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Tax Alert – Companies' and Personal Withholding Tax Regime

Introduction

Withholding Tax ("WHT") is an advance tax payment which is deducted and withheld from any income or disbursement due to a taxable person or to a taxable corporation, for onward remittance to the relevant tax or government collecting authority, against a final income tax liability.

This advance tax payment can 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 authorities.

Tax payers do not have any discretion as to whether to withhold and remit this advance tax in the light of the mandatory statutory obligation on the person making the payment to withhold and remit this advance tax. Failure to deduct or to withhold, and remit this advance tax to the relevant tax authority attracts punitive fines and penalties some of which are enumerated in this tax alert.

Companies WHT

Section 78 of the Companies' Income Tax Act (as amended) ("CITA") requires that where a company makes a payment to another company or to an individual, either as interest (with inter-bank deposits and royalty excluded), rent, dividend, etc, such a company shall at the time of making such payment deduct an advance tax of ten per cent (10%) of the gross amount that is paid, and remit such deducted and withheld tax to the Federal Inland Revenue Service ("FIRS") forthwith.

Non-Resident Companies & WHT

Any tax withheld from the income due to a non-resident company or individual is deemed to be a final tax on such non-resident's income earned from its Nigeria sources provided that the non-resident company does not have a fixed base or permanent establishment for doing business in Nigeria. See Section 78 (4) CITA.

Franked Investment Income. Section 80(3) CITA

Dividend income received after the deduction of the advance withheld tax of ten per cent (10%) of such dividend income is regarded as Franked Investment Income to the company receiving such dividend, and such dividend would not be charged to any further Nigerian tax with regard to the income of the recipient company.

Where however such franked investment income is re-distributed and tax is required to be accounted for on the gross amount of the dividend so earned, such company will be entitled to set-off the tax already withheld on the dividend income in order for double taxation not to accrue on the franked investment income.

Currency for Remitting WHT

All taxes that are withheld are required to be remitted in the currency of the transaction to the relevant tax authority not later than 21 days for corporations, and 30 days for individuals, from the date that the withheld amount was deducted or ought to have been withheld and remitted. See Sections 82 & 84 of CITA.

Unutilised Withholding Tax Credit Notes

The Companies' Income Tax Amendment Act, 2007 now allows all unutilised withholding tax credits to be set-off against the future tax obligations of the beneficiary of such withheld taxed income. There is however no similar provision with respect to any unutilised WHT credit notes for individuals under the Personal Income Tax regime.

Penalties for Failure to Deduct WHT

Any person obligated to deduct, withhold and remit immediately this advance tax, in the currency of the transaction from which the deduction was effected, but who fails to do so, or having withheld or deducted this advance tax fails to pay it over to the Federal Inland Revenue Service within twenty-one (21) days from the date the obligation to withhold or deduct the advance tax arose, shall be guilty of an offence and liable on conviction to (a) pay in addition to the tax not withheld or where withheld, is not remitted; (b) a penalty of one hundred per cent (100%) per annum on the advance tax withheld or not withheld, or where withheld the advance tax is not remitted; in addition to (c) interest at the prevailing commercial bank lending rates on the advance tax and the penalty for not remitting the advance withheld tax.

PERSONAL INCOME AND WITHHOLDING TAX PROVISIONS

Sections 69-75 of the Personal Income Tax (Amendment) Act ("PITA") mandatorily requires that where any rent, interest or royalty, dividend or directors fees is paid by a corporation to an individual, or where such income is paid by an individual to another individual, the payer of such income must deduct, withhold and remit forthwith, or otherwise within thirty (30) days of the deduction whether the deduction is made or not, ten per cent (10%) of the gross amount paid as an advance or withheld tax to the tax authority of the State where the recipient of the income resides.

Where the income paid is with regard to interest or royalty income, the rate of the advance tax to be withheld and remitted forthwith is ten per cent (10%) of the gross interest income; and for royalty income, the rate of advance tax is five per cent (5%) of the royalty income.

Non-Resident Individual Tax Payer

Non-resident individuals who receive income in Nigeria are entitled to deem the ten per cent (10%) advance tax that is withheld from such income to be a final tax on such Nigerian earned income provided they are not resident in Nigeria.

Non-Resident individuals may also be able to claim further tax relief from their home country if their home country has a signed Double Taxation Agreement or Treaty (''DTT'') with Nigeria with regard to such Nigerian earned income.

WHT and Total Tax

The primary purpose of the withholding tax regime is to ensure that all advance taxes withheld in Nigeria entitles the recipients of such income to claim a tax credit or a tax relief against such recipient's final/total tax obligation(s) for the relevant tax year.

Penalty for Failure to Deduct and Remit

Section 74 of the PITA provides that where a taxable individual who is obligated to deduct, withhold and remit an advance tax, as stated above, fails to deduct or having deducted or withheld this advance tax, fails to remit the tax to the relevant tax authority within the 30 days from when the tax was required to be deducted or withheld, such a taxable person shall be guilty of a tax offence which on conviction carries the following penalties:-

a) A Fine of ₦5,000 or ten per cent (10%) of the amount of the advance tax due, whichever is higher of the two, in addition to;
b) The tax deductible or deducted; plus
c) Interest on both amounts at the prevailing commercial bank lending rates.

Exemption from Withholding Tax

Dividend, interest, rent or royalty derived from outside Nigeria but brought into Nigeria through approved government channels like the Central Bank of Nigeria or any bank or corporation licensed in Nigeria to provide foreign exchange services, are exempted from the advance or withholding tax provisions in Sections 69, 70, 71 and 72 of PITA.

WHT and Relevant Tax Authority?

Some State tax authorities are now insistent on the production of withholding tax credit notes issued by such State tax authority where the payer of the income is a corporation while the recipient is an individual, before any withholding tax relief is granted. This may be in the light of the provisions of Sections 69-72 and Section 108 of the Personal Income Tax Act (as amended) which latter Section describes a person to include an executor, trustee, company, partnership, community, family and individual.

Sections 78-80 of the Companies Income Tax Act (as amended) however provides that where any income is payable by a corporation to another corporation or by a corporation to an individual to whom the provisions of the Personal Income Tax Act (as amended) apply, the corporation paying the income is statutorily required to deduct, withhold and remit ten per cent (10%) of the income so paid to the Federal Inland Revenue Service.

In the light of the provisions of the Companies' Income Tax Act (as amended) on withholding tax, it will amount to double taxation for a corporation to withhold income twice for remittance to FIRS and or to the relevant State tax authority.

An amendment is therefore desirable to both PITA and CITA to definitively make all incomes due to an individual liable to withholding tax remittances to the relevant State tax authority while incomes due to corporations should suffer advance withholding tax for remittance to the Federal Inland Revenue Service.

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