



Can the House of Representatives Order Tax Audits?

'Taxspectives' by Afolabi Elebiju | Originally published in *ThisDay Lawyer*, 30th October 2012, p.12



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Introduction

Recently the House of Representatives, through its Committee on Finance, announced "Investigation of Corporate Tax Returns (2006-2011)" at page 51 THISDAY, 2/4/2012. The advertorial indicated the Committee is "conducting a back duty investigation on tax returns and remittances of companies made to the Federation Account for the period 2006 - 2011" and "has therefore appointed Olusola Adekanola & Co. as Tax Consultants to work with it in investigation remittances and returns of companies in the areas of: Company Income Tax, Education Tax, Withholding Tax, Value Added Tax, Royalties, Petroleum Profit Tax including any other revenues accruing to the Federal Government." Listing 182 companies in diverse sectors of the economy that would be subject to the exercise, it enjoined: "to ensure the success of this exercise, all Companies are requested to cooperate with the Committee and the consultants in the discharge of this national assignment."

Although this action seems at first glance, contrary to principle, the House purportedly acted further to its constitutional oversight role - the advertorial cited "section 88 and 89 of the Constitution and Order CVIII, Section 155(2)(i) of the House Standing Orders." Not surprisingly, the Nigerian Employers Consultative Association (NECA) is up in arms against the initiative. After issuing a statement questioning the action and highlighting potential negative ramifications, NECA directed its members not to cooperate with the Consultants. NECA has also instructed its counsel (Tunji Abayomi & Co.) to test the legality of the House's action; the firm has subsequently filed a suit seeking injunctive and declaratory reliefs.

I examine the hydra headed issues and implications of this "legiscutive" action of the House in this piece.

The Purported Basis - Oversight Function

Section 88(1) 1999 Constitution provides that "subject to the provisions of this Constitution, the National Assembly can by resolution published in its journal or the Federal Gazette, direct or cause to be directed an investigation into - (a) any matter or thing with respect to which it has powers to make laws; and (b) the conduct of affairs of any person, authority, ministry or

government department charged... with the duty of or responsibility for-(i) executing laws enacted by the National Assembly; and (ii) disbursing or administering laws enacted by the National Assembly." Pursuant to section 88(2), the purpose is to enable the NA make laws and correct defects in existing laws within its legislative competence and to "expose corruption, inefficiency or waste in the execution of laws within its legislative competence and in the disbursement or administration of funds appropriated by it."

Section 89 gives effect to section 88 by providing powers as to matters of evidence. The NA can procure evidence it considers necessary or desirable to be given on oath, summon witnesses and require them to produce documents or information under their control, as well as issue warrants to compel the attendance of recalcitrant witnesses upon sanctions of fine; such warrants may be executed by the Police or persons authorised by the NA leadership.

Sections 4, 5, and 6, 1999 Constitution vests legislative, executive and judicial powers of the Federation (and of the States) in the NA/SHA, the President/Governor and the Courts respectively. The strict separation of powers and systems of checks and balances underpins Nigeria's federalism; case law is replete with the courts' vigilance in ensuring that arms of government stay within their allotted spheres.

On a combined reading of the above constitutional provisions, and given that section 88 starts by affirming its (and section 89's) subservience to the other provisions of the Constitution, the better approach would be to investigate (review) FIRS' performance of its tax administration responsibilities, specifically its management of the corporate tax audit process. Such "health check" on FIRS, rather than of individual companies' tax compliance status, would be less objectionable.

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Sections 2 and 25(1) FIRS Act (FIRSA) charges FIRS with administering Nigerian tax laws, and the factual reality is that FIRS has grown Federal tax revenue profile from about N1 trillion in 2004 to N4.62 trillion in 2011: http://www.telling.com/index.php?option=com_k2&view=item&id=1317:the-new-cash-cow; and <http://www.punchng.com/business/business-economy/fg-made-n4-62tn-from-taxes-in-2011-firs/>.

Such investigation of FIRS' processes might throw up areas for improved performance. Questions that the House could ask FIRS relate to use of varied powers in the FIRS Act, and are there legislative gaps that could be plugged to make the most immediate impact in FIRS' performance? Strikingly, the planned audit is against the backdrop of NA's routine delay in passing tax bills; examples abound since 1999, not just the PIB that is a recent notorious example.

Post Audit Issues: Questions and Questions

The House action raises a myriad of unending questions, and I would ask a few here. What would be the legal status of the Consultants' audit reports? If they find that there has been underpayment/remittance of taxes, how will next steps be implemented? Will the House compel FIRS to issue additional assessments?

Consider this scenario: a company recently audited by FIRS for 2006-2011 was given a clean bill of health or FIRS determined its tax liability to be a certain quantum. Another audit by the Consultants (a repetitive exercise consuming corporate time and resources) produces a divergent finding. Will the Consultants' report trigger tax objection and appeal provisions of the FIRSA (Section 59 & 5th Schedule), which envision FIRS as the counterparty to taxpayer(s) in tax disputes? Section 34(1) FIRSA provides that "any amount due by way of tax shall constitute a debt due to the Service and may be recovered by a civil action brought by the Service."

Or will the House seek the aid of the Attorney-General, as the Chief Law Officer of the Federation with powers to enforce statutory provisions, to take action on the Consultants' report? Such a 'snub' of the FIRS would be most remarkable, whilst the technicality of the tax issues may constrain AGF's



capacity to successfully prosecute tax recoveries without FIRS support?

Neither the Consultants nor the House can issue assessments/additional assessments on the listed companies; any (enforcement) actions founded on them would most likely be declared null and void. Whilst Section 9 PSC Act authorises NNPC to receive Tax Oil on PSCs and section 25(2) FIRSA empowers FIRS to appoint any government agency to collect revenue on its behalf, only the FIRS can issue, revise or refuse to amend tax assessments as the case may be. See: Part X CITA, Part VII PPTA, Part VII PITA (as applicable) and section 2 TETFund Act 2011.

It is also noteworthy that FIRS' 'supervising Minister' (Finance) can give FIRS, "such directives of a general nature or relating generally to matters of policy" (s.60). But section 12(4) FIRSA empowering FIRS to appoint consultants to support the FIRS has a key proviso: "such consultants shall not carry out duties of assessing and collecting tax or routine responsibilities of tax officials." Is tax audit contemplated by the House not routine responsibility of tax officials?

A Better Way?

The primary function of the NA is lawmaking, however, it seems that more legislative energy is being expended on oversight functions than NA's *raison d'être*. Investigations pursuant to section 88 1999 Constitution could in this instance, focus more on making laws and correcting defects in existing laws under NA's legislative competence. That way, headlines such as 'N/Assembly Spends N318.2bn to Pass 12 Bills in 3 Years' (BusinessDay 17/5/2011), would fade from memory.

The modality for implementing the House's intervention proceeds on the assumption/thesis that FIRS has been underperforming its statutory role and therefore needs to be 'helped'. This could be de-motivating (given FIRS' consistently progressive tax revenue profile) and engender FIRS' 'reluctance' to support the House's efforts. A better approach should be for the NA to explore ways of using their legislative powers to strengthen FIRS/facilitate its optimal performance. In this regard, the oversight function could be exercised to achieve the desired result by asking FIRS to tender its report card on corporate tax audits.

Conclusion

The exercise seems like a journey with an uncertain end. Steven Covey in his *Seven Habits of Highly Effective People*, advises in terms of the 2nd Habit, to "begin with the end in mind." Sometimes this helps prune planned action. The wisdom in African proverb is that if the destination is not desirable, why begin the journey? Moreso, "it is never too late to turn away from the wrong road."

Why didn't (and can't) the House ask FIRS about tax compliance status of the listed companies? If there has been any laxity, FIRS would be under pressure to do the needful. In the event that the House does not reverse its present decision, then the NECA suit (if successful), may provide a judicial signpost for the House to better direct its oversight energies in the future.

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