EKITI STATE UNIVERSITY ADO-EKITI
LAW JOURNAL
VOLUME 6, 2015

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CHAPTER THREE

FEDERAL INLAND REVENUE SERVICE'S INFORMATION POWER *VIS-A-VIS* BANK'S SECRECY REGULATIONS IN NIGERIA: A CRITIQUE

ABSTRACT

The thrust of this paper is a critique of the Federal Inland Revenue Service's right to classified information on bank customers' *vis-à-vis* bank secrecy regulations. In doing this, the paper examines different categories of Federal Inland Revenue Service's information and investigation powers, taxpayer's right to notices and the issue of professional privilege in banker/customer relationship. The paper critically examines, whether, seeking protection under the professional privilege could avail or protect the bankers just like the legal practitioner from divulging client information to FIRS. The finding of the paper reveals that, unlike the legal practitioners, the banker cannot avail himself this protection. However, in order to guarantee taxpayers right to notices, freedom of expression as well as right to privacy, apart from the amendment of sections 26(2) Federal Inland Revenue Service Act and 47(5) Personal Income Tax Act, the paper also recommends that the taxpayer should be allowed to have access to a copy of the third party notice so as to know the information sought on them by FIRS and to be able to defend themselves.

Ø **Key Words**: Information Powers, Bank Secrecy, Professional Privileges.

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1.0 INTRODUCTION

The need to efficiently tackle fiscal fraud and improved tax collection are increasingly being seen as a necessity by government all over the world. In recent times, Governments have come up with different legislative, operational measures and reforms[1] to curb and or control fiscal fraud. To achieve this, under tax law, most countries have extended the investigation powers of their respective tax authorities. In Nigeria, one of the means of extension of investigative power and or compliance strategy of the Federal Inland Revenue Service (FIRS) is the mandate given to bankers to give information upon demand by the Service, of the financial statement of individuals and body corporate[2], and also the names and addresses of new customers of the bank.

Information power of a relevant tax authority is the power to request for information at the disposal of a third party about a tax payer. Such third party could be a banker, a government agency or another tax authority. The main reason for this is to curb or control tax evasion.

Generally, Revenue Authorities have powers to obtain all information relevant to the correct assessment of tax liabilities[3]. These powers may extend beyond the taxpayer to third parties such

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[1] One of such was the Nigerian Tax Administrations reform system which among others target the reduction of tax evasion by naming and shaming recalcitrant and defaulting taxpayers, abolition of levies imposed by regulatory bodies which constituted incidence of double taxation, the establishment of a tax or revenue division of the Federal High Court to enable specialization by judges and quick disposal of cases e.t.c. for other reason that necessitated the Nigerian Tax Administrations reform system, see Ifuek O.O Federal Revenue Service and Taxation Reforms in Democratic Nigeria, (Safari Books Ltd, Ibadan, 2012), p.19

[2] Section 28(2) Federal Inland Revenue Service Establishment Act, 2007

[3] 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. www.oed.org/ctp/consumption/cis-2010.pdf accessed on 03 February, 2012

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as the taxpayer's bankers[4]. Revenue bodies also have more specific powers, some of which are that taxpayers must produce records and documents on request[5] See S.27 (1) & (2) Federal Inland Revenue Service Establishment Act, 2007 titled call for returns, books, document and the extensive power to enter business premises, though in a number of countries, access is limited to certain time of day[6] or required the taxpayer's consent[7] or pursuant to an authorization by warrant issued by a judicial officer upon an application by an officer of the Service[8]. Every authorization however should be in the form prescribed by the enabling statute[9].

In any economy be it developed or developing, exchange of information plays a vital part in the battle against tax fraud. The tax authorities cannot efficiently tackle tax evasion if financial institutions refuse to exchange key information at their disposal with the tax authority. Section 28(2) of the FIRS (Establishment) Act 2007 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

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[4] See S. 28 Federal Inland Revenue Service Establishment

5 Act, 2007, titled, "Information to be delivered by Bankers", and information.

[6] See. S. 29(1) Federal Inland Revenue Service Establishment Act, 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.

[7] S. 29(5) Federal Inland Revenue Service Establishment Act, 2007

[8] S. 29(6) Federal Inland Revenue Service Establishment Act, 2007

[9] 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.

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stipulated in the notice, information including the name and address of any person specified in the notice.

Similarly but unfortunately, despite the fact that where banking information is required, the notice to the relevant bank must be signed by the Chairman of the Board, section 26 (2) of the Act provides for an officer of the service not below the rank of Chief Inspector of Taxes or its equivalent to act, by calling for Returns, Books, Documents and Information *without giving any of the required notices set out in the Act.*[10]

The latter part of this provision which makes it compulsory for a banker to provide information to the Service "without giving any of the required notices..." though, has the objective of reinforcing the tax authorities' investigative power in their search for information at the financial or banking institutions; but it is more of a law that tend to take away the taxpayer's right to notice and exposes them to both reasonable and unreasonable manner of information gathering by tax officers.

The issue now is, can a banker take refuge under the professional privilege and refuse disclosing information concerning their customers to the FIRS when demanded for? What will be the legal implication of such refusal; and what is the position of the Nigerian tax law with regards to FIRS's right to information *vis-a vis* the bank's secrecy regulations?

Structured into six sections, the next section discuses the conceptual framework of the study while section three discuses the FIRS's power to enforce tax collection and information powers of FIRS. Section four is on the issue of the taxpayer's right to notice and the problematic nature of section 26(2) FIRSEA and section 47(5) of the Personal Income Tax Act with regards to taxpayers' right to notices. Section five is on the issues of professional privilege,

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[10] Emphasis mine

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power to obtain information by FIRS as well as bank's secrecy regulation. The final section concludes the paper with some recommendations on the observed shortcomings in the Act particularly with regards to the taxpayer's right to notice and privacy.

2.0 CONCEPTUAL FRAMEWORK AND OPERATIONAL DEFINITION OF TERMS

In doing justice to the concept at hand, it is important to note that there are some key words which meaning is to be ascertained from the beginning. The words are 'information power', 'Bank Secrecy', 'Professional Privilege'. Information power in this study is the exclusive power at the disposal of the FIRS to demand for third party information on any taxpayer. Bank Secrecy on the other hand is the level of secret the banking institutions are expected to maintain with respect to customer's account details. Professional privilege is the privilege giving to some group of professional to keep certain secrete kept with them by their client from another person.

3.0 AUTHORITY TO ENFORCE TAX COLLECTION AND FIRS'S INFORMATION POWERS TO CHECK TAXPAYER'S TAX POSITION

3.1 REVENUE POWER TO ENFORCE COLLECTION

In Nigeria, Revenue Authorities have traditional powers to enforce tax debt collection. Amongst these powers are powers:

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.

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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 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[11], while some are permitted to 'name and shame' taxpayers through the public disclosure of individual taxpayer's offences.

Apart from the fact that received information must be kept as secret as possible and may not be disclosed to any unauthorized person, a member of staff of a Relevant Tax Authority (RTA) can use information relating to an individual taxpayer in its possession for assessment duties only, and may not disclose such information for any other purpose except in the following circumstances.

i. In the course of litigation for the enforcement of the provisions of the Act.
ii. Disclosure to any tax authority for the performance of its duties.
iii. Under the exchange of information article of the double Taxation Agreement.

3.2 INFORMATION/INVESTIGATION POWERS OF FIRS

In many countries of the world, a Search Warrant is required to enter private dwellings and business premises while exercising the information/investigation power of the tax officers. But in some other countries, search warrant is only required where fraud or crime is suspected. Also, the power to seize documents requires some

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

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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[12]. 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. In Nigeria, there are lots of instruments at the disposal of the revenue in exercising information gathering powers on both the individual as well as corporate organizations; notably amongst them are:

3.2.1: Power to Inspect Businesses

The FIRS 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.

3.2.2: Search Warrants

In very serious case, 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

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[12] Tax Administration in OECD and selected Non-OECD countries. Comparative Information Series (2006). Prepared by the Forum on Tax Administration Feb. 2007 Centre for T ax Policy and Administration. www.oed.org/ctp/consumption/cis-2010.pdf accessed on 03 February, 2013

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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[13].

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[14]. 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 vs Ross Minster Ltd*[15], 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 right 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.

However, all information and documents supplied or produced in pursuance of any requirement should be treated as

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[13] Section 29 (6) Federal Inland Revenue Service Establishment Act, 2007
[14] See Section 29 (7)(c) (d)(e), Federal Inland Revenue Service Establishment Act, 2007
[15] *(1980 STC 42)*

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confidential[16]. 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.

3.2.3: 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[17], 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 function 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[18].

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[19]. Where the Service is able to make exact duplicate copies of all information stored in the computer hardware, instead of taking

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[16] 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, www.oed.org/ctp/consumption/cis-2010.pdf Accessed on 03 February, 2012.

[17] 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.

[18] S. 29(1) Federal Inland Revenue Service Establishment Act, 2007

[19] S. 29(2) Federal Inland Revenue Service Establishment Act, 2007

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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[20].

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 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[21]. S. 29(8) of the Act stated 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[22].

An authorized officer of the Service may remove books or documents to make copies, and the books or documents returned as soon as practicable[23].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[24]. The owner of a book or document that is removed is entitled to inspect and

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[20] S. 29(3) Ibid

[21] 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 a 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.

[22] S. 29(8) (a)&(b) Federal Inland Revenue Service Establishment Act, 2007

[23] S. 30(1)&(2) Federal Inland Revenue Service Establishment Act, 2007

[24] S. 30 (3) Federal Inland Revenue Service Establishment Act , 2007

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obtain a copy of the book or document, at his own expense, at the premises to which the book or document is moved to[25].

3.2.4: 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[26]. The time specified by such notice shall not be less than seven days from the date of service of such notice

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[27]. 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[28].

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

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[25] S. 30 4 (a)(b) Ibid
(a) at the time the book or document is moved to the premises and
(b) at reasonable times subsequently

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

[27] S. 26(3) Ibid

[28] S. 26 (4) Ibid

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for his inability to comply with the provision[29]. 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[30].

3.2.5: 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[31].

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[32].

4.0 ISSUE OF TAXPAYER'S RIGHT TO NOTICES AND THE PROBLEMATIC NATURE OF SECTION 26(2) FIRSEA AND SECTION 47(5) PITA EXAMINED

Issuance of Notice in writing in tax assessment, investigation and information gathering cannot be over-emphasised. It is this notice that would afford the tax payer to know and put forward the necessary demand by the tax officers. Giving of Notice by tax officer before taking any action permeates almost all the sections bordering on the information and investigation powers of FIRS. The essence

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[29] S. 26(5) Ibid
[30] S. 26(6) Ibid
[31] Federal Inland Revenue (Establishment) Act, 2007 Section 27(1)
[32] Section 27(2) Federal Inland Revenue Service Establishment Act, 2007

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of this is just to show that the taxpayers are having right to notice before action by FIRS. This also put into action, the rule of law and right to privacy of an individual.

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[33].

The FIRS can by notice in writing require a taxpayer to provide information or to 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 FIRS Act, titled, "call for returns, books, documents and information". Such a notice is called a 'taxpayer notice.

Third-Party Notices is another distinct notice that the FIRS frequently issue in the cause of investigation tax payers tax position. 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 taxpayer. 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,

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[33] E. .g. Australia Ireland, New Zealand Singapore and South Africa

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it should be clearly able to be derived from existing documents or intended to explain terms and entries in known documents.

In the United Kingdom, just like Nigeria, 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.[34] 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.

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.

4.1 PROBLEMATIC NATURE OF SECTION 26 (2) FIRSEA, AND SECTION 47(5) PITA WITH REGARDS TO TAXPAYERS RIGHT TO NOTICE

A careful perusal of the last leg of the section 26 (2)of the FIRSEA that empowers some categories of senior tax officer's to carry out certain investigative power without giving the required notices to the tax payer is a negate and seem to be taking away the right of the taxpayers' to notice. According to the section,

> ...an officer not below the rank of Chief Inspector of Taxes or its equivalent may act in any cases stipulated... *without giving any of the required notices set out in the Act*

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

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It is the humble contention of this paper that, given such an open-ended power to the tax officers may breed and encourage abuse of power, victimization and breach of right to notice and privacy of the taxpayer by the tax officer with impunity. In a nutshell, this section of the provision is inconsistence with other provisions which require the taxpayers to be put on notice and " in writing " when requesting by the FIRS to " ...to complete and deliver to 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..."

Furthermore, apart from the fact that the taxpayers' right to notice is curtailed, due to the fact that there is no right 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; there is also an impediment to taxpayers' right of expression over record keeping requirement of FIRS with regards to taxpayers' statutory records. On this, the taxpayer has 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.

Similarly, with the insertion of a new sub-section 5 in section 47 Personal Income Tax Act, the FIRS now enjoys unreserved and unlimited power to ask or procure *any information* from any organization and to which such organization must comply. In the word of the Act[35],

[35] Section 47(5) thereto

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Any organization including governmental bodies, professional bodies, trade associations and any other organization shall provide *any information demanded by any tax authority* in a format as may be prescribed by the tax authority.

The introduction of the phrase 'any information demanded of them by any tax authority' grants unrestricted power to the FIRS to obtain information from any quarter and on any items not necessary only "in respect of the profits or income..."as provides in section 26(1) FIRSEA, 2007 or " money transaction, personal details" as stipulated in section 28(1)(a)(b)(c) (2)of FIRS Act, 2007 The provision is section 47(5) PITA is ambiguous, not specific and seems to be a violation of the right of the taxpayer to privacy because "any information " could mean anything. What obtains in section 26(1) (a-d) of the FIRSEA, 2007 is milder than what now obtains in section 47(5) PITA (Act), 2011 as regards the extent of information and investigation powers of FIRS.

Before the promulgation of the PITA (Act) the information that could be requested from third parties are limited to those that would help the tax authority access correctly the tax liability of the taxpayer. However, Section 47(5) of the PITA 2011 is now couched or framed in such a way that there is no restriction to the information which the FIRS can procure about a taxpayer, and any organization so approached for information has no power to turn down the request. This provision has indirectly taken away the taxpayers' right to privacy and right of expression.

5.0: POWER TO OBTAIN INFORMATION BY FIRS *VIS-À-VIS* BANK'S SECRECY AND ISSUES OF PROFESSIONAL PRIVILEGES,

The nature of a bank's trade and its continual involvement with finance put it in an almost unique position of holding information

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concerning at least one part of the income or expenses of a great many other taxpayers. Therefore, as banks are statutorily empowered to collect savings, it is imperative to presume that holding of information concerning the financial standing of many taxpayers will also be one of their responsibilities[36].

Even though the tax authorities are empowered to break through the bank secrecy regulation to gain access to the bank accounts and other information in respect of any individual, one of the major policies in the banking sector is not to disclose information concerning their customers' affairs to third parties[37].

The issue of bank secrecy is so important to the extent that even in a legal proceeding, except the bank is a party, a bank "...shall not be compelled to produce any banker's book the contents of which can be proved in the manner provided in Section 97 of this Act[38] or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of the court made for special cause'[39].

However in Nigeria, under certain circumstances, every bank is required to give certain information to the Federal Board of Inland Revenue once it receives a notice to that effect. The simple implication of this is that banks as taxpaying entities are of course, subject to the usual compliance provisions contained in the Companies Income Tax Act Cap. C21 Laws of the Federation of Nigeria, 2004 and elsewhere.[40]

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[36] Olokooba S.M "A Legal Analysis of the Taxation of Banking Business in Nigeria (1990-2010)", an unpublished Ph.D. thesis, Faculty of Law, University of Ilorin, p.107

[37] Akintoye O.D "The Personal Income Tax (Amendment) Act, 2011: Effects of the amendment on the Right of Taxpayers", second Ph.D. seminar presentation, Faculty of Law, University of Ilorin, 2013, p.15

[38] Evidence Act

[39] Olokooba S.M, op.cit, p.107

[40] One of such elsewhere is when a bank is directed by any competent court of law to disclose or produce banker's book. See Section 157 Evidence Act, Cap. E14 LFN,2004.

[41] Abdulrazaq, M.T. 'Reporting and Compliance Matters for Banks', (Lagos Business School, 2005), ,p.2

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In two areas of banks' activities, i.e., where a bank pays interest, and the Inland Revenue demand for information on it, secondly when a bank makes payment on income whose origin is offshore, the legislation imposes responsibility on bank to disclose information. In such circumstances the legislation has provided rules for ensuring that, in most cases, the bank withholds basic rate tax on moving any payment to the receipt of the income[41]. Other areas where the law requires banks to disclose information when asked by the Inland Revenue are in:

a. detail interest paid by banks,
b. reporting of and accounting for interest payments,
c. production of books, documents accounts and returns,
d. banks acting as agents trustees or investment manages,
e. information relation to income from dividends; and
f. safekeeping of deposits.

Both the Evidence Act[42] and the FIRSEA[43] allow for the contents of documents to be proved either by primary or secondary evidence.[44] Primary evidence is the document itself produced for the inspection of the court, while secondary evidence

however, all oral or written communications made by a client to his lawyer in the normal course of professional employment are privileged[45]. This means that such information cannot be divulged by the legal practitioner or be required to be tendered in evidence,

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[42] S. 84 E.A,2011

[43] 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" 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.

[44] See section 87(a)(b)(c)(d)(e) FIREA, 2007, See. 86 (1) E.A, 2011

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

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without the client's express consent first having been obtained[46]. 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",*[47]

5.1: Legal Professional Privilege and the Banker

When it comes to the issue of professional privileges, the case of a legal practitioner is different from that of the Banker/ customer relationship. Generally, a legal practitioner is not allowed to reveal a confidence or secret of his client, or use same to the disadvantage of the client, or to the advantage of himself or a third person, unless the client consents.[48] Exceptionally however, a legal practitioner may reveal confidences or secret when permitted under the Rules of Professional Conduct for Legal Professionals or under a required law or a court order, or when his client has the intention to commit a crime and such information is necessary to prevent the crime. A lawyer is allowed to reveal confidence or secrets

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[46] See the Supreme Court case of *Abubakar vs Chuks (2007) 18NWLR PT.1060 366*

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

[48] Se the Nigerian Supreme Court case of *Abubakar v. Chuks* (2007)18 NWLR pt.1060, 360, see also, Rule 19(2)(a)(b)(c)and (c) Rules of Professional Conduct for Legal Practitioners

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necessary to establish or collect his fees or to defend himself or his employees or associates against an accusation of wrong conduct.[49]

In Nigeria, by virtue of section 192 & 195 of the Evidence Act 2011 and in a number of judicial authorities, 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 exceptions[50]apply, then the party's claim to legal professional privilege is assured. It is an obligation that continues even after the retainer has come to an end[51]. It is of essence to note however that 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 customer and his Banker. Such communications are not of the kind within the scope of the principle.

5.2 Banker/Customer Relationship vis-a vis Bank Secrecy Regulation Examined

Considering the provision in section 28(1) of FIRSEA, 2007 which requires bankers to prepare and deliver information on bank customer to the Service upon demand, can a banker rely on the Professional Privilege not to divulge information upon demand by the FIRS? Is the professional privilege enjoyed by legal practitioners not to divulge client information to the third party extended to the banker?

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[49] See Rule 19(3)(a)(b)(c) and(d)) Rules of Professional Conduct for Legal Practitioners and Ethics

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

[51] Adebambo O, 'Legal Professional privilege: Antecedents and Developments' (Business Day, Thursday 30/3/2012)

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Bank secrecy or bank privacy is a legal principle in some jurisdiction.[52] In those jurisdictions, banks are not allowed to provide to authorities personal and account information about their customers unless certain conditions apply.[53]

Banker/Customer relationship is one of those binding legal relationships which create reciprocal duties and liabilities between the parties thereto. Banker/customer relationship was judicially defined in the case of *First Inland Bank Plc v. Effong*[54]as a relationship of a debtor and creditor. The relationship between a bank and its customer is also contractual[55] and it is common knowledge that in every contract, there are reciprocal duties and responsibilities that the parties thereto are expected to perform and fulfill whish usually flow from the terms of the contract between them.

A valid contract in law was just judicially defined in the case of *Orient Bank Plc v. Bilante International Ltd.* Where Niki Tobi defined it as a legally binding agreement between two or more persons by which rights are acquired on one hand and forbearances on the other hand. There can therefore not be a contract without the existence or concurrence of rights and duties, because every legal binding contract is a give and take transaction of which a Banker/ Customer relationship is one[56].

A banker has a duty under its contract with its customer to exercise reasonable care and skills in carrying out its duties and obligations. The duty of reasonable care extends and covers the bank's duty of confidentiality, to keep secret all official transactions of its customer, and not to reveal same to a third party, except in

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[52] 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.

[53]for example where a criminal complaint has been filed.

[54] (2010)16 NWLR (pt.1218), p. 200-201

[55] See *UBA Plc v. Ajabule*

[56] Akintoye O.D "The Personal Income Tax (Amendment) Act, 2011: Effects of the amendment on the Right of Taxpayers", second Ph.D. seminar presentation, Faculty of Law, University of Ilorin, 2013, p.19

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special cases and circumstances. If the bank breaches its omnibus duty of confidentiality, this can constitute a valid ground for its customer to sue for breach of contract on the ground of negligence. To succeed in a claim of negligence, a plaintiff must establish:

a) The existence of a duty of care owed to it by the defendant;

b) Failure to attain to attain the standard of care prescribed by law, and

c) Damages or injury suffered by the plaintiff as a result of the duty of care owed it by the defendant

A customer who is a plaintiff in an action for negligence is required to state or give particulars of the negligence alleged, and is entitled to recover on the negligence pleaded in the particulars. Thus, it is not sufficient for a plaintiff to make a blanket allegation of negligence against a defendant in a claim for negligence without giving full particulars of items of negligence relied on, as well as the duty of care owed him by the bank[57].

A customer can sue a bank for any cause of action whether founded on contract, negligence or any other tort, regardless of whether there is privity of contract, as what matters is what is being sued for. It cannot be lost of sight that bankers may in certain circumstances be liable to persons who are not their customers for the tort of negligence which cause them pecuniary damages[58].

Under the Swiss Principle of Bank Secrecy, privacy is statutorily enforced. With Swiss law strictly limiting any information

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[57] See *Diamond Bank Ltd v. PIC Ltd* (2009) 18 NWLR (pt 1172), 67, see also, *British Airways v. Atoyebi* (2010)14 NWLR (pt.1214) 561, *Iyere v. B.F.F.M* (2008) 18 NWLR (pt.1119), 300, see further, *F.B.N Plc v. M.O Kanu Sons Ltd(2006), 26 NSCQR* (pt.II),999. See also, ibid, p.20

[58] See *UBA Plc v. Automobile C.N Ltd* (2012)All FWLR(pt.610)

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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 is to transmit to the U.S authorities, information concerning 4,450 American clients suspected of tax evasion.

The recent English case of *Prudential Plc and Prudential Gibraltar Limited vs Special Commissioner of Income Tax and Philip Pandoifo (HM Inspector of Taxes)*[59] where the main issue was whether the principle of Legal Professional Privilege (LPP) can, and/ or should extend further than has thus far been recognized, to include and cover, "other classes" of professionals. 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 advise 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.

Even 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".

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[59] (2010) EINCA CIV 1094

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Despite this position of the court, it is the humble argumen of this paper that a dichotomized analysis of who among the professional should be entitle to professional privileges is against the principle of equity. A professional under whatever name, be it banker or accountant or any other name should be accorded and allow to use the shield of professional privileges in protecting clients classified information just like the legal practitioners. Since confidentiality is the basic ground of banker/customer relationship, this paper further argues that disclosure of customers' information to any other third parties amounts to breach of contract which entitles the plaintiff (bank customer) to sue on ground of negligence on the part of the banker.

6.0: CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

From the foregoing, it could be gleaned that, 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 information/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.

It is also of note that in exercising the right of entry (into business premises or private dwelling) a search warrant is required from the FIRS, and that all information and documents supplied or

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produced in pursuant of any requirement should be treated as confidential and any officer that contravenes this rule is liable on conviction to a fine or imprisonment or both. The FIRS also has the power to compel production of documents and to access lands, buildings, books and documents. Notwithstanding this power, the authorized office cannot enter any private dwelling except with the consent of an occupier or pursuant to an authorization issued.

The question of whether the professional privilege as regards refusal to divulge client information to the third party can be extended to other professionals such as bankers and accountants also examined. On this, the paper revealed that presently, the current disposition of the court to this is that the Professional Privilege cannot be claimed by the banker or other professionals save only the legal practitioners because the communications with the banker and others are not within the scope of the principle[60].

In conclusion, this paper further observed that the taxpayers right to notices from FIRS before demanding for information on bank customers' is contravened by the provision in Section 26 (2) of the FIRSEA, which provides for an officer of the Service, not below the rank of Chief Inspector of Taxes or its equivalent to act, by calling for Returns, Books, Documents and Information, *without giving any of the required notices set out in the Act*. Based on this and for the fact that legislation requires Revenue Authority to act reasonably and responsibly in the way and manner they carry on their duties, this paper recommends the following:

6.2 Recommendations

* The taxpayer should be allowed to have access to a copy of the Third Party Notice so as to know the information sought and to be able to defend himself. This is a right that should

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[60] See *Prudential Plc and Prudential Gibraltar Limited vs Special Commissioner of Income Tax and Philip Pandoifo (HM Inspector of Taxes)* (2010) EINCA CIV 1094.

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be enforced and protected, and which is in line with an emerging trend in tax administration practice that has begun to recognize that taxpayers have rights that should be respected.

* Nigeria should borrow a leave from countries in the Nordic region, that is, Denmark, Estonia, Finland, Norway, and Sweden and more recently Chile and Spain, who have reformed the third party information approach by making Third – Party information available to taxpayers by way of a pre-filled or pre-populated tax returns or tax proposal. The essence of this is that, it will reduced compliance burden, faster processing of taxpayer's tax return information, quicker refunds of overpaid tax to taxpayer and it will also eliminate boarding of raising amended assessments by tax officers.

* Section 26(2) FIRSEA that allows officers not below the rank of Chief Inspector of Taxes to act without given any of the required notices set out in the Act be amended to read...an officer not below the rank of Chief Inspector of Taxes or its equivalent may only act in any cases stipulated... *after giving the required notices set out in the Act.* This amendment will guide against wrongful use of information/investigation powers of the tax authorities and guarantees taxpayers' right to notices.

* The introduced phrase '*any information* demanded of them by any tax authority' in section 47(5) need to be amended to guide against the inconsistency of this section with section 26 (i) which is also on FIRS information rights. While section 26(1) FIRS states clearly tax authorities can only demand Information on taxpayers tax position on financial statement

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of individuals and body corporate, section 47(5) is an open-ended statement "any information". The word "any" is ambiguous and need to be amended and replace with specific information.

* The taxpayers' should have a right 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. This will indirectly strengthened taxpayers' constitutional right of expression.

* Professional privileges not to disclose client's classified information be extended to other categories of professionals like banker, accountants etc. Doing this will guarantee the effectiveness of bank secrecy regulations and further strengthened banker/customer relationship.

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