TAT affirms FIRS's right to administer and collect withholding tax as an advance payment of income tax

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The Tax Appeal Tribunal (TAT or "the Tribunal") Lagos Zone has held, in the case between *Investment Holdings Limited ("IHL" or "the Company" or "the Appellant")* and *Federal Inland Revenue Service ("FIRS" or "the Service" or "the Respondent"),* that the FIRS is empowered by law to administer and collect Withholding Tax (WHT) as an advance payment of income tax. The TAT also clarified that WHT is not another type of tax different from the companies income tax (CIT). Rather, it is a form or structure of an advance collection of CIT.

Further, the Tribunal reaffirmed the subsidiary legislative function vested in the Minister of Finance (MoF), under the Companies Income Tax (CIT) Act (as amended), to issue regulations for the administration of the WHT regime.

Facts of the case

In 2020, FIRS conducted a tax audit exercise on IHL's tax and accounting records for the 2013 to 2018 tax years. Following the audit exercise, FIRS raised additional WHT assessments of ₦95,832,255.85 for the relevant tax years. The Appellant disputed the WHT assessments. However, it made a payment of ₦3,904,214.40, which it alleged was for Tertiary Education Tax (TET) liability and not a part payment of the additional WHT liability assessment.

Dissatisfied with the FIRS' position regarding the WHT assessments, the Company filed an appeal before the TAT on 29 April 2022 and sought the following reliefs:

a. *A declaration that the charge and collection of WHT by the Respondent is unconstitutional as WHT is not listed under the exclusive list of taxes to be collected by the Federal Government of Nigeria (FGN) by virtue of items 58 and 59 of Part I of the Second Schedule to the Constitution of the Federal Republic of Nigeria 1999 (as amended) ("the Constitution")*

b. *A declaration that the Respondent lack (sic) the power to amend the CIT Act Cap C21 Laws of the Federation (LFN) 2004 (as amended) by extending the coverage of WHT to include all aspect (sic) of building, construction and related services, contract and agency arrangement, consultancy, technical and professional services, contrary to the provisions of Sections 78, 79 and 89 of CIT Act*

c. *An order setting aside paragraph 3.0 of the FIRS' letter of intent (LOI/T13) dated 8 December 2020, together with the relevant WHT assessment demand notes, all dated 8 December 2020.*

In response, the FIRS raised a Preliminary Objection (PO) challenging the jurisdiction of the TAT to entertain the appeal on grounds that it did not pertain to a dispute or controversy arising from the operations of the FIRS (Establishment) Act, 2007 (FIRSEA) as prescribed by Section 59(1) and Paragraph 11(1) of the Fifth Schedule to the FIRSEA. The Tribunal, in its ruling on 6 August 2022, dismissed the PO and ordered the parties to file their final written addresses on the issues.

IHL's argument

IHL argued that the powers granted to the FIRS to administer revenue (taxes) accruable to the FGN under Section 2 and Item 9 of the First Schedule to the FIRSEA were restricted to specific taxes enumerated in items 58 and 59 of Part I of the Second Schedule to the Constitution (i.e., the Exclusive Legislative List). Given that WHT is not explicitly listed in the Constitution as one of the applicable taxes, the Respondent's WHT demand notices and letter of intent were unconstitutional, ultra vires, null and void.

To support its position, IHL referenced the Federal High Court (FHC)'s judgment in the case between Attorney

General for Rivers State and FIRS & Attorney General of the Federation wherein the FHC held that taxes such as Value Added Tax (VAT), WHT, TET, etc., which are not expressly listed under items 58 and 59 of Part I of the Second Schedule to the Constitution are outside of the jurisdiction of the FGN. The Appellant also argued that the Taxes and Levies (Approved List for Collection) Act 1998 {sic} (TLA), which includes WHT as one of the taxes collectible by the FGN, had been nullified in the case of *Uyo Local Government Council Vs Akwa Ibom State Government & Anor* because of its inconsistency with the Constitution. Consequently, the Company concluded that the Respondent lacked the power to assess and/ or collect WHT in the first instance.

Furthermore, the Company noted that, where the TAT upholds the FIRS' power to impose and collect WHT, the FIRS can only impose and collect WHT on rent, interest and dividend as provided in Sections 78, 79 and 80 of CIT Act, and lacks the power to expand the scope of WHT to other services through its *Information Circular No. FIRS/2006/02*. The Appellant also noted that specific provisions of CIT Act could only be amended by legislation and not by a circular through which the FIRS sought to subject all aspects of building, construction and related activities, contracts and agency transactions, consultancy, management, technical and professional services to WHT.

Finally, IHL submitted that Sections 78, 79 and 80 of the CIT Act were inconsistent with the provisions of items 58 and 59 of Part 1, Second Schedule to the Constitution and, to the extent of such inconsistency, should be null and void.

FIRS' argument

The FIRS argued that it operated within its legal jurisdiction in line with the powers granted it under Section 66 and Sections 78 – 81 of the CIT Act to assess companies to additional tax and collect WHT on liable transactions respectively. Based on the above provisions, it has the necessary powers to impose and collect WHT, including a review of the WHT regimes in accordance with the provisions of the Constitution and the CIT Act.

Consequently, the FIRS urged the Tribunal to interpret the provisions of Section 8(d) of the FIRSEA in a manner that promotes its objectives of stimulating economic activities and development, and dismiss the appeal for lack of merit.

Issues for determination

Based on the arguments submitted by both parties, the Tribunal adopted the two following issues for determination:

- *Whether by virtue of the combined provisions of the Constitution, FIRSEA and the CIT Act, the Respondent acted within its powers to assess the Appellant to WHT; and*
- *Whether by its Information Circular, the Respondent had extended the coverage of WHT contrary to the provisions of Sections 78, 79 and 80 of CITA.*

TAT's decisions

After considering the arguments of both parties, the TAT held that:

1. Sections 78 – 81 of the CIT Act provide the legislative framework for subjecting incorporated entities to WHT. While WHT initially applied to certain types of income such as rent, dividends, interest, director's fees, and royalties, Section 81 of the CIT Act was introduced to expand the scope of WHT to include general deduction of tax at source.

   Consequently, Section 81 created a special class of WHT which allows the FIRS to issue directives for the recovery of income tax assessable on any company, irrespective of any assessment, from payments made by any person to such company, provided that such directives are in writing or published in the Federal Gazette.

2. WHT is not a separate type of tax but a form of collection of CIT. Simply put, WHT is required by law to be withheld or deducted by the payer of the income from the income of the recipient and remitted to the relevant tax agencies of government. It is an advance payment of income tax which is evidenced by WHT credit note. Therefore, WHT is treated as a payment on account of the beneficiary's final tax liability, i.e., the amount of tax to be paid by the beneficiary will be reduced by the quantum of the WHT credit notes.

3. While the Constitution provides the lists of items the FGN may levy and impose tax on, it does not prescribe for the administration and/ or collection of the taxes. The responsibility to administer and collect the relevant taxes is granted to the Respondent by the FIRSEA, which established it. Therefore, the Respondent acted within its powers when assessing the Appellant to WHT.

4. It is settled law that FIRS Information Circulars do not have the force of law and cannot be used to vary, amend, or extend the provisions of law. However, this is not the case in the instant appeal as the Appellant's assertion that the FIRS Information Circular was the statutory basis for the administration of WHT is inaccurate.

   Section 81(7) of CIT Act provides that the MoF "*…, on the advice of the Board, may make regulations for carrying out the provisions of this section.*" The MoF, on 1 January 1997, issued the regulations for the administration of WHT, otherwise known as the Companies Income Tax Act (Rates, etc. of Tax Deducted at Source (Withholding Tax)) Regulations ("the WHT Regulations"). Thus, the framework for the extension of WHT base and rates is the WHT Regulations and not the FIRS Information Circular. Further, the power to extend the application of

WHT to other classes of transactions was properly exercised by the MoF, in line with Section 81(7) of the CIT Act.

The TAT also clarified that the Court of Appeal's decision nullifying the TLA did not challenge the validity or constitutionality of WHT. Therefore, it is not relevant to the issues submitted in the instant appeal. Consequently, the TAT found no merit in the Appellant's claim and resolved the two issues in favour of the Respondent.

Commentary

The TAT's decision reiterates a longstanding position that WHT is not a separate category of tax, but rather a method of collecting income tax in advance. It also clarified that, while Section 81 of the CIT Act provides the statutory framework for the deduction of income tax at source, the WHT Regulations issued by the MoF is the statutory instrument for the extension of WHT to all classes of transactions, pursuant to the provisions of the Section 81 of the CIT Act. Therefore, it is a misconception to suggest that the Information Circular issued by the FIRS to provide guidelines on the implementation of the WHT Regulations is the statutory framework of WHT regime.

However, one key area that the FIRS needs to urgently address is the practical issue arising from the implementation of the provisions of Section 40 of the FIRSEA in respect of non-deduction of WHT on qualifying transactions. The imposition of interest and penalty for non- compliance is not disputable. However, given that WHT is an advance payment of income tax, and not another form of tax, as clarified by the TAT, should a Company that fails to deduct WHT on payments to its suppliers be liable to pay the related WHT (principal sum) once it can be proved that the beneficiaries have included the related income in their respective tax returns? Otherwise, this will result in the incidence of double tax on the same income. This has been a source of dispute between taxpayers and the FIRS. To address this dispute, the requirement to pay the principal sum should be limited to those taxpayers that fail to remit the tax withheld while payment of the related interest and penalty will apply to any taxpayer that fails to deduct or remit what has been withheld. Therefore, FIRS should revisit this matter and ensure that double tax impact is avoided as much as possible.