

## Withholding Tax on International Transportation Payments Impact on the ease of doing business in Uganda



Credit: <https://www.weforum.org/projects/decarbonizing-road-freight-initiative>

## 1. Introduction

In March 2021, Uganda's Tax Appeals Tribunal ("Tribunal") ruled in favor of the Uganda Revenue Authority ("URA") collecting withholding tax ("WHT") at the rate of 15% on freight payments to non-resident transporters for cargo deliveries into Uganda from abroad. Though this decision did not initially attract much public attention, there are now growing concerns especially as Uganda gears up for the development phase of its crude oil discoveries that the prevalent enforcement of this WHT imposition will make Uganda a less competitive destination for doing business as this article highlights.

## 2. Contention with the law

The decision of the Tribunal notwithstanding, it is still far from settled whether WHT should apply on freight payments to non-resident transporters with both the taxpayers and the URA holding starkly divergent positions.

The taxpayers argue that there are specific provisions under section 86 of the Income Tax Act ("ITA") that deal with the taxation of non-resident transporters in Uganda. Pursuant to section 86 of the ITA, transportation income earned by non-resident transporters is subject to taxation in Uganda via the withholding tax mechanism only if it relates to the delivery of cargo that has embarked, boarded or originated from Uganda. By implication therefore, it is the taxpayers' contention that freight payments to non-resident transporters for cargo deliveries into Uganda from abroad are not taxable in Uganda.

The URA on the other hand maintains that the general provisions of the ITA under section 85 apply and that non-resident persons earning income under a Uganda source services contract are subject to taxation in Uganda. The URA further argues that any category of payments to non-resident transporters for cargo deliveries into Uganda not covered by the provisions of section 86 of the ITA would be taxable under section 85 of the ITA as income earned under a Uganda source services contract.

## 3. The impact of the withholding tax

While charging tax on freight payments for inbound cargo can increase Uganda's tax revenues, it is questionable whether in light of the consequential practical complexities, there is justification at a policy level to tax such. To alleviate this, several jurisdictions only tax income earned from cross border transportation to the extent the conveyance of the underlying cargo originates from within their borders.

Uganda's regional peers namely Kenya, Tanzania, Ethiopia and Zambia tax freight payments to non-resident transporters only to the extent the carriage of outbound cargo commences from their jurisdictions. Freight income earned on the inbound delivery of cargo from abroad is not taxed in those countries. While generally acceptable to the URA that transportation income by non-resident transporters is chargeable to tax in Uganda to the extent the outbound delivery of cargo commences from Uganda, the URA also seeks to tax non-resident transporters freight income on the inbound delivery of cargo from abroad. This position is a subject of contention considering that the same income is also ordinarily subject to taxation in the country of commencement of the cross border transportation.

The imposition of WHT on international freight payments becomes even more complex when considered from the perspective of commercial terms ("incoterms") that outline the guidelines setting out the rights and obligations of buyers and sellers under international commerce. Incoterms among others define the party with the responsibility for the freight charges. For example, the importer of the goods bears the freight charges under the cost, insurance and freight ("CIF") incoterm but there other incoterms where the transportation charges are paid by the seller.

URA's ability to enforce the collection of this WHT largely depends on the extent to which the freight or transportation charges incurred by taxpayers in Uganda can easily be ascertained. This is not necessarily obvious in view of the conditions imposed by the incoterms as illustrated above. It is possible the URA could argue that the incoterms upon which cargo is imported into Uganda are inconsequential after all even if the freight charges are paid by the seller, the costs are still attributable to the buyer in Uganda. Such a position would further escalate legal disputes between the URA and the taxpayers.

It is also likely that the URA would encounter several challenges enforcing the collection of this WHT in business to consumer transactions and therefore only focus on the easy targets within business to business dealings that are easier to audit. This could cause a market imbalance because of the inability of the URA to tax all the eligible transactions.

The logistics and transportation industry in Uganda equally finds itself in a quagmire. It is common for them to subcontract counterparts abroad to make deliveries on behalf of their customers in Uganda. It would mean the logistics companies must pay their counterparts outside

Uganda less the 15% WHT for the inbound delivery of cargo.

WHT is ordinarily borne by the party receiving the payment but it is not the case always as sometimes foreign vendors demand that they are paid net of local taxes with the client in Uganda grossing up the tax charge hence pushing up their costs of doing business. It is highly unlikely that regional logistics players would find it attractive participating in international transportation terminating in Uganda when the same underlying income that they have earned is also subjected to taxation in their home countries. They are likely to demand that the WHT imposed by Uganda is absorbed by the local client otherwise they would not provide the service.

On the basis of the foregoing illustration, you can imagine the additional carriage costs that fuel companies would incur on transportation charges paid to non-resident transporters delivering their fuel into Uganda if they have to shoulder the 15%

WHT charge. It is inevitable that the additional cost imposed by the WHT would be pushed down to the final consumer. Uganda's oil and gas industry is moving into the development phase and a lot of inputs to be used will be imported. If this WHT imposition is not rethought, there will be project cost overruns that may derail Uganda's first oil projected to flow in 2025.

#### **4. Conclusion**

There is therefore urgent need for the intervention of the government to safeguard Uganda's competitiveness and ease of doing business by addressing the concerns of the business community especially players in the logistics and transportation sector. The government through the Ministry of Finance, Planning and Economic Development should re-evaluate whether at a policy level it is intended or justified to impose taxation on inbound international transportation into Uganda when several other countries do not tax the same.

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At Deloitte, he lived and worked in Uganda, Kenya, Tanzania and the United Kingdom for over 6 years and subsequently became the firm's chief of staff for the Energy and Resources Industry Group seeing him play a lead advisory role in Uganda, Kenya, Tanzania, Mozambique, South Sudan, Somalia and Ethiopia.

Denis is widely published and a regular commentator in the local, regional and international media and speaker at various forums regarding the taxation and financing of energy projects as well as the protection of large capital projects within the framework of international investment law.

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Bill is a Senior Advisor with Cristal Advocates. He has concentrated on working with energy companies with a particular focus on cross border transactions and M&A since 1989 and is a leading global energy and tax practitioner with wide international experience. Between 1986 and 1998, he worked in London with the UK tax authorities and Big Four accounting firms. From 1998 to 2004, he was based in Kazakhstan working across the Caspian region with Deloitte. He was in the region at the time it was developing its infrastructure for crude oil production with international investment following the collapse of the Soviet Union.

From 2004 to 2008, he worked in Russia where he led Deloitte's oil and gas industry group and established Deloitte's office in Sakhalin. He moved to East Africa in 2009 leading Deloitte's energy and resources industry group in Uganda, Kenya, Tanzania, Rwanda, Ethiopia and Mozambique. He was initially based in Kampala, Uganda later relocating to Dar es Salaam, Tanzania. Bill returned to the UK in 2014 supporting Deloitte UK teams working on outbound projects investing in Africa and was a key member of Deloitte UK's energy and resource practice until his retirement from the firm in September, 2018.

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John leads the public policy and advocacy practice at the firm and combines unique public and private sector experience.

Prior to joining Cristal Advocates, he had worked as a Private Secretary to the President of the Republic of Uganda. During this time, he participated in several public and private sector engagements that included advising and coordinating activities relating to oil and gas as well as infrastructural projects of national significance. John had earlier worked with the Post Bank Uganda Limited and Shonubi Musoke and Co. Advocates.

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Dickens leads the oil and gas practice at Cristal Advocates. He has an in depth appreciation of Uganda's oil and gas sector having served as the maiden Company Secretary of the Uganda National Oil Company (UNOC) and the Uganda Refinery Holding Company Limited (URHC). UNOC represents the Government of Uganda commercial interests in the oil and gas sector while URHC represents government interests in the refinery project as well as managing the petrol based industrial park.

Dickens was instrumental in UNOC's formation and initial period of operation and also served as its head of Contracts, Negotiations and Advisory until May 2018. Prior to joining UNOC, Dickens was Legal Counsel at the Petroleum Directorate of the Ministry of Energy playing key legal advisory roles on the negotiation and implementation of PSAs, Joint venture and other oil and gas agreements. He was also part of the team that shepherded the process of enacting the current Ugandan oil and gas Legislations and Regulations including the local content requirements.

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