

TAT rules that Withholding Tax applies on commissions deducted upfront by betting agents



www.pwc.com/ng

January 2022

Background

SV Gaming Limited (SVG) is a sports betting company which uses a network of agents including Retail Agents across the country in order to reach its customers. The customers place bets and pay the stakes to the Retail Agents. If the customer wins, the Retail Agent pays the winnings to the customers. Periodically, the Retail Agent will deduct its commission and pay over the balance (net of commission and winnings) from the customers' stakes, to SVG. Withholding tax (WHT) is not deducted on the commissions earned by the Retail Agents.

The Ekiti State Internal Revenue Service (EKIRS) conducted a tax audit of SVG for 2018 and 2019 tax years and eventually issued a WHT assessment of about ₦3.3m in respect of the commission earned by the Retail Agents based in the state. SVG objected to the assessment and subsequently appealed to the Tax Appeal Tribunal (TAT).

Parties' Arguments

SVG's Arguments

- Under the Personal Income Tax Act and the WHT Regulations, WHT is recoverable from qualifying payments made to a taxable person. Therefore, it is the act of making payment that triggers a WHT obligation.
- The words "payment made" should be given their literal or ordinary meaning. The dictionary definition of "pay" and "payment" means "giving money for works, goods or services" and "act of paying" respectively. Based on these definitions, SVG is not liable to deduct WHT in respect of commissions earned by its agents as it never made any payments to those agents.
- SVG did not dispute that the agents earn taxable income, or that they are due to pay income tax. Rather, SVG argued that it does not have the opportunity to account for the WHT on commission earned by the Retail Agents as they are in control of the cash and their commission is deducted upfront in full.

EKIRS' Argument

- SVG is an agent of the EKIRS for the collection of WHT in respect of commission earned by its agents in the State.
- The relationship between SVG and the agents is that of a principal/agent. The commission is paid, whether directly or indirectly.
- The deduction of their commission upfront is a contractual agreement between both parties which does not take away SVG's statutory obligation to deduct WHT. SVG should have directed the agents to deduct their commission net of 5% WHT which would be remitted by SVG.

Tribunal's Decision

The Tribunal accepted the EKIRS' arguments and ruled as follows:

1. There is a principal-agent relationship between the parties. Money wagered by customers and paid to the Retail Agents were paid to SVG, as the agents only acted on behalf of SVG in collecting the wagers.
2. From the point of collection of the wagers, there is also an implied trust in respect of the monies collected as the agents are bound to render account to SVG and disburse the funds in accordance with SVG's directives.
3. Even if a literal interpretation of the words "payment made" is applied, the retention of their commission upfront from wagers received from customers on behalf of SVG amounts to payment of the commission. Therefore, SVG has a statutory obligation to deduct WHT on those payments.

Analysis and Takeaway

The judgment raises interesting questions around its application to other trust or fiduciary (in addition to agency) arrangements such as banking and insurance brokerage. The judgment did not distinguish the various scenarios or set out bright-line rules for taxpayers in similar situations. It could be inferred however, that in order to reach its decision, the Tribunal considered SVG as the party with the economic control in the transaction and the agents were acting exclusively for SVG.

For certain banking transactions, the bank holds the deposits on behalf of the customers and deducts Commission on Turnover (CoT) or interest on the deposits at source. Would the bank customers have an obligation to deduct and account for WHT on the CoT or interest deducted by the banks (even if the customer had no opportunity to withhold)? The bank customers may argue against deducting WHT on the basis that they do not have economic control and cannot bargain against the bank debiting their account 100% for CoT and interest accordingly.

For insurance brokerage, can it be argued (against the decision of the Tribunal) that the insurance broker acts for the customers (even though the brokers earn their commission from the insurance premium)?

There are practical problems for taxpayers with the suggestion by the Tribunal that the agents should deduct 95% of their commission with SVG remitting the 5% to the tax authority. The present agency practice whereby the agent deducts their commission in full is more practically viable especially considering the difficulty and delays in getting WHT credit notes. A legislative amendment that mandates that the agent that deducts the commission, also has the statutory obligation to remit the WHT on behalf of the principal, may be more widely acceptable. This will also align with the literal wordings of the law which is that the person in control of the money should have the obligation to withhold. The government should also reform the WHT system to ensure speedy access to the WHT credit notes without placing additional administrative burden on the taxpayer who already suffered the tax.

It is possible that many of the Retail Agents are subject to a minimum Personal Income Tax of 1% (after factoring in all reliefs and allowances). This means that such Retail Agents will always have a refund of 4% from the State. Many state tax authorities do not pay out refunds to taxpayers in practice. This defeats the purpose of the WHT system, and the refund provisions should be reviewed.

Betting companies in Nigeria are advised to review their operating structure in light of this judgement and to revisit their contractual agreements with their agents in order to identify and address all exposures.

For a deeper discussion, please contact any member of our Tax Controversy and Dispute Resolution team below:

Kenneth Erikume
Tax Partner
kenneth.y.erikume@pwc.com

Emeka Chime
Associate Director
chukwuemeka.x.chime@pwc.com

Adeoluwa Akintobi
Senior Associate
adeoluwa.akintobi@pwc.com