

## FEDERAL HIGH COURT DECLARES THE 0.005% POLICE TRUST FUND LEVY IMPOSED ON THE NET PROFIT OF COMPANIES IN NIGERIA UNCONSTITUTIONAL

### Background



The Nigeria Police Trust Fund (Establishment) Act 2018 (as amended) (the “Act”) was signed into law by the President of the Federal Republic of Nigeria on June 24, 2019. The Act established a framework for the management and control of the Nigeria Police Trust Fund (the “Trust Fund”). Essentially, the Trust Fund is designed to provide funds for the training and retraining of the personnel of the Nigeria Police Force (“NPF”). It is also aimed at financing state-of-the-art security equipment and machinery for the NPF, improving the welfare of the personnel, and enhancing their preparedness to effectively discharge their constitutional duties of protection of lives and property, among other objectives.

Pursuant to section 4(1)(a) and (b) of the Act, the constitution of the Trust Fund shall include:

- a) An amount constituting 0.5% of the total revenue accruing to the Federation Account; and
- b) A levy of 0.005% of the net profit of companies operating business in Nigeria.

The Federal High Court, Abuja Division, presided over by Hon. Justice A. R. Mohammed (“FHC” or the “Court”), recently considered the constitutionality of the provisions of the Act, in the case of *Attorney-General of Rivers State v Attorney-General of the Federation & 3 Ors.* (“*AG Rivers v AG Federation*”)<sup>1</sup>. The Court declared the provisions of the Act to be unconstitutional. The decision has far-reaching implications for the ability of the Federal Inland Revenue Service (“FIRS”) to enforce the provisions of the Act on

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<sup>1</sup> Unreported judgment, delivered on January 26, 2022, in Suit No: FHC/ABJ/CS/511/2020

companies, going forward. The decision also raises questions regarding allocation of tax powers in Nigeria and the ability of the FIRS to enforce certain sundry federal taxes.

### Facts and decision in the case

The Federal Government of Nigeria (“FGN”), relying on the provisions of the Act, had deducted 0.5% of the total revenue accruing to the Federation Account for the month of March 2020 and remitted same to the Trust Fund. Aggrieved, the Rivers State Government (“RSG”), acting through the office of the Attorney-General of Rivers State, commenced an action in the FHC against the FGN, challenging the constitutionality of section 4(1)(a) and (b) of the Act. The RSG urged the Court to declare the said provisions unconstitutional, null and void, and restrain the FGN from further implementing the said provisions. The RSG also sought orders mandating the FGN to refund all sums deducted based on its implementation of the provisions of section 4(1)(a) and (b) of the Act.

The RSG’s key contention in *AG Rivers v AG Federation* is that, in accordance with the provisions of section 162 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) (the “Constitution”), the FGN is required to maintain a special account called the “Federation Account”, into which all revenue collected by the FGN shall be paid (except for a few identified proceeds).

Further, the RSG argued that any amount standing to the credit of the Federation



Account is required to be distributed to only three (3) sets of beneficiaries, namely, the FGN, the State Governments, and the Local Government Councils in each State of the Federation (“LGCs”), and that no organ or agency of the FGN is entitled to receive revenue as a first-line charge from the Federation Account other than from revenue due to and distributed to the FGN. The RSG further submitted that, by virtue of the provisions of the Constitution, the responsibility to establish, fund, and maintain the NPF is solely that of the FGN (That is, it does not extend to, and should not affect the revenue due to State Governments).

The RSG contended that all taxes (except a few exempted cases), levies, and revenue collected by the FGN, including those collected from companies, are to be paid into the Federation Account, the total balance of which is to be distributed to the FGN, State Governments, and LGCs in line with the provisions of the Constitution. The direct allocations from the Federation Account to agencies or organs of the FGN, such as the NPF, was contended to be a violation of constitutional stipulations.

On the other hand, the FGN contended that it has constitutional powers to prescribe the manner of distribution of funds collected into the Federation Account, and that the provisions of section 4(1)(a) and (b) of the Act were made pursuant to that power. The FGN further argued that the NPF was created for the Federation as a whole and not solely for the FGN and as such, funds can be allocated to the NPF by an Act of the National Assembly.

To further buttress its points, the FGN argued that the “total revenue accruing to the Federation”, as stated in the Act, is distinct from the “total amount standing to the credit of the Federation Account”, as stated in section 162 of the Constitution. It was contended that charges may be validly drawn from the Federation Account and that the balance (after such charges) qualifies as the total amount standing to the credit of the Federation Account (to be distributed among the FGN, State Governments, and the LGCs), within the context of section 162 of the Constitution.

In its judgment, the FHC held that from the wording of section 161(1) of the Constitution, it is abundantly clear that all revenue collected by the FGN (except the proceeds derived from the personal income tax of personnel of the Armed Forces of the Federation, the NPF, the Ministry of Foreign Affairs, and the residents of the Federal Capital Territory, Abuja), must be paid into the Federation Account maintained by the FGN. Accordingly, the Court declared section 4(1)(b) of the Act, which empowers the FGN to pay revenue received by way of a 0.005% levy on the net profit of

companies operating in Nigeria, to be unconstitutional, null and void; for being inconsistent with the provisions of section 161(1) of the Constitution.



The Court further held that, in view of the provisions of section 162(3) of the Constitution, the revenue standing to the credit of the Federation Account cannot be deducted directly from the account or made subject to a first-line charge for the benefit of any organization, agency, or body including the NPF (or its Trust Fund), except to the FGN, the State Governments, and the LGCs. The FHC found no basis for the FGN’s contention, that the use of the word “credit” in section 162(1) of the Act clearly shows that a debit can also be made from the revenue accruing to the Federation Account before it can be distributed to the FGN, the State Governments, and the LGCs. The Court took the view that an accession to such argument would amount to reading into the Constitution what is not there. Ultimately, the Court ordered a refund of RSG’s share of all sums unconstitutionally deducted by the FGN from the Federation Account and applied directly to the Trust Fund as a first-line

charge. However, the Court declined to make the same order in respect of the other States of the Federation who were not parties to the case.

## Commentary

Nigeria is a constitutional democracy that operates three (3) tiers of government – Federal, State, and Local Governments. The Constitution delineates the legislative powers of government among the three tiers, including the power to impose and collect tax. Hence, a tier of government in Nigeria can only validly tax a person over whom it has the competence to exercise legislative control. The tier of government must also have the competence to exercise legislative authority over the subject-matter of the tax. Thus, any taxation without legal or constitutional basis/authority is a nullity.

In our view, the decision in *AG Rivers v AG Federation* is unassailable, in that it reinforces the constitutional allocation of tax powers in Nigeria. It validates the saying that taxation is an absolute power which acknowledges no other limits than those expressly prescribed in the Constitution. It therefore appears logical for the FHC to have declared the provisions of section 4(1)(a) and (b) of the Act to be null and void to the extent of its inconsistency with the Constitution.

Having invalidated the charging provisions of the Act (that is, section 4(1)(b) thereof), for allowing a first-line charge on revenue accruing to the Federation Account in contravention of the provisions of the Constitution, the decision in *AG Rivers v*

*AG Federation* may have also provided a ground for challenging the legality of the Trust Fund. By the same token, the decision may impact on the powers and ability of the FIRS, to henceforth collect the 0.005% levy imposed on the net profit of companies operating in Nigeria, as well as certain sundry federal taxes of a similar nature. Given the significant impact that the FHC decision may have on taxable entities going forward, it is prudent for companies operating in Nigeria to seek professional advice from their legal and tax advisors regarding their obligation to pay the 0.005% levy imposed on their net profits under the Act.

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Click [here](#) to read our previous commentary on the enactment of the Nigeria Police Trust Fund (Establishment) Act 2018.

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## EDITORIAL TEAM

Ken Etim  
(Managing Partner)  
[ketim@banwo-ighodalo.com](mailto:ketim@banwo-ighodalo.com)

Abimbola Akeredolu, SAN, FCI Arb.  
(Partner)  
[aakeredolu@banwo-ighodalo.com](mailto:aakeredolu@banwo-ighodalo.com)

Azeezah Muse-Sadiq  
(Partner)  
[asadiq@banwo-ighodalo.com](mailto:asadiq@banwo-ighodalo.com)

Oluwatoba Oguntuase  
(Senior Practice Support Lawyer)  
[ooguntuase@banwo-ighodalo.com](mailto:ooguntuase@banwo-ighodalo.com)

Emmanuel Onyeabor  
(Associate)  
[EOnyeabor@banwo-ighodalo.com](mailto:EOnyeabor@banwo-ighodalo.com)

**Enquiries:**  
[taxteam@banwo-ighodalo.com](mailto:taxteam@banwo-ighodalo.com)

## OUR OFFICES

48, AWOLOWO ROAD, SOUTH WEST IKOYI  
LAGOS, NIGERIA

AFRI-INVESTMENT HOUSE  
50, AGUIYI-IRONS STREET, MAITAMA  
ABUJA, NIGERIA

234 9060003561-2;  
8050875883; 8092714452; 9020524921  
(ABUJA - 09 2912127)  
[BANWIGHO@BANWO-IGHODALO.COM](mailto:BANWIGHO@BANWO-IGHODALO.COM)  
[WWW.BANWO-IGHODALO.COM](http://WWW.BANWO-IGHODALO.COM)