

# ***Tax Appeal Tribunal says withholding tax is due on dividends from gas profits***

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## ***In brief***

The Tax Appeal Tribunal (TAT) has ruled in favour of the Nigerian tax authority to levy withholding tax on dividends paid out of gas profits by an upstream petroleum companies.

The judgement takes a simple view of a rather complex provisions of Sections 60 and 11 (2) of the Petroleum Profits Tax Act (PPTA) and Sections 80 and 9(1) (c) of the Companies Income Tax Act (CITA). A more in-depth analysis will be required in the future to conclusively resolve the issue.

## ***In detail***

### ***Background***

The PPTA is the guiding legislation for the taxation of all companies engaged in upstream petroleum operations in Nigeria (in simple terms production of crude oil, natural gas and related hydrocarbons). Section 60 of the PPTA exempts from further tax, any dividends which are paid out of profits that are taken into account under the provisions of the PPTA and upon which PPT is charged, assessed and paid.

One of the available incentives in the PPTA for the utilisation of associated gas is contained in Section 11(2)(d) which provides that:

*“expenses identified as incurred exclusively in the utilisation of*

*associated gas shall be regarded as gas expenses and be allowable against the gas income and profit to be taxed under the Companies Income Tax Act”*

One interpretation of this provision is that gas income is not taken into account in the calculation of the amount of chargeable profit upon which PPT is “*charged, assessed and paid*”. As such, the exemption conferred by Section 60 of the PPTA should not apply to dividends declared from gas operations.

Another interpretation is that Section 2 of the PPTA defines petroleum operations as winning and transportation of petroleum, which is defined to include ‘*any mineral oil and natural gas*’. Section 9 also states that ‘*all income incidental*

*to and arising from petroleum operations*’ is subject to PPT. This implies that gas income is taxed under PPTA, albeit at the CIT rate based on Section 11(2)(d). Thus, the exemption under Section 60 should also apply to dividends from gas profits.

### ***Facts of the case***

The Federal Inland Revenue Service (FIRS) audited the Appellant (Agip) in 2013 and issued an assessment for WHT on the company’s dividends relating to gas for the periods 2006 to 2009. The amount assessed by the FIRS was US\$3,375,496.

Agip objected to the assessment which the FIRS refused to amend. Subsequently, Agip lodged an appeal at the TAT.

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## **Overview of the judgement**

### **Agip's position**

The issue for determination brought forward by Agip was whether or not dividends paid out of its gas income should be liable to WHT under the provisions of CITA.

Agip contended that dividend payments from its gas income should not be liable to WHT as PPTA exempts it from paying any further tax. Agip took this position on the basis that Section 11(2) provides an incentive rate of 30% as against the 85% tax rate under PPTA. It further contended that the incentive does not affect its ability to enjoy WHT exemption granted by Section 60 of PPTA.

### **FIRS' position**

The FIRS argued that Agip's gas income is governed under CITA and not PPTA. The FIRS maintained that Section 11(2) of PPTA transfers the taxation of associated gas profits to CITA and that any dividend paid out from gas profits does not qualify for the WHT exemption under Section 60 of PPTA.

### **The decision**

The TAT analysed and provided interpretations to Sections 11(2) and 60 of the PPTA.

According to the TAT, the provision of Section 11(2) is unambiguous. The TAT stated that the above section requires a company to set aside expenses incurred for associated gas utilisation while the gas income and profit should be taxed

under CITA. The TAT ruled that the phrase "under CITA" puts gas income completely under the full provisions of CITA such that its other provisions would apply to such income.

The TAT indicated that if the PPTA intended to apply only the CITA rate, as against the whole Act, it would have been expressly stated so. Therefore, the subsection of the PPTA provides that gas income would be fully taxed under CITA and not merely that the CIT tax rate would govern the taxation of such income.

The Tribunal set aside Agip's claims that Section 60 of the PPTA applies to its gas income which is subject to PPTA and no other law. The TAT stated that Agip cannot pay taxes under one statute (CITA) and obtain incentives from another (PPTA). Essentially, its associated gas profits are not subject to PPTA and consequently cannot enjoy the WHT exemption under Section 60 of the PPTA.

The TAT held that since Agip's gas income is liable to tax under CITA, Agip is subject to all the provisions of CITA in assessing its gas income. Therefore, Agip is liable to WHT on dividends paid out of its gas profits as provided under Sections 80 and 9(1) (c) of CITA.

### **The takeaway**

The TAT's ruling provides some clarity on the previously divergent interpretations of Sections 11(2) and 60 of the PPTA by players in Nigeria's upstream petroleum industry.

By determining that gas income is taxable in its entirety under the provisions of CITA, the TAT's ruling effectively removes gas operations from the scope of the PPTA. This therefore has significant impact beyond the main issue in this dispute in view of the consequential issues that may arise such as the application of commencement rules, excess dividend taxation and so on. It is expected that the judgement will be appealed given that there are tenable arguments for both interpretations on the subject.

In the meantime, companies that have adopted the practice of exempting their dividends paid out of gas profits from WHT and other provisions of CITA should begin to re-assess their positions and review their past and current tax uncertainty treatment while awaiting a conclusive ruling by the courts. The entire process could take years.

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***Let's talk***

For a deeper discussion of how this issue might affect your business, please contact:

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