



AN OVERVIEW OF THE KEY PROVISIONS OF THE DEDUCTION OF TAX AT SOURCE (WITHHOLDING) REGULATIONS 2024



Introduction

On the 1st of July 2024, the Federal Government of Nigeria, under the hand of the Finance Minister, Hon. Olawale A. Edun, announced the promulgation and immediate implementation of the Deduction of Tax at Source (Withholding) Regulations 2024 (the "Regulations"). The Regulations marks the beginning of a simplified and business-friendly withholding tax (WHT) regime, signifying a substantial shift in Nigeria's fiscal policy and tax administration. The Regulations outlines the procedures for deducting taxes at source from payments to taxable individuals and companies under the amended Companies Income Tax Act, the Personal Income Tax Act ("PITA"), Capital Gains Tax Act and the Petroleum Profits Tax Act. Notably, the Regulations, which took effect on 1st July 2024, supersedes all other existing Regulations on

Deduction at Source or WHT.¹

Overview of Withholding Tax

WHT is a method for collecting income tax at the time of payment for specific transactions. It serves as an advance payment that can usually be offset against income tax liabilities, although there are situations where WHT is considered as a final or definitive tax. The implementation of WHT provides several benefits. It allows the government to effectively manage its cash flow by proactively collecting tax revenue on a transaction-specific basis, reducing reliance on annual tax filings. Additionally, WHT helps in reducing tax evasion and collecting valuable data related to the commercial activities of taxpayers, thereby contributing to a better understanding of the economy.

¹ Regulation 10 of the Deduction of Tax at Source (withholding) Regulations, 2024

Overview of Withholding Tax

Before now, existing Withholding Tax Regulations have given rise to numerous concerns about the timing of Withholding Tax deductions, exemptions for specific transaction types, excessively high tax rates for certain transactions, and other administrative challenges. Hence, the Regulations was promulgated to address these issues through the implementation of substantial amendments. These key innovative provisions are highlighted below:

a) Clarity on WHT regime on supply of goods:

Section 1(a) of the Regulations 2024 imposes WHT on transactions specified in the First Schedule of the Regulations, at the rates specified in the Schedule. Unlike the previous WHT Regulations that exempted WHT on 'sales in the ordinary course of business' which created a lot of confusion as to what qualifies as 'sales in the ordinary course of business', the Regulations clearly outline that Nigerian businesses are required to apply a 2% WHT on the sale of goods², except in cases where the goods are directly manufactured or provided by the manufacturer or producer. Additionally, over-the-counter sales³ and other specific transactions listed under the Exemptions in Section 8 of the Regulations are also excluded from the application of the WHT.

b) Withholding Tax on Transactions without Tax Identification Number:

When vendors fail to furnish their Taxpayer's

Identification Number (TIN), any trading income they earn will be subject to a WHT at a rate that is double the specified standard rate.⁴

c) Clarity on who has the Obligation to deduct WHT:

The Regulations eliminates the requirement of businesses that operate the Pay-As-You-Earn (PAYE) scheme to be eligible to deduct WHT. This means that almost all businesses, including those exempt from tax, government ministries, departments, agencies, and their payment agents are now required to deduct withholding tax on eligible transactions. However, there are some exemptions.⁵

The following are exempt from withholding tax deduction obligations:

- i. Individuals.
- ii. Small Companies or Unincorporated entities whose gross turnover is less than N25,000,000 provided that:
 - a. The supplier has a valid TIN and
 - b. The value of the transaction is N2,000,000 or less.⁶

In essence, small companies are not required to deduct withholding tax if the transaction value is less than NGN2,000,000 and the vendor has a valid TIN. This provision aims to provide clarity on who is required to deduct WHT and under what circumstances.

² First Schedule, Deduction at Source (Withholding) Regulation, 2024.

³ Regulation 8 (1)(C) (ibid).

⁴ Regulation 1(C)(ibid).

⁵ Paragraph 2(1), Deduction at Source (Withholding) Regulation, 2024

⁶ Paragraph 2(2) (ibid)

d) Clarity on Time of Deduction of WHT:

The Regulations have provided clarity on the appropriate time that the obligation to deduct WHT arises. It provides that for transactions between unrelated parties, withholding tax (WHT) should be deducted at the earlier of the following events:

- when payment is made; or
- when the amount due is otherwise settled.⁷

For transactions involving related parties, WHT applies at the time of payment or when the liability is recognized. However, we note that the provision of the existing tax laws⁸ which state that WHT for passive income streams such as dividends, interest, royalty, and rent become due at the earlier of when the payment is "made or credited" remains in force and overrides the provisions of the Regulations.

e) When to remit Withholding Tax:

The timelines for payment or remittance of withholding tax remain consistent with the previous withholding tax regulations. Hence, payments to the Federal Inland Revenue Service (FIRS) remain due by the 21st of the following month,⁹ while payments to the relevant State Internal Revenue Services (SIRS) are due by the 30th of the following month. Additionally, the Regulations specify that Capital Gains Tax (CGT) deducted on payments to individuals should be remitted to the relevant State's Internal Revenue Service (IRS) by the 10th of the following month thus, aligning with the timeline for income tax payments made through the Pay-As-You-Earn (PAYE) Scheme.

f) The Deducted Amount at Source is Not a Separate Tax:

The Regulations have clarified that WHT deductions should not be considered as an additional tax or an extra cost for the contract or transaction but as an advance payment of income tax.¹⁰ Hence, WHT payment should not be factored into the contract price. The purpose of this clarification is to prevent the shifting of the tax burden on transactions subject to WHT, which ordinarily lies on the vendor/recipient of an income, to the recipient of the service/transaction, whose only obligation is to deduct the WHT and remit to the relevant tax authority.

g) WHT Receipts and Credits Now Issued by Customer:

The Regulations stipulate that the customer, rather than the tax authority, is responsible for issuing a receipt of tax deducted to the vendor.¹¹ This receipt must encompass specific details of the recipient or supplier, comprising their name, address, Tax Identification Number (TIN) and/or NIN or RC Number, nature of the transaction, gross amount, the amount deducted, and payment month.¹² Upon presentation of this receipt, the tax authority will extend credit to the supplier/recipient, irrespective of whether the entity making the deduction has remitted the withheld tax to the tax authority. The vendor can furnish this receipt to the relevant tax authority as proof of WHT deducted and obtain credit, regardless of whether the WHT was remitted by the customer. In scenarios where customers issue receipts for deducted but unremitted WHT, they will be liable for the WHT as part of their tax obligation, along with interest and penalties under the law.

⁷ Paragraph 4(2) (ibid)

⁸ See Sections 69, 70, 71, and 72 of the Personal Income Tax Act, 2004 (as amended), and Sections 78, 79 and 80 of the Companies Income Tax Act, 2004 (as amended).

⁹ Regulation 5(1), Deduction at Source (Withholding) Regulation, 2024

¹⁰ Regulation 3 (ibid).

¹¹ Regulation 6(1), Deduction at Source (Withholding) Regulation, 2024

¹² Ibid.

h) Customers that fail to deduct WHT:

Customers who failed to deduct WHT but made full payments to their vendors will now incur an administrative penalty and a one-time annual interest charge.¹³ This is a departure from the previous requirement for such customers to pay the withholding tax in addition to the prescribed interest and penalty. We note that the Regulations do not prescribe the amount or measure of the administrative penalty, which suggests that the administrative penalty is subjective or left at the discretion of the tax authority. However, we note that Section 74 (1) of the Personal Income Tax Act, Section 82 of the Companies Income Tax Act, and Section 40 of the Federal Inland Revenue Service Act, 2007, all prescribe a penalty of 10% per annum of the tax withheld or not remitted for failure to deduct or remit WHT. We expect that the administrative penalty will be in line with the 10% rate under the tax laws.

i) Increased WHT Rate on Director's Fees:

The Regulations have increased the WHT rate applicable to director's fees. This change affects both residents and non-residents. The WHT rate, which used to be a flat 10%, has been adjusted to 15% for resident directors and 20% for non-resident directors.

NOTE: We are of the view that this increment if challenged in court, may be struck down as it ought not to override the provisions of Section 72 (2) of the Personal Income Tax Act (PITA), which provides that the rate of WHT on director's fees 'shall' be 10 per cent, except the PITA's provision is amended. We note that Section 72 (2) of PITA was not amended by any of the Finance Acts, and it is trite that an Act of the National Assembly cannot be amended by a mere Regulation.

j) Clarification on what amounts to an 'Across-the-Counter Transaction':

The Regulations provides a comprehensive definition of across-the-counter transactions¹⁴, indicating that such transactions involve interactions between parties without an established contractual relationship or formal contracting arrangement. These transactions typically entail immediate payment, which can be made in cash or through electronic means at the point of exchange.

k) Transactions exempted from Deduction at Source:¹⁵

The Regulations include the following as WHT exempt (amongst others):

- Compensation payments under a Registered Securities Lending Transaction in line with Section 81(8) of the Companies Income Tax Act.
- Any distribution or dividend payment to a Real Estate Investment Trust or Real Estate Investment Company as provided under Section 80(5) of the Companies Income Tax Act.
- Goods manufactured or materials produced by the person making the supply. The Regulation expands the definition of manufacturing/production to include the production of energy, including electricity, gas and petroleum products.
- Across-the-counter transactions, i.e. transactions carried out between parties without established or prior contractual relationship and in which payment is made on the spot.

¹³ Regulation 7(2) (ibid).

¹⁴ Regulation 9 (b) Deduction at Source (Withholding) Regulation, 2024.

¹⁵ Regulation 8 (1) (ibid).

- Interest and fees paid to a Nigerian bank by way of direct debit funds which are domiciled with the bank.
- Out-of-pocket expenses that are normally expected to be incurred directly by the supplier and are distinguishable from contract fees.
- Payments made on Insurance premiums
- Imported goods not creating taxable presence in Nigeria.
- Supply of Liquefied Petroleum Gas (LPG), Compressed Natural Gas (CNG), Premium Motor Spirits (PMS), Automotive Gas Oil (AGO), Low Pour Fuel Oil (LPFO), Dual-purpose kerosene (DPK) and JET-A1.
- Commission retained by a broker from monies collected on behalf of the principal in line with the industry norm for such transactions.
- Winnings from a game of chance or a reality show with content designed to promote entrepreneurship, academics, and technological or scientific innovation.

NOTE: An exemption from deduction at source in this Regulation shall not be deemed as an exemption from payment of the relevant income tax except as provided in the enabling law. We also note that the comprehensive list of the eligible transactions and the applicable WHT rates are provided under the First Schedule of the Regulations.

Knotty Areas/Considerations

i. Issuance of Withholding Tax Receipts:

The Regulations now require customers to issue WHT receipts instead of the tax authorities

handling this task as before. This change aims to allow taxpayers to access value promptly, cutting delays and value loss. However, concerns exist about implementing this change on the TaxPro Max portal and other online systems used by state tax authorities. It is strongly recommended that customer-issued receipts should include payment reference numbers to facilitate the reconciliation process.

ii. Issues Concerning WHT Refund:

The reduction of the WHT rate for some transactions and services with low-profit margins has caused issues with surplus credits and reclaiming excessive WHT payments, leading to cash flow challenges for businesses. Clear guidelines from the FIRS and the Joint Tax Board are expected to address the process of obtaining WHT refunds through a more pragmatic and fast approach rather than protracted audits.

CONCLUSION

The newly issued WHT Regulations have been meticulously crafted to delineate explicit and harmonized guidelines for the implementation of withholding tax. This departure from the preceding framework, characterized by ambiguous and disparate rules, aims to rectify inconsistencies in tax applications. It is envisioned that unwavering adherence to the provisions of the new Regulation will engender an efficacious tax regime within the country.

As Nigeria continues to grapple with the current economic realities and fiscal challenges, it is hoped that these Regulations will bring about a refinement of Nigeria's fiscal system and engender an investment-friendly economy.

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