

IN THE TAX APPEAL TRIBUNAL
LAGOS ZONE
SITTING AT LAGOS

TAT/LZ/023/2012

Between

Chevron Nigeria Limited

Appellant

And

Federal Inland Revenue Service

Respondent

Judgment

Issues for Determination

Section 39(1) of the Companies Income Tax Act (CITA) provides tax incentives to companies that utilize gas in downstream operations. The Appellant utilizes gas in its downstream Escravos Gas-to-Liquid Project (EGTL Project), a joint venture with the Nigerian National Petroleum Corporation (NNPC). The Appellant claimed 35% Petroleum Investment Allowance (PIA) incentive in its tax returns from 1998 to 2008. The Respondent disallowed them in the Appellant's petroleum-profits tax assessments.

Under CITA and PPTA, is a company engaged in gas utilization entitled to any deductions; if so, at what rate?

Introduction

In its audit exercise in 2009, the Respondent discovered that the Appellant had deducted Petroleum Investment Allowance on the EGTL Project at 35% rate. The Appellant claimed it was entitled to 35% Petroleum Investment Allowance based on the provisions of CITA, the Carry Agreement it had with NNPC, the Ministry of Finance's decision, and the Nigerian President's directive. The Respondent did not agree, reducing the 35% Petroleum Investment Allowance to 5%. The Respondent then raised Notices of Additional Assessment on the Appellant.

Facts and Proceedings

The Appellant embarked on 2 gas projects with NNPC: EGTL Project and EGP3 Project. Regarding EGTL, the Appellant executed 2 agreements with NNPC in 2001: the Head of Agreement for the Escravos Gas to Liquid Project (EGTL) {Exhibit E7} and a Carry Agreement for Escravos Gas-to-Liquid (EGTL) Project {Exhibit E8}. The Head of Agreement provides that



the Appellant will fund the project 100%. The Appellant also undertook to provide NNPC equity funding under the carry agreement.

The Federal Government supported the gas projects. The Minister of Finance, by its letter of 13 August 2001 (Exhibit E11), confirmed the Carry Agreement with the Appellant. On 30 March 2005, NNPC also confirmed that Petroleum Investment Allowance for the EGTL Project would be 35% (Exhibit E9). The President of the Federal Republic of Nigeria approved the projects in his letter dated 5th April 2015 (Exhibit E10). The Appellant then funded the projects.

When the Appellant prepared and filed its returns for petroleum profits from 1998 to 2004 and 2005 to 2008, it claimed 35% Petroleum Investments Allowance. The Appellant paid accordingly.

But after auditing the Appellant's accounts, the Respondent challenged the Appellant's claims for Petroleum Investment Allowance of 35%. Instead the Respondent allowed 5% deduction and assessed the excess to tax. The Respondent assessed the Appellant to US\$73,803,533 for 2004 (covering 1998-2004) {Exhibit E1} and US\$628,226,961 for 2008 (covering 2005-2008) {Exhibit E2}.

The Appellant objected, requesting a review of the additional assessments (Exhibits E3 and E4). The Respondent refused (Exhibits E5 and E6). The Appellant then appealed the Respondent's decisions. The Appellant filed depositions made by its Tax Manager (Babatunde Ale) and its Senior Analyst (Tolulope Olanrewaju). The Respondent called 2 witnesses, Mathew Gbonjubola (its Deputy Tax Manager) and Sunday Okeowo. Both parties introduced documentary evidence.

Parties' Positions

The Appellant argues that the 35% Petroleum Investment Allowance it claimed in respect of EGTL Project is backed by section 39(1) of CITA.

Section 39(1)(b) of CITA provides for 35% additional allowance for companies engaged in gas utilization in the downstream sector.

The Appellant also contends that it is entitled to 100% capital allowance by virtue of section 11(2)(f) of PPTA. Section 11(2)(f) provides that all capital investments relating to gas-to-liquids facilities would be treated as *chargeable capital allowance* and recovered against a company's crude-oil income.

The Appellant also argues that the Carry Agreement (Exhibit E8), NNPC's letter (Exhibit E9), and the President's approval (Exhibit E10) supported the 35% Petroleum Investment Allowance it claimed. The Appellant contends that the Federal Government's representations create a legitimate expectation that its petroleum profits tax liability would be varied.

The Respondent disagrees, emphasizing that Petroleum Investment Allowance is provided for under PPTA at 5% rate for onshore petroleum operations, and not 35%, thus the Appellant's deductions are not according to law.

AN APPEAL TRIBUNAL
LAGOS ZONE
CERTIFIED TRUE COPY
SIGN: 
10/12/15

The Respondent disagrees, emphasizing that Petroleum Investment Allowance is provided for under PPTA at 5% rate for onshore petroleum operations, and not 35%, thus the Appellant's deductions are not according to law.

The Respondent also counters that the Appellant's tax liability cannot be varied by any agreement between the Appellant and the Federal government. The Respondent avers that since tax payable by companies is imposed by statutes and not agreements, the Appellant's claims are not acceptable.

Analysis

1. Under CITA and PPTA, is a company engaged in gas utilization entitled to any deductions; if so, at what rate?

The Appellant argues that because the EGTL Project is a downstream project, the Appellant is entitled to claim 35% Petroleum Investment Allowance under section 39(1)(b) of CITA, with capital allowance of 100% under section 11(2)(f) of PPTA.

The Respondent counters that Petroleum Investment Allowance is not contained in any provisions of CITA. According to the Respondent, section 39(1)(b) provides for *additional investment allowance*, not Petroleum Investment Allowance.

Petroleum Investment Allowance as incentive under PPTA

Under PPTA, section 11(1) provides incentives to companies that utilize associated gas, subject to the conditions contained in section 11(2). The section does not contain any rates. But paragraph 5 of the Second Schedule to PPTA provides that:

(1) For the purpose of this Act and subject to the provisions of this Schedule, where a company has incurred any qualifying capital expenditure wholly, exclusively, and necessarily for the purposes of petroleum operations carried out by it, there shall be due for that company, for the accounting period in which that asset was first used or for the purposes of such operations, an allowance (in this Schedule called "Petroleum Investment Allowance") at the appropriate rate per cent, set forth in Table I to this Schedule, of such expenditure. (Emphasis supplied)

Table I lists the chargeable rates as follows:

- a. Onshore operations: 5%
- b. Operations in territorial waters and continental shelf areas up to and including 100 metres of water depth: 10%
- c. Operations in territorial waters and continental shelf areas in water depth between 100 metres and 200 metres: 15%

- d. Operations in territorial waters and continental shelf areas beyond 200 metres of water depth: 20%.

So Petroleum Investment Allowance is available to companies who have incurred any qualifying capital expenditure for the *purpose of petroleum operations*. For onshore operations, Petroleum Investment Allowance is 5%; for offshore operations, the allowance rate varies depending on water depth.

Investment Allowance under CITA

Section 39 contains incentives for companies engaged in gas utilization for *downstream* operations. Section 39(1)(a) and (b) provide for:

- a. an initial 3-year, tax-free period, renewable for additional 2 years and
- b. an additional 35% investment allowance, in the alternative.

So while the PPTA specifically provides for *Petroleum Investment Allowance*, section 39(1) of CITA provides for *investment allowance*.

The EGTL Project, as stated in the Head of Agreement (Exhibit 7), is a joint-venture project for the construction of a *downstream* processing plant at Escravos for the production and processing of natural gas into liquid fuels. The EGTL Project is clearly an onshore project. But because EGTL Project is a gas-to-liquid project, and not just any petroleum-operations project, it is different from the category listed in Table I of the Second Schedule to PPTA.

This means section 39(1) of CITA applies, not PPTA. Section 39 of CITA specially provides incentives for companies engaged in *gas utilization*. This is where the EGTL Project belongs. Section 39(1)(b) entitles the Appellant to claim an additional 35% investment allowance, notwithstanding Appellant's use of the nomenclature *Petroleum Investment Allowance*.

Do the provisions of CITA conflict with the provisions of PPTA on incentives?

In respect of incentives for gas utilization, the PPTA and CITA are not contradictory, but complementary. Section 11(2)(d) of PPTA provides that *expenses identified as incurred exclusively in the utilization of gas shall be regarded as gas expenses and be allowed against the gas income and profits to be taxed under the Companies Income Tax Act*. This is why section 11(2)(c) of PPTA requires that companies eligible for incentives keep the expenses incurred in the utilization of associated gas, where predictable, separate from those incurred on crude-oil operation. Only expenses not able to be separated are allowable against the crude-oil income of the company under PPTA.

TAX APPEAL TRIBUNAL
LAGOS ZONE
CERTIFIED TRUE COPY
SIGN.....
DATE 07/12/15

It is the Appellant's inaccurate use of the term *Petroleum Investment Allowance* to describe the 35% *additional allowance* it is entitled to under CITA that has created the seeming conflict between CITA and PPTA. Petroleum Investment Allowance is unknown to CITA. The Appellant is entitled to 35% *additional investment allowance*, not Petroleum Investment Allowance.

Is the Appellant also entitled to 100% capital allowance?

Under section 11(2)(f) of PPTA, all capital investments relating to gas-to-liquid facilities are to be treated as *chargeable capital allowance* and recovered against the crude-oil income. But the section does not provide the rate at which this allowance will be enjoyed. This does not mean the rate is 100% under PPTA as the Appellant has claimed.

To properly construe the meaning of capital allowance as used in PPTA, section 11(2)(f) cannot be read in isolation. Section 20(2) of PPTA provides that the aggregate amount of *all allowances* due to a company under the provisions of the Second Schedule for the accounting period shall be computed. These include annual allowances available in respect of qualifying capital expenditure incurred on the provision of certain assets at specific rates annually. Table II to Paragraph 6 of the Second Schedule to PPTA provides the rates for allowances on an annual basis as follows:

1st Year: 20%
2nd Year: 20%
3rd Year: 20%
4th Year: 20%
5th Year: 19%

We note that these rates were also listed in NNPC's letter to the Appellant, confirming the fiscal arrangement that applied to the EGTL and EGP3 Project (Exhibit E9). There, capital allowance for the EGTL project is 20% in the first 4 years and 19% in the 5th year. The Appellant is therefore entitled to treat its capital investments in respect of the EGTL Project as *chargeable capital allowance*. It can recover its capital investments against its crude-oil income by virtue of section 11(2)(f) of PPTA. The rates must be in accordance with Table II to Paragraph 6 of the Second Schedule to PPTA.

This Tribunal has considered the deductions companies engaged in gas utilization are entitled to. We have also determined the rate that applies to the Appellant by virtue of the relevant provisions of CITA and PPTA. Therefore, we need not determine the question of legitimate expectations.



Conclusion

The Appellant's EGTL project is a gas-utilization project in the downstream sector. Thus it entitles the Appellant to 35% *investment allowance* under CITA. We discharge the Respondent's Notice of Assessments PPTBA 61 for 1998-2004 years of assessment and PPTBA 86 for 2005-2008 years of assessment which disallowed the 35% as *Petroleum Investment Allowance*. We order the Respondent to serve reviewed Notices of Assessment allowing Investment Allowance of 35%.

But the Appellant is not entitled to claim 100% capital allowance against its crude-oil income. We order the Respondent to apply the rates provided in Table II to the Second Schedule of PPTA to determine the Appellant's chargeable capital allowance against the Appellant's crude-oil income.

Legal Representation:

Mrs Olufunke Adekoya, SAN with T.I. Emuwa Esq. O. Adebisi Esq. M. Ukpebor Esq. and S. Esuga Esq. I. Berenibara Esq. Ms A. Adewusi, J. Akhator Esq. M. Oluwole Esq. Ms A. Ezegbulam and Ms O. Olowu for the Appellant.

B. H. Oniyangi (Mrs) with Bright Igbinosa Esq. and B. D. Akintola (Mrs) for the Respondent.

DATED AT LAGOS THIS 28TH DAY OF OCTOBER 2015

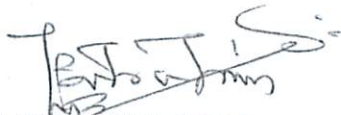


KAYODE SOFOLA, SAN (Chairman)



CATHERINE A. AJAYI(MRS)
Commissioner

D. HABILA GAPSISO
Commissioner



MUSTAFA BULU IBRAHIM
Commissioner



CHINUA ASUZU
Commissioner

APPEAL TRIBUNAL
LAGOS ZONE
CERTIFIED TRUE COPY

SGN

