



# Tribunal rules again in favour of the FIRS on Excess Dividend Tax

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## Background

The Federal Inland Revenue Service (FIRS) audited the tax returns of Ecobank Nigeria Plc (“Ecobank”, “the company” or the “Bank”) relating to the 2015 and 2016 financial years (FYs).

The FIRS alleged that the Bank paid out about N5.5bn in dividends to its shareholders out of its 2015 FY accounts when the company was in a tax loss position for the year.

The FIRS assessed the Bank to Excess Dividend Tax (EDT), using Section 19 of the Companies Income Tax Act ([CITA] *pre Finance Act, 2019*). This provision sought to impose a 30% tax on dividends paid by a company in any year, where such dividends exceeded the company's taxable profits for the year.

Ecobank stated that the dividends were mostly paid out of tax exempt income from bonds, treasury bills and other government securities and as such should not be liable to EDT. The Bank conceded to EDT of about N352m relating to dividends paid from taxable trading income.

Ecobank also stated that the FIRS' assessment was not valid as it did not consider the N352m EDT already paid.

However, the FIRS insisted that the EDT provision should be applied regardless of the source of the dividend, and that Section 19 aims at preventing shareholders from partaking in dividends without paying taxes.

Following an assessment and several correspondences between the Bank and the FIRS, the dispute was appealed to the Tribunal (or TAT).

## Issues for Determination

The Tribunal made a determination on the following issues:

1. Was the FIRS correct to assess EDT on dividends paid out of profits from Bonds, Treasury Bills and other Government Securities which are specifically exempted from Companies Income Tax?
2. Was the FIRS misdirected as it did not consider the EDT on dividends from taxable profits already paid by the Bank?
3. Whether the FIRS interpreted and applied the EDT provision correctly in line with legal principles.

## The Decision

The Tribunal upheld the FIRS' assessment and ruled that EDT was applicable on the sums paid out of “tax exempt” profits.

According to the Tribunal, the EDT provision in Section 19 (*before the Finance Act 2019*) is not concerned with the source or origin of dividend paid. As long as the dividend declared and paid is greater than taxable profits, EDT applies.

The TAT agreed with the FIRS that the EDT provision seeks to prevent shareholders from sharing dividend without payment of tax for whatever reason.

The TAT also ruled that the FIRS had separately acknowledged the payment of the undisputed sum, and as such the EDT assessment was still valid.

## Takeaway

This decision is consistent with earlier rulings of the courts and the Tribunal on EDT cases. Therefore, companies that distributed dividends in excess of their taxable profits before the commencement of the Finance Act, 2019 would need to

re-assess the risk of EDT, especially those with open FIRS audits.

The recently signed Finance Act, 2019 amends the EDT provision, and now excludes the following from the computation of EDT:

- Dividends paid out of retained earnings, provided that the dividends are paid out of profits that have been subjected to tax under CITA, the Capital Gains Tax Act, or the Petroleum Profits Tax Act;
- Dividends paid out of profits that are specifically exempt under CITA or other tax laws (therefore, Ecobank would not have been liable to EDT if the dividends were declared today);
- Dividends from Franked Investment Income (i.e. dividends on which WHT was deducted)
- Distributions by Real Estate Investment Companies from rental and dividend income.

In the light of this decision and changes introduced by the Finance Act, it is necessary for companies to analyse their dividend history and take steps to address any EDT exposure.

For a deeper discussion, please contact any member of our **Tax Dispute Resolution team** below or your usual contact within PwC Nigeria:

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