

UUBO TAX UPDATE – EYES ON THE TAX - FIRS REQUESTS FOR WHT AND VAT ON PAYMENTS TO DISTRIBUTORS AND OTHERS



The Federal Inland Revenue Service (the “FIRS”) recently issued a public notice titled “Deduction at Source of Withholding Tax (WHT)/Value Added Tax (VAT) on Compensation Paid to Agents, Dealers, Distributors and Retailers by Principal Companies” (the “Notice”). With the Notice, the FIRS has sent a reminder to all corporate entities operating in Nigeria, particularly those in the fast-moving consumer goods sector, of their obligation to deduct WHT at the appropriate rates from the compensation due to their distributors, dealers and agents in the form of commission, rebates etc. The FIRS also included customers that receive rebates on the list. In addition, distributors, dealers and agents are, by the Notice, required to include VAT on their invoices to the corporate entities at the rate of 5%.

The FIRS requires that the WHT and VAT should apply to the compensation irrespective of how the payment is made - whether by cash, credit note or even good-in-trade. While corporate entities are to make the WHT deduction, distributors, dealers and agents are required to collect the VAT and both parties should remit same to the FIRS on or before the 21st day of every month.

The requirement to apply WHT and VAT is consistent with the provisions of the enabling statutes - the Companies Income Tax Act 2004 (as amended) (CITA) and the Value Added Tax 2004 (as amended) (VATA) respectively. The Regulations require that WHT shall apply to commissions at the rate of 10% if the recipient is a company and 5% for agency fees. The VAT on commissions and agency fees is at a flat rate of 5%.

While the rules around WHT and VAT applicable to commissions are clear, they are less unclear in relation to rebates. A

rebate is essentially an amount which is paid by way of a reduction in price or return/refund of what has already been paid by a person. A rebate is mostly used for sales promotion by marketers as a way to incentivise persons to either purchase or sell their products. It is unclear how the FIRS intends to apply WHT and VAT to rebates, especially where such rebates are by way of a reduction in prices. It, however, appears from the Notice that the FIRS’ main focus is on commission, and not on rebates. The coming days will tell when the FIRS seeks to enforce WHT and VAT on rebates. Based on the words used in the CITA and VATA, both statutes do not appear to us to contemplate the imposition of WHT and VAT on rebates.

The FIRS issued the Notice in respect of the provisions of the Companies Income Tax (Rates, Etc., of Tax Deducted at Source (Withholding Tax) Regulations 1995 (the “Regulations”) and paragraph 3.8 of the FIRS Information Circular No. 2006/02 of February, 2006 (the “Circular”). The Notice contains provisions which we believe are inconsistent with the provisions of the applicable tax laws, some of which we have identified below.

First, the Notice purports to, relying on the provisions of the Regulations and the Circular, impose an obligation on the affected companies to deduct VAT due on the compensation paid to its distributors, dealers, agents and customers contrary to the provisions of the VATA. Under the VATA, other than government ministries, agencies and departments and oil and gas companies which are permitted to withhold VAT and remit to the FIRS, the obligation to collect and remit VAT to the FIRS is on the supplier of the good or service (in this case the distributor, dealer or agent) and not the recipient of such good or service (in this case the affected



company). Furthermore, neither the Regulations nor the Circular relied upon by the FIRS contain any provision relating to the collection and remittance of VAT by the affected companies. The imposition of this obligation by the FIRS is, therefore, inconsistent with the provisions of the VATA. What the FIRS seems to be doing is asking the affected companies to reverse charge themselves VAT – this should only be the case if a distributor, agent or dealer is not a Nigerian corporate entity.

Second, whilst the law clearly sets out the nature and type of payments on which tax must be withheld or which VAT applies to, the Notice has expanded the list of payments on which tax is required to be withheld or which VAT applies to by including rebates and goods-in-trade. The FIRS could be challenged on this ground, if it seeks to enforce same against companies, as it does not have the power to expand or reduce such list. Furthermore, it is unclear how the obligation to withhold tax on goods-in-trade would work in practice.

Third, the period within which the tax withheld or the VAT due on such payments must be remitted to the FIRS as contained in the Notice is incorrect. The CITA provides that tax withheld must be remitted to the FIRS within 21 days from the date the amount was deducted or the time the duty to deduct arose while the VATA requires the VAT due on the supply of goods and services to be remitted to the FIRS on or

before the 21st day of the month following that in which the purchase or supply was made. The Notice, however, requires the affected companies to remit WHT/VAT on or before the 21st day of every month which is inconsistent with the enabling statutes.

Based on the foregoing, corporate entities must be mindful of the tax implications of each arrangement that they seek to enter into with their distributors, dealers and agents and should take steps to ensure that such arrangements do not expose them to tax liabilities. It is, therefore, pertinent to ensure that you obtain tax advice on how the Notice and FIRS' current aggressive tax drive will:

- (i) impact your existing/future business arrangements with your distributors, dealers or agents;
- (ii) affect your reporting obligations to the FIRS; and
- (iii) your obligations under the relevant tax laws.

This update is for general information purposes only and does not constitute legal advice. If you have any questions or require any assistance or clarification on how the Notice would apply to you or your business or require tax advice on any aspect of the Nigerian tax laws, please contact: taxteam@uubo.org.