows:

S. 37 – The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communication is hereby guaranteed and protected.

S. 43 – Subject to the provisions of this constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria.

S. 44 (1) – No movable property or any interest in any 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 a law that, among other things –

(a) requires the prompt payment of compensation therefor; 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.

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<sup>22</sup> Per Ogunwumiju, J.C.A at Page 488 paragraph E.



S. 44 (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;
- (b) for the imposition of penalties or forfeitures for the breach of any law, whether under civil process or after conviction for an offence.

The Appellant’s Counsel, Chief Alfred Eghobamien (SAN) argued that any judicial pronouncement on Section 104 of the Personal Income Tax Act without complying with Sec. 1(1) of the constitution is unconstitutional and void. He submitted that failure to avail an aggrieved person or any person to be adversely affected by the decision of a court, body or tribunal with the opportunity to respond to the case against it constitutes a breach of his right to fair hearing and since S. 104 PITA is subject to S. 1(1) and 36(1) of the constitution, the section of PITA is null for contradicting the constitution which is the grund norm.<sup>23</sup> On his part, Ken Mozia (SAN), counsel to the Respondent argued that the constitution recognizes the fact that the steps taken in consonance with the tax law by tax authorities are proper and in some circumstances property may be compulsorily taken and may be sold for the purpose of enforcement of tax payment under S. 44(2) of the constitution.<sup>24</sup> The reliance of the learned silk Ken Mozia) on S. 44(2) of the Constitution as a legal platform for justifying the constitutionality of the power to distrain for non-payment of tax appears legally unassailable. This is because S. 44(2) of the Constitution (as amended) makes the imposition or enforcement of tax, rate or duty an exception to the provision of S. 44(1) of the Constitution on the right to property. However, a garnishee proceeding is not analogous to the proceeding under S. 104 of PITA. A garnishee proceeding is an offshoot of a concluded trial. It is only a means of enforcing a validly delivered judgment. On

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<sup>23</sup> Page 473, Paragraphs F – H.

<sup>24</sup> Pages 474 - 475, Paragraphs D – C.

the other hand, a distraining order which by its nature is a final order, is made *exparte*.

Chief Ferd Orbih (SAN), an *amicus curiae* argued that the decisions to be taken under S. 104 PITA are too weighty to be taken behind the tax payer affected and strongly argued that the tax payer should be afforded fair hearing. He further argued that no parallel can be drawn between the garnishee proceeding and proceedings under S. 104 of PITA. He argued that the garnishee is ordered to show cause and is heard before a garnishee order nisi is made but the tax defaulter is not heard in this case. He urged the court to declare S. 104 unconstitutional.<sup>25</sup>

Olu Daramola (SAN), an *amicus curiae* argued in his brief that the Tax Act and the distress of property for default of payment are reasonably justified in a democratic society. He pointed out that S. 104 of PITA does not even violate the tax defaulter's freedom from compulsory acquisition of property. He submitted further that because the taking of the defaulter's property in satisfaction of tax obligation is expressly sanctioned by S. 44(2) of the constitution, S. 104 PITA does not compulsorily take away the property of a defaulter in the manner prohibited by S. 44(1) of the constitution.<sup>26</sup>

Mr. Ade Ipaye, an *amicus curiae*, and Attorney General of Lagos State argued that S. 104 is constitutional and can be enforced in its current form; he contended that S. 44(2)(a) of the constitution is the important exception to the right to property and that the section must be read alongside S. 24(f) of the Constitution. He stressed that S. 36(2) of the Constitution is an exception to S. 36<sup>27</sup> of the Constitution and that the tax authority must make an honest declaration of the facts of the case before filing a motion *exparte* before the court. He finally urged the view that pursuant to S. 24(f) of the constitution, tax payment is an obligation and that

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<sup>25</sup> Pages 475 – 476, Paragraphs D – B.

<sup>26</sup> Pages 477 – 478, Paragraphs D – H.

<sup>27</sup> S. 30(1) Constitution of the Federal Republic of Nigeria 1999 (as amended).

failure of a citizen to pay tax strips him of the protection offered him by S. 44(1) of the constitution.<sup>28</sup>

Mr. B.O. Odigwe, who adopted the brief of the AG Delta as amicus curiae argued that S. 104 is Constitutional and that before it can be said to be unconstitutional, it must be shown to manifestly contravene S. 1(3) of the Constitution. He argued that even though the Constitution guarantees any individual's right to own property under S. 43, this right is qualified under S. 44(a) – (m) which gives power to tax enforcement authorities to enforce payment.<sup>29</sup>

Finally, Ojibara Esq, who adopted the brief of Paul Usoro (SAN) as amicus curiae in his oral argument cited S. 104 PITA and S. 44(2)(a), S. 44(2)(b) and S. 44(2)(e) of the Constitution and submitted that the distraining of a taxable person's chattel is constitutional. However, counsel quarreled with the distraint through an ex parte motion and argued vociferously that the use of ex parte motion denies a tax defaulter of the right to be heard.<sup>30</sup>

After a careful examination and consideration of the Constitution, the relevant statute and the positions canvassed by the counsel to the parties and the learned senior counsel invited by the court as amici curiae, the court said:

*Owing to the provision of S. 44(2)(a) of the constitution above, the question of whether S. 104 of PITA offends the tax payer's right to own property, privacy and freedom from compulsory acquisition of property is of no moment in matters of tax enforcement. To argue contrary will be to argue that because a debtor has freedom from compulsory acquisition of property, his property cannot be taken even when a court order for enforcement of debt payment is given. Let us not forget that the position of a tax payer who has failed to pay*

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<sup>28</sup> Page 480, Paragraphs B – D.

<sup>29</sup> Page 483 Paragraph B.

<sup>30</sup> Page 484 Paragraphs E - F.

*the tax due is that of a debtor. As such, to that extent, S. 104(2) of PITA is constitutional.*<sup>31</sup>

The position of the court is ably fortified by the preponderance of opinion of most of the senior counsel in the case which weigh heavily in support of the constitutionality of the power to distrain for non-payment of tax. This position is humbly shared by us. However, one of the most contentious points raised in this appeal is whether or not the use of ex parte application for applying for a distraining order denies a tax payer of his right to fair hearing.

Paul Usoro (SAN) is of the view that distrain through an exparte motion denies a tax defaulter of his right to be heard. He said exparte orders are not inherently bad but are bad where they are absolute leaving no room for the affected party to be heard.<sup>32</sup> The decision of the Court on this point is without equivocation. The court said:

*... looking at the antecedents of acts to be done by the tax authority intended at putting the tax payer on notice, allowing him to object if he wants, and the different provisions allowing the tax payer air his view, I am of the humble opinion that the exparte provision in S. 104 of the PITA is constitutional and does not offend his right to fair hearing.*<sup>33</sup>

### **An Appraisal of the Court's Decision**

The crux of this appeal is founded on the provisions of S.104 of the Personal Income Tax Act<sup>34</sup>. While reviewing the arguments of the parties on the power to distrain the court said:<sup>35</sup>

*The PITA is a statute containing 109 sections all providing for different but connected aspects of tax*

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<sup>31</sup> Per Ogunwumiju, JCA at 489, Paragraphs C – D.

<sup>32</sup> Supra, note 22.

<sup>33</sup> Per Ogunwumiju, JCA at Page 492.

<sup>34</sup> Per Ogunwumiju, JCA at pp 486.

<sup>35</sup> Per Ogunwumiju, J.C.A at Pages 487 – 488 Paragraphs F – D.

*enforcement. Thus, it will amount to an incomplete exercise to evaluate S. 104 singularly without recourse to other sections, which outline procedure to be adopted before effect can be given to S. 104. Below are the sections that apply to the appellant as a taxpayer in the tax enforcement process.*

*S. 2 PITA lists the persons from whom tax is to be collected;*

*S. 40 outlines persons chargeable and returns;*

*S. 44 is on self-assessment of tax by individual;*

*S. 54 allows assessment of income tax by the tax authority;*

*S. 57 provides for service of notice of assessment;*

*S. 58 allows for revision of assessment in case of objection;*

*S. 59 provides for how to handle errors and defects in assessment and notice.*

*S. 60 In establishing Tax Appeal Tribunal allows an aggrieved party to approach the tribunal on cases arising from operation of the Act;*

*S. 98 provides that tax is payable notwithstanding proceedings;*

*S. 104 gives the tax authority the power to distrain for non-payment of tax.*

*From the above listed sections, it should be noted that S. 104 is the concluding section of a long list of sections that govern tax enforcement as it relates to the appellant. The section is the concluding part of outlined process of enforcement of tax and thus a scrutiny of the constitutionality of the section cannot be done in solitude but with recourse to the other sections listed above”.*

Section 104(8) of PITA is to the effect that the order of a court of competent jurisdiction is only mandatory in the sale of any immovable property. The issue of service is not in contention in this case. However, can it be said that the assessment was final and conclusive? This is one of the major conditions precedent that must be complied with by the relevant tax authority before it can lawfully seek to enforce the power to distrain for non-payment of tax under S. 104 of PITA. The question that naturally flows from the above is, when is an assessment final and conclusive? In law, an assessment is deemed to be final and conclusive as regards the amount of the chargeable income when there is no valid objection or pending litigation or appeal against it.<sup>36</sup>

There is a pertinent question to ask here. Having finally agreed with the tax authority on the tax due and a part of same paid, can it be said that the assessment had become final and conclusive? The Court of Appeal said<sup>37</sup>:

*Finally, on 7/09/2012 there was a tax review meeting between both parties at the State Board of Internal Revenue where the Appellant's tax liability was reduced to N15,199,947.18 and the Appellant was given seven days to pay up the said sum. The Appellant paid the sum of N2,317,350.75 to the tax authority on 12/09/2012 being PAYE tax for 2005 – 2010 as contained in pages 25 and 26 of the record.*

The answer to the above question is in the affirmative with respect to the amount of the chargeable income (PAYE remittances) but it is not conclusive as to other matters.

In *Federal Board of Inland Revenue v. Joseph Rezcallah & Sons Limited*, the Supreme Court was called upon to determine whether the Court can question the validity of a tax assessment that has become final and conclusive. The court said:

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<sup>36</sup> Edjeba, A.E, “A Critical Examination of Offences and Penalties under the Federal Inland Revenue Service (Establishment) Act 2007”, *UBJBL vol. 1 No. 1 (2013)*, 88, 91.

<sup>37</sup> Per Ogunwuniju, JCA at page 493 paragraphs B – C.

*It will be noted that the section provides that the assessment is final, as regards the amount of the chargeable income in view however, it is not conclusive as to other matters, and the court in subsequent proceedings can inquire into the validity of the assessment except in so far as it is restricted by S. 58.<sup>38</sup>*

In this case the Appellant's motion on notice dated 9/11/2012 for an order discharging the ex parte order for distraint of property made against it was still pending before the lower court when the Respondent sealed up its business premises on 5/12/2012. It is submitted that in the eyes of the law, the assessment was not final and conclusive. Therefore, the trial judge was with profound respect, in error when he proceeded to deliver its ruling on 6/6/2012 without first taking the motion seeking to discharge the distraining order made on 02/11/2012.

### **The Way Forward**

The Court of Appeal has in a profound and lucid manner, affirmed the constitutionality of the power to distraint for non-payment of tax in Nigeria. This paper however contends that although the power to distraint for non-payment of tax is constitutional but its enforcement through ex parte application is unconstitutional mainly because it is a breach of the fair hearing provisions of the constitution of the Federal Republic of Nigeria (as amended).

With profound respect to the court, there appears to be no argument or dispute over the several opportunities to be heard offered to the Appellant by the Respondent before the matter was taken to court. The bone of contention is whether or not the distraint of the Appellant's property through an exparte order was a denial of its right to be heard. It should be noted that there is no provision for service of the distraining order on the defaulting tax payer before executing a warrant of distress. The submission of Ken Mozia (SAN) to the effect that since an exparte application is the statutorily prescribed mode of applying for a distraining order,

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<sup>38</sup> Supra, note 17,61 ratio 1.

it is incumbent that the procedure and no other is complied with,<sup>39</sup> even where the procedure deprives a taxpayer of his right to property, albeit temporarily, without fair hearing, appears legally untenable. The taxpayer is completely shut out of the allegations contained therein because of the nature of an ex parte application (especially one for a distraining order) which most of the time is shrouded in secrecy. The reason for the secrecy was explained by Ken Mozia (SAN) when he said that “putting a debtor on notice will ensure that by the time the application is granted, there might likely be nothing left to distrain”.<sup>40</sup> With respect, the reason adduced for the secrecy is based on a premise that lacks legal support. To break the logjam requires taking measures that will guarantee upholding the defaulting tax payer’s right to fair hearing on the one hand and realizing the tax authority’s laudable objective of generating revenue for the government, on the other hand.

The knotty aspect remains the mode and the procedure for its implementation. This paper advocates the retention of exparte application, though not in its present form, as the mode of applying for a distraining order because it is a safeguard against the unsavoury experience of prolonged litigation, especially in tax matters.

The distraining order should be in the interim.<sup>41</sup> This will enable a tax defaulter to show cause why the distrained chattel or property should not be sold. S. 104(5) of PITA only gives the tax payer 14 days within which to comply with the order otherwise the distrained goods will be sold. Chief Ferd Orbih (SAN) argued in the case that the garnishee is ordered to show cause and is heard before a garnishee order nisi is made but the tax defaulter is not heard in this case.<sup>42</sup>

The garnishee model is hereby recommended as an escape route from this legal conundrum. Since tax is payable notwithstanding proceedings<sup>43</sup>, in the case of dispute as to the

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<sup>39</sup> Supra, note 14.

<sup>40</sup> Supra, note 14.

<sup>41</sup> Supra, note 20.

<sup>42</sup> Supra, note 15.

<sup>43</sup> S. 98 Personal Income Tax Act Cap P8 LFN 2010.



figure or amount involved, the tax payer should pay the amount admitted by him into an interest yielding account to be determined by the court pending the final determination of the matter.

Finally, there is the need to amend the extant law to reflect the above suggestions/reform in the interest of the government and the taxpayer.

### **Conclusion**

This paper postulates that any law that enhances or facilitates the enforcement of tax payment for the overall growth of the economy without impinging on the right to fair hearing of the taxpayer is a law that is reasonably justifiable in a democratic society. This is necessary to avoid the crippling effect of non-payment of tax on the economy of any nation.

The controversy over the use of *ex parte* application as a veritable vehicle for driving the power to distrain for non-payment of tax appears resolved by the Court of Appeal for now. However, unless the above suggestions and others that will guarantee fair hearing are put in place, we may not have heard or seen the last on it.