

# TAT rules that sales in the ordinary course of business is exempt from WHT in Tetra-Pak West Africa Limited Vs. FIRS

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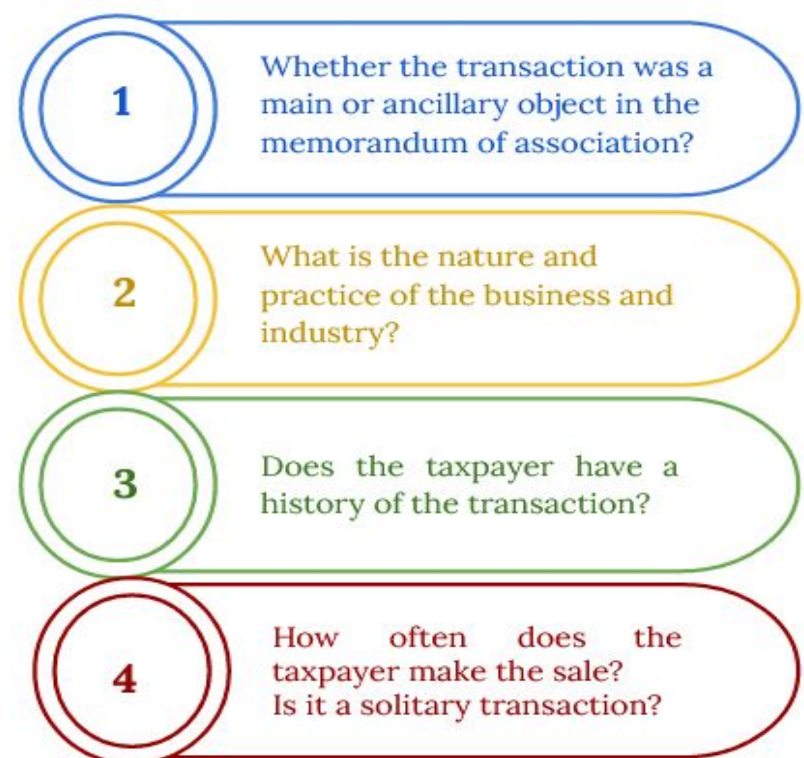
The Tax Appeal Tribunal (TAT) ruled that sales in the ordinary course of business are not subject to withholding tax (WHT). The decision was reached in a WHT dispute on 30 November 2020 between Tetra-Pak West Africa Limited and Federal Inland Revenue Service (FIRS).

## Background

The principal activity of Tetra-Pak West Africa Limited (TPWA or the Company) is the importation and sale of packaging equipment and spares for customers in the manufacturing sector. TPWA's customers deducted WHT on its fees for sales in the ordinary course of its business. Hence, the company had unutilized WHT credit notes for the years in which it recorded a loss. The Companies Income Tax [Rate, etc., of Tax Deducted at Source (Withholding Tax)] Regulations exempts all sales in the ordinary course of business from WHT. However, all types of contracts and agency arrangements are subject to 5% WHT.

TetraPak sought clarification from FIRS whether the sale of packaging equipment, spare parts, and materials constitutes sales in the ordinary course of business that is exempt from WHT. However, the Federal Inland Revenue Service (FIRS) dismissed the request and held that the sales were contracts with rights and liabilities enforceable by law at a WHT rate of 5%. TPWA later filed an appeal with the TAT to dispute FIRS' position and seek a WHT refund.

## The issues



### Four issues

The Tax Appeal Tribunal settled four (4) issues between TPWA and FIRS.

1. *Whether the transaction was a main or ancillary object in the memorandum of association of TPWA?*

Not all intra-vires activities are transactions in the ordinary course of a business nor are all transactions in the ordinary course of operations regarded as intra-vires activities. The Memorandum of Association shows that the objects include the sale of equipment and repairs. While this may not be a conclusive test, it helps to make a decision.

2. *What is the nature and practice of the business and industry?*

3. *Does the taxpayer have a history of the transaction?*

Events or history of transactions will show whether a sale is in the ordinary course of business.

4. *How often does the taxpayer make the sale? Is it a solitary transaction?*

A solitary transaction is similar to an adventure and would not mean sales in the ordinary course of business. However, the determination of transactions in the ordinary course of business is subject to daily operations.

### **TAT decision**

WHT is an advance payment of tax on behalf of the taxpayer. It is not a tax as statutorily defined but only a form of payment on account for income tax. WHT is a collection device for lowering tax avoidance or evasion. However, the WHT system in Nigeria seems ambiguous in defining sales in the ordinary course of business.

Apart from passive income like dividends imposing WHT on active income often raises issues. Exceptions to the standard rule may cause tax avoidance. The tax authority may also seek to optimize tax collection through WHT without checking whether the rate is higher than the effective tax rate for a particular industry. Nevertheless, the WHT system in Nigeria aims to reduce tax evasion and increase tax collection.

The sale of packaging materials, spare parts, and equipment will qualify as sales in the ordinary course of its business. Such sales fall within the exemption in the WHT Regulations and, therefore, it is not subject to WHT.

For instance, when a company buys or sells its usual stock in trade, the transaction is not subject to withholding tax. See A.de Ipaye, *Nigerian Tax Law è Administration - A Critical Reviews*.

### **Concluding remarks**

The scope of sales in the ordinary course of a business is a grey area in the Nigerian tax law. During the compliance process, taxpayers often forgo the WHT portion of their income as either payment on account or final tax. It may even lead to unutilized WHT credit that increases each year with a low probability of cash refund from the tax authority. The ambiguity has aided revenue collection while leaving a taxpayer with the hope of using the amount withheld to offset income tax in the foreseeable future. TAT ruling has now unraveled the factors to consider before subjecting all sales to WHT. Exciting times lie ahead for interested taxpayers if superior courts hold the same view as the TAT. The tax authority will, however, attempt to pursue the case to the final stage. A full celebration of the TAT ruling at this point may therefore appear premature. A copy of the decision is available [here](#).