

Nigerian Tax Appeal Tribunal rules that gratuities paid to retired employees are exempt from Personal Income Tax

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Executive summary

The Enugu division of the Nigerian Tax Appeal Tribunal (TAT or the Tribunal) delivered its judgment on 20 June 2019, in favor of Nigerian Breweries Plc. (NBP), in a tax dispute with the Abia State Internal Revenue Service (AIRS) on the exemption from Personal Income Tax (PIT) of gratuities¹ paid to employees.

NBP instituted the appeal at the TAT following the refusal of the AIRS to discharge the notices of PIT re-assessment imposed on NBP for failure to remit PIT on gratuities paid to retired employees.

In delivering its judgment, the TAT held that by applying the mischief rule of interpretation, which promotes the remedy within the intent or intention of the law, gratuities are tax exempt under the *Personal Income Tax Act* (PITA). As such, the TAT resolved the tax dispute in favor NBP.

Detailed discussion

NBP is a public limited company incorporated in Nigeria with branches all over Nigeria including Abia State. NBP is responsible for deducting and remitting the PIT of its employees to the relevant state tax authorities in line with the PITA. The AIRS is the body responsible for the assessment, collection and general administration of taxes due to Abia State in accordance with the tax law.

During an audit of NBP, the AIRS issued revised assessment notices determining that gratuities paid by NBP to its retired employees were subject to PIT. In its response, NBP objected to the revised assessments on the grounds that among others, gratuity which was subject to tax under the 1993 PITA, was no longer subject to tax by virtue of the Finance (Miscellaneous Taxation Provisions) Decree No. 32 of 1996, which deleted gratuities from chargeable income.

The AIRS in its response to the objection by NBP, issued a Notice of Refusal to Amend to the Company. Consequently, NBP filed a Notice of Appeal before the Tribunal wherein two reliefs were sought as follows:

- a. An order discharging the assessment notice issued by the Respondent
- b. A declaration that by Decree No 32 of 1996, all gratuities are tax exempt

Following the responses by the AIRS to the appeal filed by NBP before the Tribunal, three issues were called for determination on whether:

- ▶ The action (i.e., appeal) is competent on the grounds that NBP sued a non-juristic person
- ▶ NBP is liable to pay penalties and interest within the circumstances of the appeal and
- ▶ Gratuities are wholly tax exempt under the PITA, Cap. P8 LFN 2004 (as amended)

NBP in its argument contended that under the provisions of the PITA (as amended), gratuities are wholly exempt from tax. The company based this reasoning on the fact that Section 3 of the PIT Decree No.104 of 1993 lists gratuities as one of the types of income chargeable to tax. Section 3 of the PIT Decree was subsequently amended by the Section 3(4) of the Finance (Miscellaneous Taxation Provisions) Decree No.32 of 1996 by deleting the word gratuities. Therefore, from 1996 onwards, all gratuities were no longer subject to tax under the PITA. Furthermore, NBP maintained that the exclusion of gratuities from the charging section of the PITA (section 3) and its conditional application under Paragraph 18(b) of the 3rd Schedule to the PITA raises a conflict which should be resolved in favor of the whole exclusion.

In contrast, the AIRS argued that gratuities are not fully exempt from PIT as contained in Paragraph 18(b) of the 3rd Schedule to the PITA. They maintained that the 1996 Decree No.32, cited by the NBP, is not applicable to the issue of

whether gratuities are tax exempt and that the Decree is not part of the Laws of the Federation of Nigeria, 2004. They insisted that there is no conflict between the Section 3(1)(b) of the PITA and Paragraph 18(b) of the 3rd Schedule to the PITA. They also argued that Paragraph 18(b) of the 3rd Schedule to the PITA is unambiguous and applies as interpreted literally.

The judgment

Regarding the first issue, the Tribunal held that the AIRS is a juristic person that can sue and be sued in compliance with the provisions of section 87(1) of the PITA, which established the operational arm of the State Board as the State Internal Revenue Service.

On the second issue, the TAT held that in compliance with paragraph 13(2) of the 5th Schedule to the *Federal Inland Revenue Service (Establishment) Act, 2007* and Section 60 of the PITA, NBP filed its appeal within 30 days from the date it became aggrieved. Accordingly, based on the provisions of section 68(2) of the PITA, payment of penalties and interest should be in abeyance until the determination of the Appeal.

On the third issue, the Tribunal held that in compliance with the charging provision which is Section 3 of the PITA 2011 (as amended), there is no specific reference to gratuities as a chargeable income. Hence, in the absence of specific provisions in the body of the Act that subjects gratuities to tax, a schedule cannot be used to amend the provisions of the Act. In view of the forgoing, the TAT held that gratuities are tax exempt under the extant PITA.

The TAT noted that Section 3 was the charging section in the PITA in 1993 (i.e., at the time of enactment) and has remained so despite the various amendments made from the 1996 Decree No.32 to date. The only difference according to the TAT is that while gratuities were chargeable to PIT in the original principal Act, they are no longer chargeable to PIT in the amended principal Act. So, by applying the mischief rule of interpretation, the TAT, held gratuities are tax exempt under the extant PITA.

The TAT further noted that it is a settled principle of statutory interpretation that although schedules of a statute can be useful in construing the provisions of a statute, they cannot however be interpreted to override the plain words in the body of the statute. Therefore, paragraph 18 (b) of the 3rd Schedule which makes any gratuity above N100,000 taxable, was held not to be applicable to NBP.

In reaching this conclusion, the TAT resolved the issue on whether gratuities are fully tax exempt under the PITA or partly exempted in the light of the apparent conflict between Section 3(1)(b) of the PITA (“the charging section”) and Paragraph 18(b) of the 3rd Schedule to the PITA.

Consequently, the TAT allowed the Appeal and ruled in favor of NBP on the issues for determination, setting aside the revised assessment notice issued by the AIRS.

Implications

Based on this judgment, employers should not be required to deduct and remit PIT on gratuity payments made to retired employees.

Furthermore, this ruling may have put to rest the controversy on the public notices issued earlier by some state tax authorities regarding taxing gratuities for PIT purposes, as such regulations should no longer be tenable considering that the TAT has affirmed that all gratuity payments to retired employees are tax exempt in line with the PITA.

Endnote

1. With respect to retirement benefits, a gratuity is a single, lump sum payment while a pension is a periodic payment, normally on a monthly basis for life.

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