

Federal High Court nullifies funding of Police Trust Fund through direct deduction from Federation Account and levy on companies

KPMG Nigeria
February 2022



The Federal High Court (FHC or “the Court”) Abuja Division, recently delivered judgement in the case between the *Attorney General for Rivers State (AGRS or “the Plaintiff”)* and *Attorney General of the Federation (AGF or “1st Defendant”)*, *Accountant General of the Federation (“2nd Defendant”)*, *Revenue Mobilization Allocation and Fiscal Commission (“3rd Defendant”)*, and the *Honourable Minister of Finance for the Federal Republic of Nigeria (4th Defendant) (collectively referred herein as the Defendants)*, stating that Section 4(1)(a) and (b) of the Nigeria Police Trust Fund (Establishment) Act, 2019 (NPTF Act) is inconsistent with the provisions of the Constitution of the Government of the Federal Republic of Nigeria 1999 (as amended) (“the 1999 Constitution”) and, therefore, null, void and of no effect whatsoever.

Further, the Court granted the relief sought by the Rivers State Government (RSG) for refund of its share of all sums already deducted from the Federation Account in line with Section 4(1)(a) and (b) of the NPTF Act for the funding of the Nigeria Police Trust Fund (NPTF or “the Fund”).

Submissions of the parties

Below is a summary of the arguments of the parties to the case:

AGRS’ position

The Plaintiff argued that Section 4(1)(a) and (b) of the NPTF Act, which provides for payments to the Fund of 0.5% of the total revenue accruing to the Federation Account and 0.005% of the net profit of companies operating in Nigeria, directly contradicts the provisions of Section 162 (1) and (3) of the 1999 Constitution.

Section 162(1) of the 1999 Constitution provides that all revenues collected by the Federation of Nigeria (except personal income tax of personnel of the Armed Forces of the Federation, the Nigeria Police Force, the Ministry of Foreign Affairs and residents of the Federal Capital Territory, Abuja) shall be paid into the Federation Account. Section 162(3) provides that any amount standing to the credit of the Federation Account shall be distributed among the Federal and State Governments and Local Government Councils in each State of the Federation on such terms and in such manner as may be prescribed by the National Assembly. Therefore, the AGRS argued that the revenue due to the Federation Account cannot be distributed directly to any other organization, agency, or organ of Government other than the three sets of beneficiaries expressly mentioned in Section 162(3) of the 1999 Constitution.

The AGRS further argued that the Nigerian Police Force (NPF) is an agency of the Federal Government of Nigeria (FGN) and is not entitled to a share of revenue from the Federation Account. Therefore, Section 4(1)(a) and (b) of the NPTF Act represent an effort of the FGN to abdicate its responsibility to fund and maintain the NPF at the expense of the RSG and other States and local councils in each of the States of the Federation.

Based on the foregoing, the Plaintiff sought the following reliefs from the Court:

1. A declaration that it is the constitutional duty and responsibility of the FGN and not that of the Plaintiff or any other State Government to establish, fund and maintain the NPF.
2. A declaration that by virtue of Section 162(3) of the 1999 Constitution, funds due to the Federation Account can only be distributed among the Federal Government, State Governments and Local Government Councils in each of the States of Nigeria and not directly to any agency of the Federal Government such as the NPF.
3. A declaration that by virtue of Section 162(1) of the 1999 Constitution, all revenues collected by the Federation of Nigeria, at its instance or on its behalf (except a few exempted cases) are required to be paid into the Federation Account for the purpose of being distributed to the Federal, States and Local Governments.

4. A declaration that Section 4(1)(a) and (b) of the NPTF Act and any other provision therein permitting the direct deduction of any sum or percentage of revenue accruing to the Federation Account, or which ought to have been paid into the Federation Account for the purpose of providing funds for the NPTF, is unconstitutional, null and void.
5. A declaration that the FGN is not entitled to deduct any sum, appropriate any sum or withhold any sum from the Federation Account as a first-line charge for any purpose, including the purpose of funding any of its organs or agencies.
6. A declaration that the FGN is liable to refund to the Federation Account all sums already deducted from the Federation Account or withheld from the Federation Account for the purpose of funding the NPTF.
7. An order of injunction restraining the Defendants, their agents, or representatives from implementing the provisions of Section 4(1)(a) and (b) of the NPTF Act or in any manner deducting 0.5% of the total revenue or any sum accruing to the Federation Account, including collecting direct levy from companies for the purpose of funding the NPTF.
8. An order of mandatory injunction directing the 2nd, 3rd and 4th Defendants, their agents or privies to deduct from the sums due to the FGN from the Federation Account all sums deducted from or removed from the Federation Account and all sums due to be paid into the Federation Account but withheld from the said Account for the purpose of funding the NPTF or pursuant to the NPTF Act and, upon deduction, to distribute same in accordance with the provisions of Section 162(3) of the 1999 Constitution.

AGF's position

The AGF initially argued that the subject matter of the suit, which is a dispute between Rivers State and the Federation, was outside the scope of jurisdiction of the FHC. Therefore, the Supreme Court, and not the FHC, was the appropriate body to adjudicate over the case. However, the Court determined based on the Plaintiff's claim that the conditions for the invocation of the original jurisdiction of the Supreme Court did not exist. Therefore, the Court had the requisite jurisdiction to entertain the case.

The AGF further argued that the National Assembly is empowered by Section 162(3) of the 1999 Constitution to enact a statute that regulates the distribution of revenue accruing to the Federation Account. Hence, the National Assembly is not limited by the 1999 Constitution to allocate revenue from the Federation Account to the NPTF.

Finally, the AGF opined that the use of the word "credit" in Section 162(1) of the 1999 Constitution clearly showed that the three listed beneficiaries are not entitled to the total revenue accruing to the Federation Account, but only the amount remaining after the necessary charges have been drawn from the account.

Issues for determination

Based on the prayers and arguments submitted by the parties, the Court adopted the Plaintiff's issues for determination as follows:

- (i) *Whether upon a proper construction of item 45 of the Exclusive Legislative List (Second Schedule, Part 1), Sections 214 and 215 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Sections 3 and 4 of the Police Act, it is not the constitutional duty and responsibility of the Federal Government of Nigeria to establish, fund and maintain the Nigeria Police?*
- (ii) *Whether upon a proper construction of Section 162(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), the Government of the Federation is not bound to collect all taxes and levies due to it and pay into the Federation Account for the purpose of distribution to the beneficiaries listed in Section 162(3) of the said Constitution?*



- (iii) *Whether upon a proper construction of Section 162(3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), revenue standing to the credit of the Federation Account can be distributed directly from the Federation Account or made subject to a first-line charge for the benefit of any organization, agency or body other than to the Federal Government, the State Governments, and the Local Government Councils in each State of the Federation?*
- (iv) *Whether upon a proper construction of Section 1(3) and Section 162(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Section 4(1)(a) & (b) of the NPTF Act, the said Section 4(1) (a) & (b) of the NPTF Act, and any other provision of the said Act permitting direct deduction of funds from the Federation Account or direct collection of levies from companies for the purpose of funding the Nigeria Police Trust Fund is inconsistent with the provisions of Section 162(1) and Section 162(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and therefore null and void.*

FHC's decision

After considering the arguments of both parties, the Court held, among other things, that:

- (i) The FGN is not empowered by Section 162(1) and (3) of the 1999 Constitution to deduct any sums directly from the Federation Account for the purpose of training or maintaining the NPF.

Based on a combined reading of the Exclusive Legislative List, Section 214 of the 1999 Constitution and Section 5 of the NPTF Act, it is the sole responsibility of the FGN to establish and maintain the Nigeria Police as one of its agencies and cannot dip its hands into the Federation Account for this purpose.

- (ii) Section 162(3) of the 1999 Constitution provides for the distribution of any monies in the Federation Account among the Federal, State, and Local Government Councils in each State of the Federation to the exclusion of any other person or entity. To the extent that Section 4(1)(a) of the NPTF Act permits the Government of the Federation to deduct 0.5% of the credit balance of the Federation Account, and pay it into the NPTF, it is inconsistent with Section 162(3) of the 1999 Constitution and, therefore, null and void.
- (iii) By virtue of the clear and unambiguous provisions of Section 162(1)(2) and (3) of the 1999 Constitution, the FGN is obliged to pay all the revenue it collects into the Federation Account (except the proceeds of personal income tax of armed forces of the Federation, NPF, Ministry of Foreign Affairs and residents of Abuja Federal Capital Territory, which are specifically exempted). Consequently, Section 4(1)(b) of the NPTF Act, which requires companies to remit NPTF Levy into the Fund rather than the Federation Account, is inconsistent with Section 162 (1) of the 1999 Constitution and, therefore, null and void by virtue of Section 1(3) of the 1999 Constitution.

Based on the foregoing, the Court granted reliefs 1 to 5 and 7 above in favour of the Plaintiff. With respect to reliefs 6 and 8, the Court ordered the refund of only the Plaintiff's share of the amount deducted by the FGN from the Federation Account, as the remaining 35 States cannot claim the benefit of the judgement in a case where they were not parties.

Commentary on the implications of the judgement for Federal Government and Taxpayers

This is a landmark judgement with significant implications for fiscal federalism and financing of government agencies and initiatives currently funded through taxes on companies over and above their regular companies income tax.

The judgement affirms the sanctity of the Federation Account into which the FGN is to pay all the federally collectible revenues, except those specifically exempted as referenced above, and from where it cannot make any deduction for itself or the benefit of any of its agencies. The nullification of section 4(1)(b) of NPTF Act by the FHC suggests that the provision has become extinct and the basis of remittance of the levy to the FIRS as recently provided in Section 36 of Finance Act, 2021 no longer exists.

The judgement has far reaching implications for the legality of similar laws providing for partial funding of some FGN agencies and schemes through direct charge to the Federation Account, such as the National Agency for Science and Engineering Infrastructure (NASENI) Act. In essence, the FGN can no longer make a 1% direct charge to the Federation Account as provided by Section 20(2)(a) of NASENI Act to fund NASENI. Equally, the nullification of Section 4(1)(b) of NPTF Act by the FHC and affirmation of the obligation of the FGN to remit all federally collectible revenue to the Federation Account put questions on the legality of similar provisions in the Tertiary Education Trust Fund Act (Section 1) and National Information Technology Development Agency (NITDA) Act [Section 20(2)(b)]. This should make the FGN revisit such laws with a view to aligning them with the provisions of the Constitution. If not, the judgement might have signalled an end to the era of creating dedicated funds into which taxes and levies collected from companies by the FGN are paid to fund its specific projects or initiatives.

Until now, the 30% companies income tax rate has become the minimum companies income tax rate for companies subject to the additional taxes and levies imposed by TETF Act (2.5% of assessable profits of all companies); NITDA Act (1% of profits before tax payable by GSM service providers and all telecommunications companies, cyber companies and internet providers, pensions managers and pension related companies, banks and other financial institutions and insurance companies); NASENI Act (0.25% of profits before tax payable by companies with minimum ₦100,000,000 turnover operating in the banking, mobile telecommunications, ICT, aviation, maritime, and oil and gas sectors); and NPTF Act (0.005% of net profit of companies operating in Nigeria).

The foregoing commentary assumes that the judgement is correct and stands until reviewed by the higher courts where the FGN elects to appeal against it. However, the following are the other issues to be considered in evaluating the judgement and its implications for the Government and taxpayers.

1. The time of appeal against the judgement is still open for the FGN to exercise its right of appeal against the whole or any part of the judgement it is dissatisfied with. Hence, there is no finality yet to the judgement and the appeal, if prosecuted, can lead to a different outcome. For this reason, it will be in the interest of taxpayers to seek professional advice for appropriate guidance on their obligation under Section 4(1)(b) of the NPTF Act nullified by the FHC in the judgement and the implications of this for similar provisions in other legislation referenced above.
2. There was no reference in the case to Section 80(1) of the 1999 Constitution, which recognizes that a public fund can be established for a specific purpose, and Section 80(3), which approves the disbursement of money from any such public fund in accordance with the related Act of the National Assembly. It will be interesting to see how this will affect the judgement if it is considered on appeal.
3. While there is no challenge to the power of the FGN to enact tax laws in the areas of its legislative competence, the import of the judgement is that taxes collected under such laws must be paid into the Federation Account for sharing among the three tiers of Government. In the circumstances, the FGN through the FIRS can continue to collect TET, NPTF, NITDA and NASENI levies for remittance into the Federation Account rather than the earmarked funds. The reality, however, is that the purpose of the earmarked funds will be defeated if only the FGN's share is ultimately paid therein, while the States and Local Government can spend their share on purposes other than the purposes for creating the earmarked funds.
4. As held by the FHC, if other State Governments cannot enjoy the benefit of the judgment to obtain a refund of their share of the Federation Account which the FGN had, so far, appropriated to fund the NPTF, it begs the question if taxpayers can equally claim a relief from the nullification of Section 4(1)(b) by the Court as they were not parties to the case.

Ultimately, the response of the FGN to the FHC judgement will determine the effectiveness of the judgement and its impact on NPTF and, generally, other earmarked funds and taxpayers who have obligations under the related laws.

