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## Non-remittance of PAYE and WHT in Nigeria

by **Adetayo Adetuyi** and **Nnanke Williams**

On 14 May 2019, the Tax Appeal Tribunal (TAT) sitting in Lagos, Nigeria, delivered a judgement in the case of *Shell Nigeria Exploration and Production Company Limited (SNEPCO) v Lagos State Board of Inland Revenue (LSBIR)* where SNEPCO was the appellant and LSBIR was the respondent. The appeal centres on the determination of when a tax assessment becomes final and conclusive

and whether penalties and interests which arise from unremitted PAYE and withholding taxes (WHTs) are payable consequent upon an objected demand notice.

### Facts of the case

The case of *SNEPCO v LSBIR* was an appeal against the demand notice issued by the respondent on SNEPCO for outstanding PAYE, WHTs and state development levy

including penalties and interest for the 2007–2012 years of assessment. The appellant objected to the demand notice and asked the respondent to discharge the demand notice. The LSBIR issued a Notice of Refusal to Amend, and consequently, the appellant filed a notice of appeal at the TAT.

During the course of the appeal, both parties held reconciliatory meetings and reached an agreement on substantial points of the dispute. The terms of settlement were entered as a consent judgment by the TAT. The parties, however, failed to agree on penalties and interest imposed on the assessment for additional PIT by the respondent vide demand notice with Reference No: LA/IRS/B468/DN/14403/06/14 dated 26 June 2014.

### Parties' submissions

The appellant submitted that a valid objection was made to the respondent within the statutory time limit, and as such, the demand notice was not conclusive. The appellant argued penalty and interest could not therefore be validly imposed on the alleged PAYE and WHT liabilities. The appellant further argued that the assessment ought to remain in abeyance until the assessment was determined and that no interest or penalty could accrue on the same. The appellant relied on ss58, 60 and 68(2) of the Personal Income Tax (PITA) and para 13(3) of the Fifth Schedule to the FIRS Act in making this argument.

The respondent, in response to the appellant's arguments, posited that where tax is not paid within the time prescribed by law, penalty and interest shall immediately accrue and be added to a tax assessment. In the case of WHT under PITA, it must be remitted within 30 days from the date the amount was deducted or the time the duty to deduct arose while the prescribed time for remitting PAYE is 10 days after the end of any month. The respondent further argued that remittance of PAYE and WHTs to the tax authority were legal obligations on the appellant, and interest and penalties are the only ways companies or taxable persons can be deterred "from engaging in fraudulent practice eg collecting PAYE/WHT and keeping or trading with it for some time before remitting same".

### The decision of the Tribunal

From the previous dispute between the parties, the Tribunal came up with the following issues for determination:

- (1) Whether or not the demand notice was final and conclusive;
- (2) Whether interests and penalties were applicable to an assessment which was not final and conclusive;
- (3) Whether or not the appellant was liable to pay penalties and interest on the unremitted WHT and PAYE arising from the assessment.

The decisions of the Tribunal on the aforementioned issues were as follows:

- (1) The demand notice was not final and conclusive; hence, the Appellant appealed against the Notice within 30 days of service of the notice as required by law.
- (2) Since the demand notice was not final and conclusive, interest and penalties could not accrue as there was no legal basis to so impose interest and penalties on a contested tax assessment.
- (3) The appellant was liable to pay penalties and interest on the unremitted WHT and PAYE arising from the 2007 to 2012 years of assessment.

### Analysis of the decision

#### Effect of finality of tax assessment

The Tribunal determined that the demand notice served on SNEPCO was not final and conclusive as SNEPCO had appealed against the demand notice within 30 days of service of the notice as required by law. A tax assessment only becomes final when the taxpayer fails to file an objection within the time limit stipulated by the law or when all the grounds of objection are fully resolved. This is because the taxpayer has the right to dispute any tax assessment imposed on him by the taxpayer. However, this right has to be exercised within a certain time limit.<sup>1</sup>

Where the taxpayer fails or refuses to exercise this right within the timeframe provided by the law, it can be rightly deduced that the taxpayer has no objection with the tax authority's assessment of his tax liabilities thus making the tax assessment final and conclusive. Thus, until a tax assessment becomes final by way of a taxpayer failing to file an objection within the time limit stipulated by the law or when all the grounds of objection are fully resolved, collection of income tax shall remain suspended.<sup>2</sup>

#### Interest and penalties applicable on inconclusive assessments

On whether interests and penalties could accrue on inconclusive assessments, the Tribunal held that there was no legal basis to impose interest and penalties on a contested tax assessment as assessment is suspended until the objection or appeal is finalised.<sup>3</sup> In effect, interest and penalties on overdue tax only start to run when an assessment becomes final and conclusive whether by the taxpayer losing his right to object to an assessment or the objection or appeal has become determined.<sup>4</sup>

#### Interest and penalties payable for failure to remit WHT and PAYE when due

In this case, SNEPCO had failed to remit WHT and PAYE arising from the 2007 to 2012 years of assessment. The Tribunal held that when WHT and PAYE is not remitted within the time stipulated by statute, penalty and interest becomes due and payable on the unremitted tax from the moment the time prescribed by statute expires.<sup>5</sup> Although this decision may appear to contradict the Tribunal's decision on the suspension of interests and penalties on

inconclusive assessments, it does not. This is because the moment a taxpayer fails to remit his PAYE and WHT within the time stipulated by law, the taxpayer becomes liable to interests and penalties. These tax liabilities are due to failure to remit WHT and PAYE within the time stipulated by law whereas the dispute on the assessment is a dispute as to the amount assessable as payable. Thus, while an objection or dispute on the amount assessable suspends the calculation of the interest and penalties until such time as the assessment is resolved, the taxpayer is not relieved of the interest and penalties liabilities arising as a result of default in remitting the WHT and PAYE.

## Conclusion

The decision in the case of *SNEPCO v LSBIR* reflects Nigeria's drive to encourage remission of WHT and PAYE taxes. With this decision, it is incontrovertible that the non-remission of these taxes within the stipulated time will incur interest and penalties whether the assessment is disputed or not. Employers who do not want to incur

additional tax liabilities are therefore encouraged to pay all remittances within the stipulated time periods required by statute as the sum deducted or withheld is regarded as a debt or monies kept and/or retained for the relevant tax authorities.

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## Endnotes

1. Section 58(1) of the Personal Income Tax Act.
2. Section 54 of the Lagos State Revenue Administration Law; s68(2) of the Personal Income Tax Act.
3. Section 68(2) of Personal Income Tax Act.
4. *Weatherford Services S.D.E.R.L v FIRS* [2016] 26 TLRN 44 to 50a.
5. Section 74(2) of the Personal Income Tax (Amendment) Act 2011.

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