



Tax Appeal Tribunal's judgement on employer's obligation to remit tax on voluntary pension contribution withdrawals

"...the employer, as an agent of collection on behalf of the government, does not have any further obligation with respect to other income of the employee outside employment income"

The Tax Appeal Tribunal ('TAT' or 'the Tribunal'), sitting in Lagos on 19 June 2019, delivered a judgment in favour of Nexen Petroleum Nigeria Limited ('Nexen' or 'Appellant') in a case with Lagos Internal Revenue Service ('LIRS' or 'Respondent'). The key issue for determination, amongst others, was whether the Appellant is obliged to deduct and remit pay-as-you-earn (PAYE) taxes on the voluntary pension contribution (VPC) withdrawals made by its employees before the timeline stipulated in the Pension Reform Act, 2014 (PRA). In delivering its judgment, TAT held that LIRS' attempt to recover PAYE taxes from employers on income

other than employment income earned is null and void.

Background/facts of the case

Nexen received a Notice of Refusal to Amend (NORA) from LIRS in response to its objections filed against assessment notices raised on the company. LIRS had conducted an audit exercise on the tax records of Nexen for 2013 and 2014 tax years and consequently demanded additional tax liability from the Appellant, which ultimately steered the filing of a Notice of Appeal at TAT.

The fundamental issues for determination before the Tribunal are as follows:

- Whether Nexen had fulfilled its statutory obligation of deducting and remitting the PAYE tax due on employees' income during the period, therefore exonerating itself from any additional tax obligation with respect to VPC
- What is the extent of the agency relationship between Nexen and LIRS; if Nexen is to act as an agent of collection for LIRS on aggregate income earned by the employees?

- Should VPC remain a tax-deductible contribution where Nexen acts as an agent of LIRS?
- Whether LIRS acted within its powers to issue best of judgement assessment on the expatriate's emoluments without recourse to the documentation provided by Nexen
- Does PRA require an employee to provide evidence of non-withdrawal within 5 years in order for the employer to oblige a VPC request?

The decision

In delivering its judgment, TAT analysed each fact of the case and ruled accordingly; citing relevant sections of the law and evaluating various decided cases. A high-level overview of the decision is set out below:

- TAT considered the employer's obligation to deduct and remit accurate PAYE taxes to the relevant tax authorities under section 81(1) of PITA. TAT noted that VPC is based on the provisions of section 4(3) of PRA, which allow employees to make voluntary contributions to their retirement savings account (RSA), while section 10 provides that all pension contributions shall form part of tax-deductible expenses. PRA does not limit the exemption to the mandatory contributions. Thus, it is on this premise that Nexen also treated VPC as tax-deductible contribution.
- To the extent that Nexen has ordinarily complied and acted within these provisions and further proved to LIRS by showing evidence of compliance, no further obligation was required from it.
- The provision of PITA on PAYE scheme clearly stipulates that an employer is an agent of government for the purpose of withholding PAYE taxes (in respect of funds due from the employer to the employee) from employees. Therefore, where an

agent performs its duties, as in the case of Nexen, it is discharged from further responsibility of any future action of the employees.

- TAT also rejected LIRS' use of discretion in adopting deemed income as the gross emoluments of the expatriates due to a perceived reduction over the years without considering supporting documents provided by Nexen. This is on the basis that the discretion by LIRS was not exercised in a judicial and judicious manner. In addition, LIRS' action violates the principle of taxation.
- Lastly, the PRA does not specify that employer has obligation to request evidence of non-withdrawal from VPC for a period not less than 5 years. Nonetheless, the Act provides in section 10(4) that any income made on the VPC shall be subject to tax at the point of withdrawal, if withdrawn before the expiration of 5 years from the date of contribution. The import of this provision is to ensure that early withdrawals become taxable in the hands of the employee and does not in any way infer that the responsibility to deduct and remit these taxes, rests with the employer. The issue of confidentiality required from Pension Fund Custodians and the Pension Fund Administrators restricts the knowledge of such withdrawals from the employer.

Our analysis

Simply put, this case seeks to address two major issues, which are:

- Where an employer has deducted relevant income tax from emoluments, is it obliged to continue acting as an agent of government regarding tax payable on withdrawals of VPCs?
- Who has the obligation to account for the relevant tax where withdrawal of VPC is

made within five (5) years of contribution?

For easy reference, we have highlighted each issue and our analysis immediately thereafter:

- The role of employers as agents of government:** The Tribunal rightly highlighted that the role of employers is limited to deduction and remittance of PAYE on emoluments paid to employees and such role is merely an administrative duty/task. Thus, the employer has no further responsibility to act as an agent of government for any future actions of its employees with respect to their VPCs.
- Obligation of employee contributor:** The Tribunal commented that the PRA exempts any income earned on any VPC from tax where withdrawal is not made before expiration of five (5) years of voluntary contribution. The interpretation of the Tribunal's ruling that the exemption stated in section 10(4) of the PRA applies to employees appears flawed on the following bases:
 - While section 10(4) refers to exemption/taxability of VPCs, it is not expressly stated whether this would be in the hands of the "employee contributor" or the Fund administrator/custodian.
 - Furthermore, section 10(4) references section 10(2), which relates to taxation of the asset/funds income accruable to pension funds and assets. Interpreting the provisions of section 10(2) in conjunction with section 10(4) of the PRA, it is arguable that the exemption of section 10(4) applies to the Fund administrator and not the employee.
 - Section 10(3) of the PRA is clear on tax exemption as only "retirement benefits" payable to RSA holders are

tax exempt. If the law wanted all contributions exempt, it would have been clearly stated.

Conclusion

The decision of the TAT in the above case has clearly shown that the obligation of an employer, with regard to deduction and remittance of applicable taxes on the employees' income, does not cover subsequent events. Therefore, the

employer, as an agent of collection on behalf of the government, does not have any further obligation with respect to other income of the employee outside employment income.

In a few cases, we have seen the tax authorities insist that the employer has the obligation of getting evidence of subsequent withdrawals by its employees from their RSA accounts and should

report such to the tax authority. By the fact of this case, it is clear that the obligation of an employer does not extend to this point.



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