



TETRA PAK WEST AFRICA LTD. V. FIRS – TAX APPEAL TRIBUNAL DEFINES SALES IN THE ORDINARY COURSE OF BUSINESS AND LIMITATIONS OF THE APPLICATIONS OF WITHHOLDING TAX.

INTRODUCTION

On 30th November 2020, the Tax Appeal Tribunal (the “Tribunal”) sitting in Lagos delivered judgment in the case of *Tetra Pak West Africa Limited v Federal Inland Revenue Service* with appeal number: TAT/LZ/WHT/007/2019. It defined what constitutes “ordinary course of business” for the purpose of determining withholding tax (WHT) liability.

SUMMARY OF THE FACTS

The appellant in the above stated case is engaged in the sale and servicing of packaging equipment, spare parts and materials. The appellant applied to the respondent (the “FIRS”) for an Advance Tax Ruling on whether its business activities qualified as sales in the ordinary course of business which is exempt from deduction of WHT by its customers. The FIRS responded by informing the appellant that its business activities are subject to WHT. This ruling prompted the appellant to file the appeal before the Tribunal.

The appellant argued therein that “sales in the ordinary course of business” is a question of fact and should be determined by reference to the nature of the taxpayer’s business and industry. The appellant submitted that in view of the fact that its business consists of the sale and servicing of packaging equipment, spare parts and materials, only activities which fall outside this scope of business should be subject to WHT.

On the other hand, the FIRS argued that “sales in the ordinary course of business” as used in the Companies Income Tax (Rate, etc., of Tax Deducted at Source (Withholding Tax) Regulations) (the “WHT Regulations”) is ambiguous and that the FIRS has the legal latitude to determine its interpretation. The FIRS argued further that adopting the appellant’s position would render the WHT Regulations redundant because any company would argue that all transactions it enters into are done in the ordinary course of its business.

RATIO DECIDENDI

The Tribunal in its decision admitted that the WHT Regulations does not define the phrase “sales in the ordinary course of business” and so resorted to decisions as pronounced by the courts of India and the Black’s Law Dictionary. The Tribunal held that in order to determine whether or not a transaction is a sale in the ordinary course of business of a taxpayer, the following must be considered:

- 1) Does the transaction fall within the objects of the taxpayer as disclosed in its memorandum of association?
- 2) What is the nature and practice of the taxpayer’s business and industry?
- 3) Does the taxpayer regularly engage in such transactions?

The Tribunal held that determining what constitutes a sale in the ordinary course of business is not closed but is a question of fact. The unique facts of each transaction must be considered in order to ascertain whether such transaction is a sale in the ordinary course of the taxpayer’s business.

Though the Tribunal held that the objects disclosed in the memorandum of association are not conclusive proof of what constitutes a company’s ordinary course of business, it also held that it is nevertheless a helpful guide for this purpose. The Tribunal further held that the sale of packaging materials, spare parts and equipment is one of the objects listed in the appellant’s memorandum of association, therefore it is part of the appellant’s ordinary course of business and is not subject to WHT.

The Tribunal went further to state that revenue loss would not be occasioned to the FIRS merely because WHT has been limited only to transactions which fall outside the ordinary course of business of a taxpayer.

The Tribunal held that WHT is merely a collection device designed to check tax evasion. The Tribunal observed that the administration of WHT in Nigeria has been done without considering whether the WHT rate exceeds the effective tax rate for the taxpayer. According to the Tribunal, the primary purpose of WHT is to prevent tax evasion while its secondary purpose is to serve as a means of tax collection.

POSSIBLE IMPLICATIONS OF THE DECISION

This judgment is beneficial and will significantly contribute to the ease of doing business in Nigeria as the scope of sales in the ordinary course of a business is a grey area in the Nigerian tax law. The tax exposure which companies suffer due to the indiscriminate imposition of WHT on their transactions will be greatly reduced.

In most cases, taxpayers are unable to claim 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 the taxpayer only with unrealized hopes of using the amount withheld to offset income tax in the foreseeable future.

Exciting times lie ahead for taxpayers because of the decision of the Tax Appeal Tribunal. Taxpayers are advised to scrutinize their transactions in the light of this judgment and to seek expert advice on the extent of their WHT liabilities.

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