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The ITF levy, to pay or not to pay, is that a question?

In the last few years, businesses, ranging from limited liability companies to companies limited by guarantee (charitable entities etc.) have received a bill from the Governing Council of the Industrial Training Fund ("ITF") demanding a payment to the Industrial Training Fund (the "Fund") of the ITF Levy.

The ITF was established under the ITF Act of 1971 (the "Act") to encourage the acquisition of skills in industry and commerce in Nigeria. This was with a view to generating a pool of resources to meet the needs of Nigeria's economic development. In its initial form, the Act required every employer with 25 or more employees, to pay 1% of their annual payroll to the Fund. In instances where the ITF (under the Act in its initial form and even after amendment) was/is unable to determine an employer's total annual payroll, it uses a "best-of-judgment" mechanism to determine the extent of liability.

The Act was amended almost a decade ago (by the Industrial Training Fund (Amendment) Act, 2011) and introduced new provisions expanding the breadth of persons liable to pay to the Fund. Now, the Act requires employers with 5 employees or more or an annual turnover of ₦50 Million and above, to contribute 1% of their annual payroll to the Fund.

To manage the broad group now liable to pay a "contribution" to the Fund, the ITF appears to have appointed Agents to enforce its demands from all employers. This approach has however been resisted by some companies and led to disputes about the validity or otherwise of the demands. In some instances, the disputes occur where these demands are seen to have been ignored or unpaid and in other instances the disputes relate to where an employer negotiates with the ITF or its Agents but fails to remit the reduced amount agreed on within a stipulated time.

The disputes have been escalated and adjudicated at the Federal High Court (FHC) in an ITF case filed by its Agent against an employer. The Agent sought declaratory and monetary reliefs against Company X on behalf of the ITF. One of these reliefs was an Order that X produce its accounts to the ITF to determine its liability to the ITF. In the alternative, the Agent sought an Order directing X to pay ₦150 Million as a "best-of-judgment" assessment. It was however not clear how the Agent determined the ₦150 Million figure, as it seemed the agent simply used its "best-of-judgment".

It is instructive to note that under the ITF Act, only the ITF's "Director-General" can make a "best-of-judgment" demand. Whilst the Director-General may delegate this power to "any staff authorized on his behalf", nothing in the Act gives him the authority to delegate it to "Agents". In reality, the ITF seems to have ignored the law and has Agents making best-of-judgment demands on employers consistently.

In the case mentioned above, X argued that the "contribution" was unconstitutional, as it is a payroll tax and not an item under the Exclusive or Concurrent Legislative Lists of the Constitution. The FHC however gave judgment against X on the ground that, since the word used in the Act was "contribution", the levy

was not a tax but a "contribution". It does not appear as though the FHC carefully analyzed the items on the Exclusive and Concurrent Legislative Lists to see whether a payroll tax is one of the items listed, before arriving at this decision. It also does not appear as though the FHC considered whether the Federal Government had the power to impose the "contribution" in the first place, especially in the light of a recent decision by the FHC (*The Registered Trustees of Hotel Owners and Managers Association of Lagos (Hotel Owners) v Attorney General of Lagos State*, where the FHC held that the Federal Government did not have powers to legislate on issues outside the Exclusive or Concurrent List).

Dissatisfied with the Judgment, X appealed. However, the Court of Appeal aligned with the FHC's Judgment and affirmed it as it also held that the "contribution" was not a tax. The Judgment and its reasoning has led to several questions, especially regarding what constitutes a tax, since the ITF levy is now a "contribution" and not a tax, based on the FHC and Court of Appeal decisions.

In addressing this issue, we find help in the Australian High Court decision in *Mathews v Chicory Marketing Board*, where a tax is defined as "a compulsory exaction of money by a public authority for public purposes" or "taxation is raising money for the purposes of government by means of contributions from individual persons". In a nutshell, a "contribution" is a tax.

The Nigerian Constitution clearly lists the taxation powers of the Federal Government on the Exclusive and Concurrent Legislative Lists. We have examined this closely and nowhere does a payroll tax appear as an item on either list. In our opinion, this is a residual matter for the State Governments (although we are not advising State Governments to now set up their own "training funds").

No matter how the courts wish to paint the "contribution" ITF demands from employers, it remains a payroll tax. It is a constitutionally questionable levy that needs final judicial interpretation at the Supreme Court. However, this is only our opinion and not the law. Consequently, as the law stands: the "contribution" is a valid demand, just as the ITF Act is a valid law, until amended, repealed, or rendered unconstitutional. We guess it is time a few more employers challenged the validity and constitutionality of this demand and the Act – as we expect a judge or justices will soon see the "contribution" for what it really is and call this "contribution" what it is – a "payroll tax".

On another note, the FHC recently gave a judgment against the ITF. This was on the grounds that the demand made by an ITF Agent based on its "best-of-judgment" was not a valid demand, as only the Director-General or any other authorized officials could validly make a "best-of-judgment" assessment. Although the Court gave Judgment against the ITF, it still maintained that the "contribution" is not a tax (just like the other courts).

We have set out below, a conversation between a lawyer and a prospective client to illustrate what employers will continue to face if the validity of the "contribution" and the Act remain unchallenged, or if the Legislature does not amend this law.

Last week, Wale, a Lagos lawyer met Chuks for a drink at Shakara Lounge on Victoria Island. The following conversation ensued:

Chuks: Hey Wale, I need to discuss something with you. I received a notice from the ITF asking me to pay a contribution of ₦100 Million. Have you seen anything like it?

Wale: Yes, I have.

Chuks: Do you think I should pay the assessment?

Wale: You have to.

Chuks: But why should I pay?

Wale: Because the law backing up the assessment is a valid and subsisting law.

Chuks: But I hear that the imposition of the ITF levy has been challenged in court.



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Wale: True. But most of the decisions have been in favour of the ITF. And the ones against the ITF have avoided the question of its constitutionality.

Chuks: Why?

Wale: Perhaps because of the revenue-generating drive of the Federal Government, which the judiciary appears to be supporting.

Chuks: But a friend told me the contribution or whatever name it is called is unconstitutional.

Wale: Its constitutionality is questionable. You see, the Constitution gives every level of government specific items to legislate on. In relation to the Federal Government, its powers to pass laws are limited to the items on the Exclusive and Concurrent Legislative Lists. The "contribution" demanded by the ITF is calculated by reference to the annual salary paid to your employees. It's a payroll tax, and neither of these lists has a payroll tax as an item the Federal Government can legislate on.

Chuks: Oh wow! I also have a couple of friends who got ITF demand notices. Can we challenge it together?

Wale: Of course, that's possible. It is called a class action. That should get everyone's attention, including the Federal lawmakers. Mindful though that a smart lawyer could oppose this strategy on the technical grounds that your respective causes of action are not the same, even though the demand notices were issued by the same body (ITF); that the amounts involved are not the same; and the affected parties are not the same.

Chuks: What do you suggest we do?

Wale: You can all do any of the following:

- petition your Senators and Representatives highlighting the unconstitutionality of the ITF Act and urging them to repeal the Act (as is done in developed economies);
- challenge the constitutionality of the Act in court; or
- pay the contribution.

Chuks: I ain't paying no dime! The petition option doesn't work well in this clime. Can't I just negotiate paying a figure less than the demand and move on? This is Nigeria, everything can be "settled".

Wale: The problem with this option is that once you have consented to pay an agreed sum, you can no longer challenge the assessment in court. Your action in court will have become academic and the courts don't engage in academic exercises.

Chuks: So you reckon the solution is public enlightenment, legislative engagement and litigation? All three combined?

Wale: At this point, it is important I reiterate that this is my unsolicited opinion as a lawyer. You need to seek professional advice from your lawyer, tax consultant and other professional advisers on what you can do to avoid paying this contribution.

Chuks: Thanks, Wale. Now I know what to do.

¹ Section 6(1) of the ITF (Amendment) Act, 2011

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