

Chapter

17

INVESTIGATION POWER OF THE FEDERAL INLAND REVENUE SERVICE (FIRS): AN OVERVIEW

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17.1 INTRODUCTION

In recent times, Governments have come up with different legislative and operational measures to curb or control fiscal fraud. Under tax law, most countries have extended the investigative powers of tax authorities. In Nigeria, one of the means of extension of investigative power of the FIRS is the mandate given to bankers to give information upon demand by the Service, of the financial statement of individuals and body corporate, and also the names and addresses of new customers of the bank. Section 28 (2) of the Act specifies that, for the purpose of obtaining information relative to taxation, the Service may give notice to any person including a person engaged in banking business in Nigeria to provide within the time stipulated in the notice, information including the name and address of any person specified in the notice.

This provision of the Act which makes it compulsory for a banker to provide information to the Service has the objective of reinforcing the tax authorities' investigative powers in their search for information at financial or banking institutions. Where banking information is required, the notice to the relevant bank must be signed by the Chairman of the Board. Section 48 of 2004 PITA requires a tax authority to disclose information in its possession and relating to an individual taxpayer, to another tax authority or the Joint Tax Board (JTB) if it is in the public Revenue interest to do so. Power of investigation is therefore one of the essential instrument of tax enforcement at the disposal of the Federal Inland Revenue Services.

17.2 WHAT INVESTIGATION POWER ENTAILS

Generally, Revenue Authorities have powers to obtain all information relevant to the correct assessment of tax liabilities.¹ Tax Administration in OECD and selected Non-OECD countries. Comparative Information Series (2006) .Prepared by the Forum on Tax Administration Feb. 2007, Centre for Tax Policy and

These powers may extend beyond the taxpayer to third parties such as the taxpayer's bankers.² Revenue bodies also have more specific powers, some of

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¹ Tax Administration in OECD and selected Non-OECD countries. Comparative Information Series (2006). Prepared by the Forum on Tax Administration Feb. 2007, Centre for Tax Policy and Administration. Accessed on 3rd February, 2012

² See S. 28 FIRSEA, 2007, titled, Information to be delivered by Bankers.

which are that taxpayers must produce records and documents on request³ and the extensive power to enter business premises. However, in a number of countries, access is limited to certain time of day⁴ or required the taxpayer's consent⁵ or pursuant to an authorization by warrant issued by a judicial officer upon an application by an officer of the Service.⁶ Every authorization however should be in the form prescribed by the enabling statute.⁷

Some countries, Nigeria inclusive, require a Search Warrant to enter private dwellings and business premises while in some countries search warrant is only required where fraud or crime is suspected. Also, the power to seize documents requires some kind of warrant. Over the last two decades countries in the Nordic region that is Denmark, Estonia, Finland, Norway and Sweden, and more recently in Chile and Spain, have fundamentally reformed this approach by making third party information available to taxpayers by way of a "pre-filled" tax return.⁸ Tax Administration in OECD and selected Non-OECD countries: Comparative Information Series (2006) Prepared by the Forum on Tax Administration, Feb. 2007 The terms, "Pre-populated" or "tax - proposal" can be used instead of 'pre-filled'. They all describe the process of making third party information available to tax payers. However, all information and documents supplied or produced in pursuant of any requirement shall be treated as confidential. In Nigeria, any officer, member or former member of the Service that contravenes this rule is liable on conviction to a fine not exceeding N200,000.00 or to imprisonment of a term not exceeding 3 years or both.⁹ Revenue Authorities have traditional powers to enforce tax debt collection. That is;

- i. to grant taxpayer further time to pay
- ii. to make payment arrangements
- iii. to collect from third parties that have liabilities to taxpayer
- iv. to seize taxpayer's assets
- v. to offset taxpayer's to his/her tax credits
- vi. to initiate bankruptcy.

They also have other powers such as, obtaining lien over taxpayer's assets, withholding government payment to debtor taxpayers, requiring tax clearance for government contracts and imposing tax liabilities on company directors

3 See S.27. 27(1) & (2) FIRSEA, 2007 titled call for further returns and payment of tax due.

4 See. S. 29(1) FIRSEA, 2007 which says in part that, An authorized Officer of the Service shall at all reasonable times have free access to all lands, buildings, places, books and document, in the custody or under the control of a public officer, institution or any other person, for the purpose of inspecting the books or documents including those stored or maintained in computers which the officer considers necessary or relevant for the purpose of collecting any tax.

5 S. 29(5) FIRSEA, 2007

6 S. 29(6) FIRSEA, 2007

7 E.g. the Third Schedule of the Act, titled Form of Authorization to Land, Buildings, Books and Documents. Specifically stipulates that Officers are authorized to carry out searches and when the need arises to break open any building or place only in the daytime.

8 Tax Administration In OECD and selected Non-OECD countries: Comparative Information Series (2006) Prepared by the Forum on Tax Administration, Feb. 2007

9 Centre for Tax Policy and Administration. accessed 03 February, 2012.9S.39 (2) FIRSEA, 2007

when certain conditions are satisfied. Additional powers are given to some revenue bodies to facilitate tax collection that entail the imposition of restrictions on taxpayers business or private activities,¹⁰ Including (i) limits on overseas travel while some are permitted to 'name and shame' taxpayers through the public disclosure of individual taxpayer's offences.

An emerging trend in revenue tax administration practice over recent decades has been an increasing recognition that taxpayers have 'rights' that should be respected in the way Revenue Authorities go about their activities. In a number of countries for example, Netherlands and Russia, these rights have been codified in tax laws, while in others such as Australia, Ireland, New-Zealand, Singapore and South Africa they have been elaborated in administrative documents, sometimes referred to as 'taxpayers' or 'service' charters.¹¹

17.2.1 Power to Compel Production of Documents

The Service has the power to access lands, buildings, books and documents, in the custody of a public officer, institution or any other person, for the purpose of inspecting the books or documents,¹² or for the purpose of carrying out any other function lawfully conferred on the Service or considered likely to provide any information that will assist it in carrying out its functions under the Act. The officer of the Service, without accepting any fee or reward, may make extract from, or copies of such books or documents.¹³

Where the hard copies of any of the books or documents mentioned above are not immediately available, because they are stored in a computer or on digital, magnetic, optical or electronic media, the Service shall take immediate possession of such removable media and the related removable equipment or computer used to access the stored documents on the media, in order to prevent the accidental or intentional destruction, removal or alteration of records and documents, especially where such could be needed as potential evidence in the investigation or criminal proceedings.¹⁴

Where the Service is able to make exact duplicate copies of all information stored in the computer hardware, instead of taking physical possession of such equipment, computer or storage media, it will make such copies and use it as digital evidence during the investigation or criminal proceedings.¹⁵ Likewise, the occupier of a land, building or place that is entered or proposed to be entered by an authorized officer must cooperate by providing the officer with all reasonable facilities and assistance for the effective exercise of this power. He must answer

10 Including (i) limits on overseas travel
(ii) closure of business or cancellation of business licenses and (iii) denial of access to government services.

11 E.g. Australia Ireland, New-Zealand Singapore and South Africa

12 Books and documents include those stored or maintained in computers or on digital, magnetic, optical or electronic media, which the officer considers necessary or relevant for the purpose of collecting any tax under any of the relevant enactment or law.

13 S. 29(1) FIRSEA, 2007

14 S. 29(2) FIRSEA, 2007

15 S. 29(3)

questions put to him orally or if required by the officer, in writing or by statutory declaration.

However, notwithstanding the power of an authorized officer to access lands, buildings, books and documents, he shall not enter any private dwelling except with the consent of an occupier or pursuant to an authorization issued.¹⁶ S. 29(7) Ibid. Every authorization issued under S. 29(7) FIRSEA, 2007, shall;

Section 29 (8) of the Act states that an officer exercising the power of entry shall produce the written authorization and evidence of identity on first entering the private dwelling and whenever subsequently reasonably required to do so.¹⁷

An authorized officer of the Service may remove books or documents to make copies, and the books or documents returned as soon as practicable.¹⁸ A copy of a book or document or digital evidence certified by or on behalf of the Executive Chairman is admissible in evidence in court as if it were the original.¹⁹ The owner of a book or document that is removed is entitled to inspect and obtain a copy of the book or document, at his own expense, at the premises to which the book or document is moved to.²⁰

17.2.2 Power to Call for Returns, Books, Documents and Information under the FIRS

For the purpose of obtaining full information in respect of its profits or income, the service may give notice to any person, body corporate or organization requiring him or her within the time specified by the notice, to complete and deliver to the Service, any return specified in such notice, to appear personally before an officer of the Service for examination or produce or cause to be produced for examination, books, documents, and any other information at the place and time stated in the notice, or to give orally or in writing any other information including name and address specified in such notice.²¹

The time specified by such notice shall not be less than seven days from the date of service of such notice. However, an officer of the Service, not below the rank of Chief Inspector of Taxes or its equivalent may act in any of the cases stipulated above without giving any of the required notices set out in the Act.²²

16 S. 29(7) Ibid. Every authorization issued under S. 29(7) FIRSEA, 2007, shall;

(a) Be in the form prescribed in the Third Schedule of the Act.

(b) Be directed to a named officer of the service

(c) Be valid for a period of 3 months from the date of its issue or such lesser period as the judicial officer considers appropriate.

(d) State its period of validity, or the date on which it expires and

(e) Notwithstanding (c) and (d) be renewable by the judicial officer on application.

17 S. 29(8) (a)&(b) FIRSEA (2007)

18 S. 30(1)&(2) FIRSEA (2007)

19 S. 30 (3) FIRSEA (2007)

20 S. 30 4 (a) (b) FIRSEA (2007)

(a) at the time the book or document is moved to the premises and

(b) at reasonable times subsequently

21 Federal Inland Revenue Service (Establishment) Act, 2007 Section 26(1)(a-d)

22 S. 26 (2) FIRSEA (2007)

The provision in Section 26 (2) of the act is inconsistent with the objective of a good tax system which advocates for fairness and equity in tax administration. This is because it gives an officer the right to act without giving any of the required notices²³ set out in the Act. This portion of the provision of the Act which grants officers not below the rank of Chief Inspector of Taxes or its equivalent the right to act without giving any of the required notices is discriminatory and inconsistent to the rule of fairness and equity which may engender corruption on the part of Revenue Officers. This is because Senior tax Officers may cash in on it to corrupt themselves, since they have the monopoly of power to act without recourse to the provision of the Act.

Anybody that contravenes these provisions in respect of each offence is liable on conviction to a fine equivalent to 100 per cent of the amount of the tax liability.²⁴ The Service may verify by tax audit or investigation into matters relating to any return or entry in any book, document, accounts, including those stored on a computer, in digital, magnetic, optical or electronic media as may from time to time, be specified in any guideline by the service.²⁵

A person can however apply in writing to the board for an extension of time within which to comply with the provisions of the Act provided that he makes the application before the expiration of the time stipulated for making the returns and shows good cause for his inability to comply with the provision.²⁶ If the board is satisfied with the cause shown in the application, it may in writing grant the extension of the time or limit the time as it may consider appropriate.²⁷

17.2.3 Power to Call for Further Returns and Payment of Tax Due
The Service may give notice in writing to any person it considers necessary, requiring such person to deliver within a reasonable time specified in such notice, fuller or further returns in respect of any matter relating to the functions of the service under the Act.²⁸ Where a tax is not paid, when it falls due under any enactment, by any person from whom it is due, whether or not the payment of that tax has been secured by a bond or otherwise, it shall be paid on demand made by the service either on that person personally or by delivering the demand in writing to his place of abode or business, and if it is not paid on demand, the person in default shall, in addition to the 100 percent of tax due and payable, also be liable to a penalty equal to the amount of tax due and payable.²⁹

17.3 TYPES OF INFORMATION REQUIRED BY FIRS TO CHECK TAXPAYERS' TAX POSITION

17.3.1 Taxpayer Notices

The FIRS can by notice in writing require a taxpayer to provide information or to

²³ That is call for returns and books

²⁴ S. 26(3) FIRSEA (2007)

²⁵ S. 26 (4) FIRSEA (2007)

²⁶ S. 26(5) FIRSEA (2007)

²⁷ Section 26(6) FIRSEA (2007)

²⁸ Section 27(1) FIRSEA (2007)

²⁹ Section 27(2), FIRSEA, 2007

produce a document if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position. This is provided for in Section 26 (1) (2) (3) (4) (5) and (6) of the Act, titled, "call for returns and payment of the tax due". Such a notice is called a 'taxpayer notice': 'checking' the taxpayer tax position includes carrying out an investigation or enquiry of any kind, while 'document' includes part of a document.

A person's tax position means his position as regards, Income Tax, Capital Gains Tax, Value Added Tax, including the corresponding charge in another country with which it has a double tax agreement. It includes the taxpayer's position, as regards any deductions or repayments that he is required to make under the PAYE regulations or any other provision of the Taxes Acts. A person's tax position means his tax position at any time, or in relation to any period, unless otherwise stated. Information power is therefore very broadly drawn as it can cover past, present and future tax liabilities. There is a limited right of appeal against taxpayer's notices. Limited in the sense that there is no rights of appeal against a requirement in the notice to provide any information or produce any document that forms part of the taxpayer's statutory records.

Taxpayer's statutory records are records which he is required to keep and preserve under the Taxes Acts. Both the FIRSEA, and the VAT Act, contain very broadly drawn record keeping requirements, which makes it unclear which particular information forms part of the taxpayer's statutory records. This is an impediment as there is no right to ask anyone outside the Service to decide whether or not a particular document is a statutory record or not. In the United Kingdom, the same problem exists and the taxpayer is faced with the choice of handing over something that he does not believe he is statutorily required to produce or refusing to do so, waiting for the Service to issue a penalty notice, and then appealing the notice in the hope of convincing the Tribunal, that the document did not form part of his statutory records.

The taxpayer has a right to seek to appeal against the requirement on the basis that the document in question is not a statutory record. The tax authority would probably then ask the Tax Appeal Tribunal (TAT) to strike out the appeal on the basis that the document in question is not a statutory record. The Service may also ask the Tribunal to strike out the appeal on the basis that they have no jurisdiction if it is a statutory record. The Tribunal could hold a directions hearing, to hear the argument as to whether or not the document is a statutory record. If they hold that it is, they would have to strike out the appeal as being *ultra-vires*. If they hold that it is not, there would then be a further hearing to determine whether or not the document is reasonably required for the purpose of checking the taxpayer's tax position. Unfortunately, such a two-stage process is likely to significantly increase the cost of challenging the Revenue's views.

In Britain, Her Majesty Revenue and Customs (HMRC) Officer can, if he wishes, completely, eliminate the taxpayer's rights of appeal against a notice, by obtaining the approval of the First-tier Tribunal to the issue of notice. It is completely at the discretion of the HMRC officer whether or not he wishes to display taxpayer rights in a particular case. While it is not out of place to allow Revenue Officers the power to use their discretion in certain cases. It will be to

the disadvantage of the taxpayer if this discretionary power is not controlled or managed properly. Tax officials who are given complete or absolute discretionary power can abuse it to the detriment of the taxpayer.

17.3.2 Third-Party Notices

This is provided for in Section 27 (1) & (2) of the Act with the title, 'call for further returns and payment of tax due'. Here, the FIRS can require a third-party to provide information or produce documents within a reasonable time, specified in such notice, if the information or document is reasonably required by them for the purpose of checking the tax position of a tax-payer. The Third Party notice must be in writing and must name the taxpayer to whom it relates. Generally, notices to banks about their customers should ask for documents rather than information. Where information is required, it should be one which can be derived from existing documents or intended to explain terms and entries in known documents. In the United Kingdom the taxpayer is not entitled to know what information is obtained from the Third Party. This is because information from third parties is a very important way by which the Revenue can establish the facts, particularly where the taxpayer is evasive or obstructive. Therefore, giving copies of third party documents to the taxpayer is believed to undermine the ability of HMRC to investigate effectively, particularly in the more serious cases.³⁰ However, there is an argument that, an investigation cannot be undermined by asking the taxpayer to explain the version of the facts that HMRC have obtained and giving him the opportunity to demonstrate that the third party information is incorrect. The reasonable thing therefore is to allow the taxpayer to have access to a copy of the notice, so as to know what information has been sought, and to be able to defend himself where necessary.

In practice, there are two situations in which HMRC need to approach third parties. The first is when a taxpayer has a gap in his records, but is otherwise generally compliant, and secondly, when information is being sought to fill in that gap. Usually the notice is to compel the third party to provide the information.

17.3.3 Power to Inspect Businesses

The FIRS also has the power to enter a person's business premises and inspect (a) the premises (b) business assets that are on the premises and (c) business documents that are on the premises, if the inspection is reasonably required for the purpose of checking that person's tax position. Business premises covers any premises or part of premises that a tax officer has reason to believe are used in connection with the carrying on of a business by or on behalf of the taxpayer.

Premises include any building or structure, any land and any means of transport. Accordingly in the United Kingdom, the HMRC has power to enter a taxpayer's car if they think it may be used for business. HMRC has power by regulation, to provide, that specified activities are or are not to be treated as the

³⁰ Mass W. Robert *Guide to Taxpayer's Rights and HMRC Powers*, (2nd Edition, Tottel Publishing Ltd West Sussex 2009), p. 61.

carrying on of a business. Business assets are therefore assets that a tax officer has reason to believe are owned, leased or used in connection with the carrying on of a business by any person. Although this refers to any person, it should be borne in mind that the power to inspect business assets can only be used for the purpose of checking the tax position of the owner of the premises. Business documents are documents or copies of documents that relate to the carrying on of a business by any person which forms part of the person's statutory records.

This power does not include power to enter or inspect any part of the premises that is used solely as a dwelling. The word 'solely' restricts this exclusion. For example, if a person answers a business call on his mobile telephone while in his bedroom, can it still be said that the bedroom is used 'solely' as a dwelling? It can be argued that in cases where business transactions are negotiated over the land line home phone; it would negate the family home being used solely as a dwelling.

The best policy is to be aware of the tax authority's rights and powers, and at the same time, to consider what the client's best interest is in particular circumstances. Volunteering information to which the tax office is not entitled may speed up the enquiry but it can on the contrary lengthen it. This is because the more information you give, the more issues there may be for the officer to explore or the more red herrings he may try to fish for.³¹ If you decide to volunteer information, it is often sensible to first ask the officer why he considers it relevant, as this may indicate in what areas he actually needed the information and you may be able to produce an alternative source of information that will satisfy his enquiry.

17.3.4 Power to Obtain and Execute Search Warrants

All jurisdictions that respect the rule of law³² and rights to privacy put constraints on the powers of police investigators, and typically require search warrants, or an equivalent procedure, for searches conducted as part of a criminal investigation. An exception is however made for "hot pursuit" of a felon,³³ If a criminal flees the scene of a crime and the police officer follows him, the officer has the right to enter a property in which the criminal has sought shelter, to prevent a imminent destruction of evidence before a warrant can be properly obtained and in exigent circumstances.³⁴

A search warrant is a court order issued by a Magistrate, Judge or Supreme Court Official that authorizes law enforcement officers to conduct a search or examination of a person or a place for the purpose of discovering contraband,

³¹ Mass, Robert W, *Guide to Taxpayers' Rights and HMRC Powers*.p.62.

³² Conversely, in authoritarian regimes, the police typically have the right to search property and people without having to provide jurisdiction or without having to secure the permission of a court

³³ If a criminal flees the scene of a crime and the police officer follows him, the officer has the right to enter a property in which the criminal has sought shelter, to prevent a felon's escape or ability to harm others.

³⁴ Exigent circumstances simply mean that the officer must act quickly. Typically, this is because police have a reasonable belief that evidence is in imminent danger of being removed or destroyed.

stolen property, or evidence of guilt to be used in the prosecution.³⁵ Note that such evidence of a crime should be confiscated if found. A search warrant can also be defined as a type of warrant that authorizes law enforcement officers to search a specified place for evidence, which can be used in the prosecution of crime. A warrant is required to seize taxpayers' documents. This power is titled, 'Power to remove Books and Documents' under the Act. However copies of any book or documents removed should be made and the books or documents returned as soon as practicable.

The Service may also co-opt the assistance and co-operation of any of the law enforcement agencies in the discharge of its duties.³⁶ The Law enforcement officer's job includes aiding and assisting an authorized officer in the execution of any warrant of distraint and the levying of distraint.³⁷ In very serious cases, the FIRS as well as the HMRC have the power to obtain and execute search warrants. They are permitted by legislation to apply for a warrant only if there are reasonable grounds, of suspecting that serious fraud is involved. In England, the officer applying for the warrant has to give evidence on oath that there are such reasonable grounds; and that evidence is likely to be found on the premises specified. He also has to swear on oath that he is acting with the approval of the board of HMRC in that particular case. The approval has to be given by the board itself, it cannot delegate this to one of its officers. In Nigeria, a judicial officer upon an application by an officer of the service may authorize the officer by warrant to enter into any premises.³⁸

Under the FIRSEA, 2007, a warrant must be exercised within three months of its being granted or such lesser period as the judicial officer considers appropriate. It must state its period of validity, and is renewable by the judicial officer on application.³⁹ It will be granted to the named officer who applied for it, and can be made subject to conditions, which must be specified in the order as to the number of officers that is permitted to search the premises and the hours within which a search may be conducted. It can also specify that a uniformed police officer must be present at the search.

In **CIR v. Ross Minster Ltd**⁴⁰, Lord Wilberforce said that once a warrant is issued, the officers named in it have power to enter and search any premises regardless of who they belong to and that the occupier has no rights to be told either what offence is alleged to have been committed or the "reasonable ground" on which the court was satisfied when it issued the warrant. The warrant permits entry to the premises, if necessary by force, as well as a search of the premises, and permits the seizure and removal of documents or anything else, that the officer to whom the warrant is issued has reasonable cause to believe may be required as evidence for the purpose of criminal proceedings, unless of course such documents attract legal privilege.

³⁵ <en wikipedia org./wiki/search warrant> accessed on 10th February, 2012

³⁶ S. 36(1) FIRSEA, 2007

³⁷ S. 36 (2) FIRSEA (2007)

³⁸ Section 29 (6) FIRSEA (2007)

³⁹ Section 29 (7)(c) (d)(e), FIRSEA (2007)

⁴⁰ (1980 STC 42),

17.4 POWER TO OBTAIN INFORMATION VIS-A-VIS THE EVIDENCE ACT AND RULE OF PROFESSIONAL CONDUCT FOR LEGAL PRACTITIONERS

Under the Evidence Act,⁴¹ statements in documents produced by computers are admissible, provided that some conditions are satisfied.⁴² The Evidence Act provides that where over a period, the function of storing or processing information, was regularly performed by more than one computer, all the computers used for that purpose during that period shall be treated as constituting a single computer.⁴³

In any proceedings where it is desired to give a statement in evidence through documents produced by computers, a certificate identifying the document containing the statement and describing the manner in which it was produced must be tendered.⁴⁴ Information shall be taken to be supplied to a computer if it is supplied to it in any appropriate form and whether it is supplied directly (with or without human intervention) or by means of any appropriate equipment.⁴⁵ Also, where in the course of activities carried on by any individual or body, information is supplied with a view to its being stored or processed for the purposes of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.⁴⁶

Both the Evidence Act⁴⁷ and the Federal Inland Revenue Service (Establishment) Act⁴⁸ allow for the contents of documents to be proved either by primary or secondary evidence.⁴⁹ Primary evidence is the document itself produced for the inspection of the court, while secondary evidence includes,

41 S. 84 Evidence Act, 2011.

42 The conditions referred to in S.84(2) (a-d) of the Evidence Act are:

- (a) That the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by anybody, whether corporate or not, or by any individual;
- (b) That over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;
- (c) That throughout the material part of that period the computer was operating properly or, if not, that in any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the productivity of the document or the accuracy of its contents; and
- (d) That the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

43 S.84(3) Evidence Act, 2011

44 S.84 (3) (a-d) E.A, 2011

45 S.84 (4) (a) E.A,2011

46 S.84 (5) (b) E.A, 2011

47 S. 84 E.A,2011

48 S. 30 (3) which says, "A copy of a book or document or digital evidence certified by or on behalf of the Executive Chairman is admissible in evidence in court as if it were the original"

49 Primary evidence is the document itself produced for the inspection of the court, while secondary evidence includes, certified copies, copies made from the original by mechanical or electronic processes or copies made from or compared with the original, counterparts of documents as against the parties who did not execute them and oral accounts of the contents of a document given by someone who has seen it. See section 87(a)(b)(c)(d)(e) FIREA, 2007, See. 86 (1) E.A, 2011

certified copies, copies made from the original by All oral or written communications made by a client to his lawyer in the normal course of professional employment are privileged.⁵⁰ This means that such information cannot be divulged by the legal practitioner or be required to be tendered in evidence, without the client's express consent first having been obtained.⁵¹

A lawyer should not knowingly reveal a confidence or a secret of his client, use a confidence or secret of his client to the disadvantage of the client or, use a confidence or secret of his client to the advantage of himself or a third person, unless the client consents after full disclosure.⁵²

There are however some exceptions to this rule. A lawyer may reveal confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them. He may also reveal confidences or secrets when permitted under the Rules of Professional Conduct for Legal Practitioners or under a required law or a court order. A lawyer may also reveal the intention of his client to commit a crime and the information necessary to prevent the crime.

Lastly a lawyer may reveal confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrong conduct.⁵³

Principle of Legal Professional Privilege (LPP) applies to protect communications written or oral between an individual and his legal adviser.

Similarly, the Evidence Act, states that no legal practitioner is permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment or to disclose any advice given by him to his client in the course and for the purpose of such employment.⁵⁴

17.4.1 Legal Professionals Privilege and the Banker

The Evidence Act has some exceptions to this general rule, to the effect that there is no protection for any communication made in furtherance of any illegal purpose, and any fact observed by any legal practitioner in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, does not enjoy such privilege. One can then deduce from the Evidence Act and the Rules of Professional Conduct for Legal Practitioners that privilege cannot be relied upon where the communication is used to facilitate crime.⁵⁵

The question is, does this privilege extend to the banker? Can he rely on the

⁵⁰ S. 19(1) Rules of Professional conduct for Legal Practitioners. Professional Standards & Ethics Department Nigerian Bar Association, 2007

⁵¹ See the Supreme Court case of Abubakar v. Chuks (2007) 18 NWLR PT.1066, 366

⁵² Rule.19 (2) (a) (b) & (c) Rules of Professional conduct for Legal Practitioners. Ibid.

⁵³ R. 19 (3) (a) (b) (c) & (d)

⁵⁴ See S. 192 (1) E.A 2011. Titled, Communications with Legal Practitioner, Professional Communication between client and Legal Practitioner. 55

⁵⁵ S. 192 1 (a) & (b) E.A, 2011 and Rule 19 (3)(c) Rules of Professionals conduct for Legal practitioner

Professional Privilege to refuse to divulge certain information upon demand by the FIRS, going by the provision in section 28(1) of FIRSEA, 2007, which requires bankers to prepare and deliver information to the Service upon demand? Bank secrecy or bank privacy is a legal principle in some jurisdiction,⁵⁶ whereby banks are not allowed to provide to authorities, personal and account information about their customers, unless certain conditions apply, for example where a criminal complaint has been filed.

The Principle of bank secrecy has been accused by NGO's and governments of being one of the main instruments of underground economy and organized crime. Under the Swiss Principle of Bank Secrecy, privacy is statutorily enforced. With Swiss law strictly limiting any information shared with third parties, including tax authorities, foreign governments or even Swiss authorities, except when requested by a Swiss Judge's Subpoena.

Former Bank employees from banks in Switzerland and Liechtenstein have testified that their former institutions helped clients evade billions of dollars in taxes by routing money through offshore havens in the Caribbean and Switzerland. The Swiss Parliament ratified on June, 17, 2010, an agreement between the Swiss and the United States Governments, allowing it to transmit to the U.S authorities, information concerning 4,450 American clients suspected of tax evasion.

It should be emphasized that to attract privilege, the communication must have been with the client's legal adviser, who is consequently unable to disclose anything the client might have said, and neither is he able to disclose any advice given. In Nigeria, by virtue of Section 192 & 195 of the Evidence Act, 2011, it has been firmly established that every client is entitled to feel safe when making disclosures to his solicitor or counsel. What this means is that counsel cannot be called to give any evidence which would infringe the client's privilege of secrecy.

Therefore, provided the communication was with the party's legal adviser, and provided other relevant criteria are satisfied, and none of the exceptions⁵⁷ apply, then the party's claim to legal professional privilege is assured. It is an obligation that continues even after the retainerhip has come to an end.^{58 59}

Legal professional privilege cannot be claimed in the context of 'other' relationships, e.g. between a client and his accountant or stockbroker for instance, or between a client and his banker. Such communications are not of the kind within the scope of the principle. The recent English case of **Prudential Plc and Prudential Gibraltar Limited v. Special Commissioner of Income Tax and Philip Pandoifo (HM Inspector of Taxes)**⁵⁹ also lend

⁵⁶ Bank secrecy is prevalent in certain countries such as Switzerland, Singapore, Luxembourg and the Philippines as well as offshore banks and other tax havens under voluntary or statutory privacy provisions.

⁵⁷ Rule.19 (3) (a) (b) (c) &(d) Rules of Professional conduct for Legal Practitioners, Ibid and S.192(1)(a)&(b) Evidence Act, 2011

⁵⁸ Adebambo O, 'Legal Professional Privilege: Antecedents and Developments' Business Day, Thursday Oct 06, 2011 accessed 30th March, 2012

⁵⁹ (2010) EINCA CIV 1094,

credence to this position, where the main issue was whether the Principle of Legal Professional Privilege (LPP) can, and/or should extend further than has thus far been recognised, to include and cover, "other classes" of professionals.

Although, the court at first instance saw merit in the arguments for an extension of the class of professionals to which the principle of privilege would apply (in the instant case to a firm of accountants, based on the rationale that lawyers and accountants should operate, on a level playing field (in terms of the advice they give and the LPP Protection), regarding the specific issue, whether or not Prudential (the Claimant) was required to disclose the advice received from Accountants. The court considered that it was "constrained by the existing state of the law" and consequently the principle did not extend to cover the documents in the Claimant's possession.

At appeal, the Court of Appeal upheld the decision at first instance, claiming that, this area of law is indeed settled and that the principle does not apply in relation to any professional, "...other than a qualified lawyer".

17.5 CONCLUSION

From all the aforesaid, it is worth of note that despite the power of the FIRS to unfettered information, a member of staff of a Relevant Tax Authority (RTA) can only use information relating to an individual taxpayer in his possession for assessment duties only, and may not disclose such information for any other purpose except in the course of litigation for the enforcement of the provisions of the Act, or, disclosure to any tax authority for the performance of its duties; and under the exchange of information article of the double Taxation Agreement.

For this, the recipient of the information must always keep it as secret and may not disclose it to any unauthorized person. Even though tax authority is empowered to break through the bank secrecy regulations to gain access to the bank accounts and other information in respect of any individual (as long as due process is followed) there is however check and balances to the extension of investigative powers, this is because a banker is not required to disclose any additional information about his customer or his bank unless such additional disclosure is required by a notice signed by the Executive Chairman of the Service on the advice of the Technical Committee of the Board. Any bank that contravenes the provisions of this section commits an offence and on conviction liable to a fine.