

EFFECTIVE ADMINISTRATION OF WITHHOLDING TAX REGIME IN NIGERIA AND IMPLICATION ON NATIONAL DEVELOPMENT

Dr. Cyril Obika

ABSTRACT

Withholding tax is not classified among the different types of taxes in Nigeria like the Companies Income Tax, Personal Income Tax, Petroleum Profits Tax etc, though it is embedded in most of the tax laws. Unlike other types of taxes that have laws establishing them and stipulating the extent of liability of tax-paying entities to them, withholding tax does not have a particular law that establishes it, even though it is found in the various provisions of the major tax laws. The various provisions of the tax laws levy withholding tax at the rate of five (5) percent or ten (10) percent, as the case may be. This tax is deducted at source ie, withheld from the payment due party B by party A, the payer. This creates more tax collectors, which ought to make the enforcement easier and less expensive. However, these huge number of collectors/remitters at times act as impediments in the implementation of the tax due to the propensity for non-remittal or partial remittal of most of the deducted or withheld funds. The lack of adequate manpower on the part of the tax authorities to check mate non-remittal or partial remittal of the same has made it imperative to rethink the mode of administration of this tax, with a view to creating incentives that will encourage the remittal of the same, in the form of some financial reward for timely and complete remittal and also encouraging whistle blowing in this area. Furthermore, adequate utilisation of the realised revenue for the immediate benefit of the locals where tax is generated will go a long way in ensuring more compliance to it.

1.0 The Concept of Withholding Tax

Withholding tax (WHT) is an advance payment of tax, which is deducted and withheld by the payer from the payee's money and subsequently remitted to the relevant tax authority as the case may be. It is a mandatory requirement of the law that same must be deducted once it falls within the types of transactions liable to WHT and be remitted to the relevant tax authority.

****C I Obika**, LLB, BL, LLM, PhD, ACTI, Chartered Tax Professional, Coordinator Postgraduate Unit/Academic Adviser and Lecturer at Faculty of Law, Enugu State University of Science & Technology (ESUT), Enugu State. Email: cyril.obika@esut.edu.ng.; Contact Number: +234 803 500 1837.

2.0 Transactions and Entities Liable to Withholding Tax

It is not every transaction between individuals or corporate bodies that is liable to the WHT regime. The various types of transactions that fall under the ambit of WHT are x-rayed hereunder:

2.1 Incomes of Individuals and Partners Subject to Withholding Tax under the Personal Income Tax Act

The Personal Income Tax Act¹ (PITA) deals, generally, with the taxability of the incomes accruable to individuals under Section 3 thereof. The income of a partnership firm is however

¹ CAP P8 LFN 2004 (as amended 2011).

not taxable, but rather the amount of income that accrues to the individual partners together with incomes from other sources or heads of income are subject to tax under PITA². Consequently, the profits and losses of the partners are apportioned to them individually and no assessment is made on the income of the partnership as a whole³. The various sections that provided for WHT will be looked into.

2.1 (i) Deduction of Tax on Rent

Section 69 of PITA provides that where a rent becomes due or payable to a person, the payer of the rent shall, deduct tax at the rate of ten (10) per cent of the gross rent and pay over to the relevant tax authority the amount deducted. Rents also include rental income from personal (rent, hire or lease payments or rights (royalties)) and real property, situated in Nigeria, which are all liable to Nigerian tax. Where the property or services are rented or hired by another, it is subjected to WHT at the rate of ten (10) per cent. However, where a person provides air/land transport service, using his/her own equipment/facilities, the transaction becomes a contract of service rather than rental or hire⁴. Furthermore, if Company A occupies an office apartment at No. 2345 Umunnorom, Umunnobe, Azigbo Avenue, Nnewi South LGA, Anambra State, owned by Mr B, and pays the sum of five hundred thousand (₦500,000.00) naira annually as rent, whenever it is paying Mr B his rent, it must deduct ten (10) percent which amounts to the sum of fifty thousand (₦50,000.00) naira and pay over the sum of four hundred and fifty thousand (₦450,000.00) naira as rent balance to Mr B. This is not really the case because in practice they merely gross up the sum by making the rent five hundred and fifty thousand (₦550,000.00) naira, then withholding ten percent and the balance is paid to the landlord. Consequently, Company A has the obligation to pay over the WHT tax on rent sum of fifty thousand (₦50,000.00) naira for and on behalf of Mr B, to the relevant tax authority. The penalty for failure to deduct tax⁵ is that the payer who is under an obligation to deduct tax under Sections 69, 70, 71 or 72 of PITA, but fails to deduct, or having deducted, fails to remit such deductions to the relevant tax authority within thirty (30) days from the date the amount was deducted or the time the duty to deduct arose, shall be liable to a penalty of an amount of ten (10) per cent fine of ₦5,000 or ten (10) per cent of the amount of the tax due, whichever is higher, in addition to the amount of tax deductible or deducted, plus interest at the prevailing commercial rate. The payer is mandated while remitting the said WHT to the relevant tax authority to state the following in writing:

- (a) the gross amount of the rent;
- (b) the amount of tax being accounted for;
- (c) the name and address of the recipient and the period for which the rent has been paid or credited; and
- (d) the address or accurate description of the location of the property concerned.

²Ibid, Section 8.

³*Mba v CIR* 1 NTC 106.

⁴ 'Withholding Tax (WHT) administration' [25 May 2014] *Our Reporter* <<http://thenationonline.net/withholding-tax-wht-administration/>> accessed on 6 February 2019.

⁵PITA 2004 (n 2), s 74.

Subsection (5) states that the payer of rent here refers to a company (corporate or unincorporated) and includes government ministries and departments, parastatals, statutory bodies, institutions and other established organizations approved for the operation of the Pay As You Earn system, whether or not liable itself to tax under any enactment or law relating to taxation of income in Nigeria or elsewhere.

Though an individual is not directly mentioned here as a payer, implying that WHT is inapplicable when an individual is paying rent to another individual, the writer is of the candid opinion that they should be expressly included in the Act, by construing the word 'include', used in the Act while listing payers, to also comprise of individuals. After all, whether it is a corporate rent payer for commercial purposes or agency of government rent payer, what is deductible and liable to WHT is the rent due to the property owner who may be an individual or corporate body. Will it not amount to an unfair tax practice if Party A and B own properties in a complex or an estate, if while Party A has WHT deducted from its money (whether grossed up or not) because a company or government MDA occupies it, Party B on the other hand is not liable to WHT because mostly individuals occupy his property for residential purposes only? Can it also be interpreted that the Act intended to exclude individuals living in properties owned by corporate bodies from paying or remitting WHT thereof, to the respective relevant tax authority, because persons or individuals were not specifically mentioned as payers that should withhold WHT in the Act?

The researcher contends that individuals should be included as payers and should deduct WHT whether due to another individual, corporate or unincorporated body etc. Taxes from companies are payable to FIRS, such that WHT on the rent of a property owned by a company is payable to the FIRS. However, where the WHT rent is deducted by a company from the rent of a property owned by an individual, the money deducted must be paid to the relevant State Board of Internal Revenue (SBIR)⁶, where the landlord resides or the property is situated (as the case may be). But this most times is not the case, thereby denying the various State Governments of the needed revenue for economic and national development. This anomaly must be corrected and the SBIR, should be active and alive to their responsibilities, and more staff employed or consultants engaged to help out. A similar situation occurs with respect to stamp duties on cheque books belonging to individuals, which the bank always pays to the FIRS as against the various SBIR.

It is undisputable that the amount of revenue realisable from WHT on rent is huge, considering its supposed ease of collection and next to nothing cost of administration. The poser here is, are these revenue realised, if not, why? The answer to this and other questions will be addressed in the course of this work. It may also be submitted that the companies comply with WHT on rent; again, what is the percentage of compliance? How many are even captured in the tax net or data base of the Federal Inland Revenue Service (FIRS)⁷. How many states of the federation of Nigeria, with the exception of Lagos State can boast of collecting a huge percentage of this WHT tax on rent. It may also be contended that enforcement of the WHT tax on rent will lead to more tax burdens on the tenant, as the landlord will most likely increase rent payable by the tenant to

⁶PITA 2004 (n 2) , s 87.

⁷Federal Inland Revenue Service (Establishment) Act No. 13, CAP F36 LFN 2007.

cushion the effect of the deduction. It is the duty of the government to ensure that it does not happen and this can be done through legislation, engagement with stakeholders etc. Moreso, people are also at liberty to vacate such premises as an increase in rent is a negotiable exercise and not meant to be imposed on the tenant as if it is automatic.

In order to realize the objective of ensuring full compliance and raising huge revenue *via* WHT, the payers as outlined above, including individuals should be given some encouragement in the form of incentives. Section 45 of PITA, is *in tandem* with this position. It provides for some bonus as a result of early filing of self-assessment returns. The section states as follows, ‘A person who files a return under Sections 41 and 44 of this Act within the time specified for filing of the return shall, if there is no default in the payment arrangement, be granted a bonus of one (1) % of the tax payable’. This is meant not only to encourage voluntary compliance of tax payment but also shore up the realisable revenue ceiling. This incentive should be extended to WHT and a percentage of the WHT (may be between 1% to 10%) should be payable to the payer (especially with respect to individuals because of the ease of tracking them) who fully complies with the provision of the law with respect to WHT remittal or the payee who informs the relevant tax authority that the WHT has been deducted from his/its money but unremitted. This is besides the fact that in practice, the advance tax payment can be allowed to be set-off against the final tax obligation(s) of the taxable person or corporation, subject to such taxable person applying for and obtaining the Withholding Tax Credit Notes in respect of each advance tax withheld and remitted to the tax authorities⁸. Notwithstanding, this provision which many are even unaware of, and may feel less inclined to take advantage of as it merely gives a tax credit and not financial benefit, which is advocated herein as an incentive for disclosure.

A whistle blowing scheme should also be introduced to encourage people to volunteer useful information that will lead to exposing fraud or non-compliance with the law, and such person/s paid between 1% to 10% of the recovered sum. It may be argued that this will increase the eventual cost of administering the tax. This suggestion is a stop gap and applicable mainly to the numerous states of the federation that are, hitherto, not getting much from WHT on rent, so as to help build and upgrade their data base, with which they will be better equipped to track defaulters. Is it not better for a state of the federation of Nigeria to generate five hundred (₦ 500m) million or even a billion (₦ 1b) naira from WHT on rent and pay even 10% thereof, than generate less than fifty million (₦ 50m) or one hundred million (₦ 100m) from same and for the same period. One can only but imagine the humongous sums paid as rent across the towns, cities and the state capitals and the WHT realisable from them.

2.1 (ii) Deduction of Tax on Interest, etc.

Section 70 of PITA states that WHT is payable with respect to interest or royalty, at the rate often per cent (10%) of gross interest and five (5%) per cent of gross royalty. Royalty refers to an unearned income and a payment of any kind as a consideration for the use of or the right to use any patent, trade-mark or right/interest. Interest, on the other hand, includes income from

⁸ Oserogho & Associates, ‘Company and Personal Withholding Tax Regime’ [28 September 2012] culled from <<https://www.proshareng.com/news/Taxation/Company-and-Personal-Withholding-Tax-Regime/18387>> accessed on 10 February 2019.

investments. WHT is inapplicable to interest on loans paid by a Nigerian company⁹. The tax deducted shall be remitted to the relevant tax authority. The payer shall state in writing to the relevant tax authority the gross amount of the payment; name and address of the recipient; and the amount of the tax being accounted for. The relevant tax authority in the case of savings interest, according to CITA, is the tax authority where the branch of the bank paying the interest is situated. One wonders why the same rule contained in Section 2 of PITA, applicable to royalty, where the residence of the individual is the determinant of the relevant tax authority, is not applicable here. It could be attributed to convenience, as the relevant tax authority where the bank is situated is better positioned to follow up. It is also very doubtful if the tax authorities, actually follow up on WHT on royalty and especially on interest or merely lie back waiting for the banks to remit same to them. Even if they intend to do that, will they have the time and adequate manpower to go through the records of the various banks to bring out this information, where the banks are not as forthcoming as they usually are? The writer posits that in order to adequately check this abuse, the law should have a provision where the payee must be entitled to a copy of evidence of remittance of the WHT on interest by the bank in his name, within 30 days of the end of the transaction or such payment. Consequently, the payee will be entitled to some percent of the WHT on interest, if after the 30 days he does not receive evidence of remittance and he reports same to the relevant tax authority. This will act as incentive for the payee to take steps towards ensuring compliance with the law and thereby raising the needed revenue for economic and national development.

2.1 (iii) Deduction of Tax on Dividend

Dividends refer to income from shares. The PITA¹⁰ provides that in situations where a dividend or such other distribution becomes due from or payable by a Nigerian company to a person, the company making the payment shall at the date when the amount is paid or credited, deduct WHT at the rate of ten per cent (10%) and remit same to the relevant tax authority. The company shall state, in writing to the relevant tax authority, the gross amount of the dividend or such other distribution; the name and address of the recipient; and the accounting period or periods of the company in respect of the profits of which the dividend or distribution is declared to be payable and the date on which payment is due. This relevant tax authority, though not expressly stated, should certainly refer to the SBIRs and not the FIRS. The incentive stated above should also be applied in order to encourage whistle blowers to come forward with vital information, leading to recovery of deducted and unremitted dividends. More so, when these companies have a penchant and proclivity to always remit taxes to the FIRS, as if it is the only tax authority in Nigeria, because they are more conversant with it. This is backed up by the Companies Income Tax Act (CITA)¹¹ that states thus:

Where any dividend or such other distribution becomes due from or payable by a Nigerian company to any other company or to any person to whom the provisions of the Personal Income Tax Act apply, the company paying such dividend or making such distribution shall, at the date when the amount is paid or credited, whichever first occurs;

⁹See (n 5).

¹⁰PITA 2004 (n 2), s 71.

¹¹ CAP C21 LFN 2004 (as amended 2011), s 80.

deduct therefrom tax at the rate prescribed under subsection (2) of this section and shall forthwith pay over to the Board the amount so deducted.

The above provision of CITA stipulates that the WHT on dividend deducted even from the dividend of an individual, should be paid over to the Board (FIRS). This is certainly not the intendment of the tax laws, even if the Board (FIRS) will later remit same to the relevant SBIR, with the attendant bottlenecks and probabilities. The CITA should be amended to mandate the companies to remit the WHT on dividend of individuals directly to the SBIR, in order to assist them to raise revenue for economic development.

2.1 (iv) Deduction of Tax on Director's Fees

On the payment of the director's fees, the payer at the date of payment shall deduct therefrom tax at the rate of ten per cent (10%) and pay over to the relevant tax authority the amount so deducted. In accounting for the tax deducted to the relevant tax authority, the payer shall state in writing the gross amount of the payment; the name and address of the recipient; and the amount of tax being accounted for¹². The relevant tax authorities should have a compendium of companies within their area and collaborate with the Corporate Affairs Commission (CAC), to determine the identity and addresses of the directors of the companies, in order to follow up on the WHT on director's fees.

2.1 (v) Penalty for Failure to Deduct Withholding Tax

Any person or body corporate who, being obliged to deduct withholding tax under Sections 69, 70, 71 or 72 and fails to deduct, or having deducted, fails to remit such deductions to the relevant tax authority within thirty (30) days from the date the amount was deducted or the time the duty to deduct arose, shall be liable to a penalty of an amount of ten (10) per cent of the tax not deducted or remitted in addition to the amount of tax not deducted or remitted plus interest at the prevailing monetary policy rate of the CBN¹³. The relevant tax authority can leverage on the power of the Accountant-General of the Federation to deduct at source, from budgetary allocation, un-remitted taxes due from any Ministry, Department or Government Agency and transfer such deductions to the relevant State upon request by such a State¹⁴. If this provision were that easy to apply, why is it that the electricity bills and other debts of these agencies are not deducted from source and paid over to the bodies and persons that they are owing. The same provision should be applicable to the Accountant Generals of the States, Commissioners of Finance or Heads of Accounts departments of the states. This presupposes that the states already know the amount due to them from the government bodies or institutions, which is the reason that we are promoting the idea of incentive to the payees to come forward with information or a whistle blowing scheme.

2.2 Incomes of Companies Subject to Withholding Tax under the Company Income Act, Petroleum Profit Tax Act and Value Added Tax Act

As stated above already, Withholding Tax (WHT) is not a distinct tax type per se, it also does not have a specific legislation establishing it, but it is provided for in other tax laws.

¹²Ibid, s 72.

¹³PITA 2004 (n 2) , s 74.

¹⁴Ibid, s 74 (2).

As discussed above under the PITA, WHT is applicable to CITA *mutatis mutandis* with respect to interest, rent, dividend in Sections 78, 79 and 80 respectively. The Petroleum Profit Tax Act¹⁵ states that any person that fails to deduct or deducts WHT without remitting to the FIRS within 30 days of deduction or the duty to deduct arose, shall be guilty of an offence and liable on conviction to a fine of 200% of the tax not withheld or remitted plus interest at the prevailing commercial rate. The agencies of government are mandated at the time of making payment to a contractor, to remit tax under the Value Added Tax Act (VAT)¹⁶ the tax charged on the contractor to the nearest local Value Added Tax Office.

The emergence of the Standard Integrated Government Tax Administrative System (SIGTAS), which came into effect on September 30, 2018, makes it possible that when a payer remits deducted WHT, the same is automatically credited to the accounts of the beneficiaries and available to be utilised. This is at the Federal level, same is not easily replicable in most states of the federation even though it is a welcome development. Even with the availability of SIGTAS, it is still necessary to encourage people with an incentive of cash reward so they can come forward with information when their WHT credit notes are not timeously made available to them. Moreso, the intention of WHT, which is an advance payment of income tax is to encourage payers to remit and pay upfront such taxes pending the period for the actual income tax payment filings. This aim will be defeated if the WHT is unremitted and no report is made to that effect.

WHT withheld and remitted on behalf of a non-resident company or individual suffices as the final tax on the non-resident's income earned in Nigeria from all of its sources in Nigeria as long as it is a company, that does not have a fixed base or permanent establishment in Nigeria. However, the law allows corporate bodies to recoup WHT deductions where the dividend is to be redistributed as what is called Franked Investment Income (FII).

WHT is payable on the exact currency of the transaction to the relevant tax authority within 21 days and 30 days for companies and individuals, respectively.

The rates of WHT vary with respect to the transaction, whether it is applicable to companies or individuals at the rate of 5% to 10% with the exception of royalties charged flatly at 15%.

More importantly, the government should endeavour to deploy the revenue from WHT, especially those from rent and such fixed transactions, to specific development in that area as a way of encouraging voluntary compliance.

3.0 Conclusion

WHT is a veritable means of raising revenue for governance, by making advance payment of income tax. There is every need to encourage compliance to it, especially *via* payment of some percentage of the WHT to persons that volunteer information leading to the recovery of unremitted WHT, especially at the state levels. Since most people not yet captured by the tax net, members of the government establishments or organised private sector, hardly file income tax return for now in Nigeria, they are not likely going to bother about their tax credit notes (especially where the full percentage of deduction is not applied), not to talk of volunteering

¹⁵ CAP P13 LFN 2004, s 54.

¹⁶ CAP V1 LFN 2004, s 13.

information about their non-remittance, since there is nothing in it for them. This will lead to loss of revenue that would have accrued to the government for development.

Furthermore, there should be a deliberate policy of the government to deploy revenue from WHT on rent and such fixed items that generate WHT, towards developing the immediate environment as a way of encouraging voluntary compliance. This will ultimately lead to the economic development of not only the localities and the states but also the entire nation.

4.0 Recommendations

1. Section 69 (5) that refers to the payer of rent as a company (corporate or unincorporated), Government Ministries and Departments, parastatals, statutory bodies, institutions and other established organisations approved for the operation of the Pay As You Earn system, should be amended to expressly include individuals. After all, whether it is a corporate body rent payer or agency of government rent payer, what is deductible and liable to WHT is the rent due to the property owner that may be an individual or corporate body.
2. WHT tax on rent of properties occupied by companies but owned by individuals when deducted by the companies should be paid over to the various relevant State Board of Internal Revenue (SBIR), where the Landlord resides or the property is situated (as the case may be), and not to FIRS. After all, the actual payer is the individual whose money is deducted and not the company who is merely paying rent.
3. In order to realize the objective of ensuring full compliance and raising huge revenue *via* WHT, the payers should be given some encouragement in the form of incentive where a percentage of the WHT (may be between 1% to 10%) should be payable to the payer who fully complies with the provision of the law with respect to WHT remittance or the payee who informs the relevant tax authority that the WHT has been deducted from his/its money but unremitted. This is in tandem with Section 45 of PITA that provides for a bonus of 1% to compliant tax payers.
4. A whistle blowing scheme should also be introduced to encourage people to volunteer useful information that will lead to exposing fraud or non-compliance with the law, and such person/s paid between 1% to 10% of the recovered sum. Even though it seems that this will increase the cost of administering the tax, it will undoubtedly magnify the realisable revenue. Is it not better for a state of the federation of Nigeria to generate five hundred (₦ 500m) million or even a billion (₦ 1b) naira from WHT on rent and pay even 10% thereof, than generate less than fifty million (₦ 50m) or one hundred million (₦ 100m) from same without paying any percent. It is merely a stop gap, until the various states are able to build and upgrade their WHT on rent data base and be better equipped to track defaulters.
5. In order to ensure that WHT on royalty and especially interest is promptly remitted by banks, the law should have a provision where the payee must be entitled to a copy of evidence of remittance of the WHT on interest, by the bank, in his name, within 30 days of the end of the transaction or such payment. Consequently, the payee will be entitled to some percent of the WHT on interest if, after the 30 days, he does not receive evidence of remittance and he reports same to the relevant tax authority. This will act as incentive for

the payee to take steps towards ensuring compliance with the law and thereby raising the needed revenue for economic and national development.

6. Section 80 (1) of CITA which stipulates that the WHT deducted even from the dividend of an individual should be paid over to the Board (FIRS), certainly is not the intendment of the tax laws, even if the Board (FIRS) will later remit same to the relevant SBIR. The CITA should be amended to mandate the companies to remit the WHT on dividend of individuals directly to the SBIR, in order to assist them raise revenue for the economic development of their various states and Nigeria in general.