

IN THE TAX APPEAL TRIBUNAL  
IN THE ABUJA ZONE  
HOLDEN AT ABUJA

APPEAL NO. TAT/ABJ/APP/009/2007

BETWEEN:

OANDO PLC

=

APPELLANT

AND

FEDERAL INLAND REVENUE SERVICE

=

RESPONDENT

CORAM:

HON. NNAMDI IBEGBU, S.A.N., F.C.I.Arb (Ag. CHAIRMAN)

HON. A. M. GUMEL

HON. BARR JUDE REX-OGBUKU

**JUDGMENT**

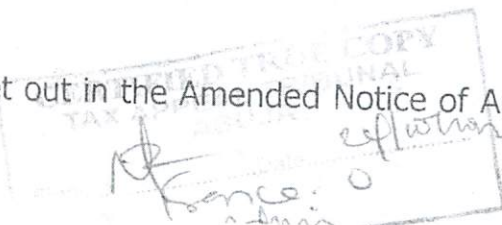
The Appellant filed this appeal against the Respondent upon being aggrieved by the Respondent's Notices of Assessment.

On the 6<sup>th</sup> day of January, 2007, the Appellant received two Notices of Assessment indicating that the Appellant is liable to pay additional income tax of N65,634,227 and Education tax of N7,278,611 for the 2003 year of assessment. The basis of the assessment was the Respondent's decision to disallow interest arising from the sum of N1.2billion the Appellant borrowed from NAL Bank Plc in the year of assessment on the ground that it is an expenditure of a capital nature. The Appellant treated the interest as an allowable deduction in arriving at its taxable profit in the year of assessment.

Dissatisfied with the assessments, the Appellant issued Notices of objection stating reasons why the interest qualifies to be so treated. In response to the objection, the Respondent issued a Notice of Refusal to Amend/Revise the Assessment to the Appellant thereby maintaining its position as to the Appellant's liability.

Dissatisfied with the respondent's Notices of Refusal to Amend/Revise the assessments, the Appellant commenced this appeal on March 23, 2007. The Appellant, with the leave of this Tribunal filed an Amended Notice of Appeal dated November 28, 2011, filed on November 29, 2011.

The Reliefs sought by the Appellant as set out in the Amended Notice of Appeal are as follows: -



- (i) An order discharging the Appellant of the assessment or quashing assessment served on it by the Respondent in respect of interest the Respondent disallowed as deductible for 2003 year of assessment (Y.O.A.)
- (ii) An order prohibiting the Respondent from assessing the Appellant to any further tax in 2003 year of assessment in relation to interest and similar charges.

**IN THE ALTERNATIVE**

- (iii) An order revising the assessment served on the Appellant in respect of interest for the 2003 year of assessment (Y.O.A.).
- (iv) Such other or further orders as this Tribunal may deem fit to make.

The Appellant called on witness Mr. Chike Njoku, who is an accountant by profession and a Treasurer in the Appellant's Company. He is a professional accountant and a member of the Chartered Institute of Taxation of Nigeria. He was employed by the Appellant in 1990. He tendered Exhibits P1, P1(i), P2 to P12.

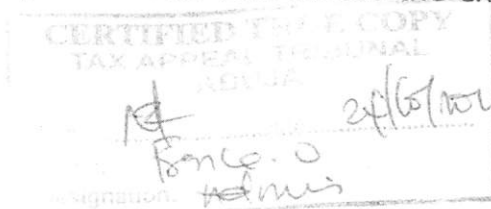
The Respondent whose position is that the loan for N1.2billion obtained by the Appellant from NAL Bank Plc was for the purpose of acquisition of the 60% interest in Agip Plc and therefore of a Capital nature and does not qualify as an allowable deduction under the provisions of the Companies Income Tax Act, Cap 60, Laws of the Federation of Nigeria, 1990 (C.I.T.A.), Cap 21, Laws of the Federation of Nigeria, 2004.

The Respondent called one witness, one Mr. S.O. Taiwo, Assistant Director Tax, of the Respondent. The Respondent tendered Exhibits D1, D2, and D2A.

The Appellant raised two preliminary issues. The first issue is with respect to the admissibility of Exhibits D and D1. The second preliminary issue is with respect to the propriety of paragraphs 8, 15 to 20 of the Witness's Statement on oath of the Respondent's only witness, S.O. Taiwo.

I will deal with the first preliminary issue whereby he raised objection at address stage to the admissibility of Exhibits D1, D2 and D2A. Exhibit D2A being the Financial Statement of UNIPETROL.

The FIRS (Establishment Act) permits the Tribunal to adopt any procedure it deems necessary. As a result, all the documents to be relied upon by both Counsel were exchanged for inspection to know if either of them will object to any of them. After that exercise, they answered that they had no objection. This was before the exhibits were tendered without objection.



The Appellant's Counsel can not at this stage raise the said objection and succeed.

In the Supreme Court case of **CHIEF JAMES ONANEFE IBORI VS. ENGR. GOODNEWS AGBI & 5 OTHERS (2004) 6 NWLR part 868 pg. 78 @ 136 F – G**, it was decided per Uwais C.J.N. that *"A document may be inadmissible but the parties in the case can consent to its being admissible. Once this has happened none of the parties will be allowed to resile from such an agreement. They are estopped to do so".* Certified True Copies of documents assure the genuineness and authenticity of the document. See *AREGBESOLA VS. OYINLOLA (2009) ALL FWLR (Part 472) pg. 1147*. See also *G.T. INVESTMENT LTD VS. WITT & BUSH LTD (2011) 8 NWLR Part 1250 pg. 500*.

I don't have to say more with respect to the Appellant's Counsel's submission in this respect. The said objection is dismissed and the Appellant's Counsel is estopped from raising such argument at this stage.

With respect to the second preliminary issue, concerning Paragraphs 8, 15 to 20 that they are legal argument, as well as opinion and conclusions this Tribunal disagrees. Paragraph 8 of the deposition of the Respondent's witness started with *"I know as a fact...."*, which shows he is saying what he knows. Likewise paragraph 15 talks about unacceptable tax avoidance strategy, paragraph 16 talks about the Financial Statement, paragraph 17 talks about the fact that the Respondent investigated the Appellant and issued notices, that they did same pursuant to Section 26 of a particular law is not legal argument, because it is agreed by both parties, that that is the function of the Respondent. Paragraphs 18 and 19 are issues of fact before the Tribunal, known to both parties. Paragraph 20 states that the Respondent disallowed what the Appellant desired pursuant to Sections 20 & 23 of CITA respectively. It is well known that the Respondent's duty is to allow or disallow in such circumstances of taxation, so it is not legal argument, opinion and conclusion.

In the case of **ORJI V. ZARIA IND. LTD (1992) 1 NWLR Part 216 pg. 124 @ 151F. Per OMO, J.S.C, (S.C.)** it was held that a mere conclusion which is a statement of fact within the knowledge of a deponent does not offend S. 87 of the Evidence Act, 1990 (now S.115 (2) of the Evidence Act, 2011). It is offensive only if it is a legal argument or legal conclusion.

This Tribunal consequently dismisses the two preliminary issues. The Tribunal now turns its attention to the main issue for determination, which the Tribunal formulates as appearing hereunder. This is in line with the issue formulated by the Appellant's Counsel which is: - Whether the N1.2billion obtained by the Appellant in August 2002 from NAL Bank Plc was for the purpose of replenishing the Appellant's working capital

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and if so, whether interest arising from the said loan is not unallowable deduction in the year of assessment?

Raising more than one issue from one ground has been frowned at by the Supreme Court as in the case of **UGWUNZE Vs ADELEKE (2008) 2 NWLR Part 1070 Pg 148 @ 168H-169A**. The issues could be married with the issues of the opposing side for simplicity and straight forwardness. Therefore it is mere irregularity.

This Tribunal has married the issues with the lone issue of the Appellant's Counsel for simplicity and straight forwardness.

Exhibit D2A which the Tribunal has held to be admissible is the Financial Statement of the Appellant. Paragraph 13 thereof states that:

*'The N9.2. Billion syndicated underwritten revolving facility was obtained to finance the acquisition of 60% ownership in Agip'*

Exhibit D2 which this Tribunal held to be admissible is the letter dated 12<sup>th</sup> July, 2005 by Pricewaterhouse Coopers, addressed to the Respondent's Chairman.

In that letter it was stated that *'In 2002, Unipetrol obtained two different 4 year-syndicated revolving loan facilities from two groups of banks of N1.2 Billion and N8 Billion respectively, to finance the acquisition of the 60% shareholding of Agip. Before the end of 2002, the N8 Billion syndicated loan took up the outstanding balance of N1.2 Billion thus consolidating the credit facility.'*

Exhibit P11, tendered by the Appellant is a letter dated 2<sup>nd</sup> August, 2002 from NAL Bank Plc, to inform the Appellant for the grant of a loan of N1.2 Billion to the Appellant upon certain conditions. Paragraph 4.0 thereof states: -

*'The facility will be used to refinance the company's purchase and acquisition cost of 60% of equity of the Agip Nigeria Plc which was held by Agip Petroli B.V.'*

Exhibit P10 tendered by the Appellant being the minutes of the 78<sup>th</sup> meeting of the Board of Directors held on 13<sup>th</sup> May, 2002 shows that the meeting was for the purpose of acquisition of 60% share in Agip Nigeria Plc.

That extract shows that the loan from NAL Bank Plc was obtained to refinance the cost of the Agip transaction comprising interest and fees.

No mention was made of the need to replenish working capital in the minutes.

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- Exhibit P4 states that the loan was used to refinance acquisition costs of Agip. It did not state that it was used to replenish the working capital of the Appellant.

The purpose of the loan from the foregoing cannot be to replenish working capital so as to ensure the smooth running of the Company as stated by the Appellant's sole witness in paragraphs 20 and 25 of his statement on oath.

Interest incurred on the loan from NAL Bank is the cost of acquiring Agip Nigeria Plc., which was meant to refinance 10% out of 15% paid as initial deposit for the acquisition of the shares in Agip Nigeria Plc., Any cost incurred in procuring the loan is cost in acquiring shares in Agip Nigeria Plc, since interest is by its nature cost of the loan of acquiring Agip Nigeria Plc. The acquisition of shares in Agip Nigeria Plc remains the basis for securing the loan from NAL Bank Plc., therefore interest (being cost of acquiring the loan) remains cost of acquiring share of Agip Nigeria Plc.

The Tribunal turns to Section 20 of CITA which refers to *"Any sum payable by way of interest and any money borrowed and employed as capital in acquiring the profits ....."*

Section 23 of CITA states that:

*"Notwithstanding any other provision of the Act, no deduction shall be allowed for the purpose of ascertaining the profits of any company in respect of: -*

*(a) Capital repaid or withdrawn and an expenditure of a capital nature".*

It means that interest will not be deductible where it is an expenditure of a capital nature. Interest incurred as a result of the loan from NAL Bank Plc was not incurred wholly, exclusively, necessarily, reasonably or for the production of the profits of the Appellant which was being ascertained. The ordinary meaning should be given to the words 'wholly', 'exclusively' and 'necessary'. ***See Shell Petroleum Development Corporation vs. Federal Board of Inland Revenue (2009) ITLRN 224.***

The cost of acquiring shares in another company cannot be in any way described as solely or inevitably incurred for the production of profits of an integrated energy provider. This is especially the case as there is no statutory obligation on the Appellant to make that purchase, which was the case in the Shell case (Supra). Therefore, the purchase of shares in Agip Nigeria Plc is the main cause and purpose of incurring the cost. The loan from NAL Bank Plc was not employed as capital in acquiring the profits of the company being ascertained. The interest was cost of acquiring shares in Agip Nigeria Plc. Consequently, the interest incurred as a result of the loan from NAL Bank Plc is not deductibles, as it constitutes capital expenditure. An expense of a capital nature is not deductible when calculating profit for income tax purposes. This is clearly contained in Section 23 of CITA.

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This Tribunal now turns its attention to know whether the description by the Appellant of the N1.2 Billion from NAL Bank Plc is for refinancing facility for replenishing working capital rather than for acquiring shares in Agip Nigeria Plc is an artificial or fictitious transaction.

The Power to disregard or amend artificial transactions is contained in Section 18 of CITA.

In the letter tendered by the Appellant dated 15<sup>th</sup> December, 2004 the Appellant explained that the facility was for the purpose of refinancing the acquisition cost of Agip as opposed to actual financing. In the document tendered by Appellant dated 12<sup>th</sup> July 2005, the representative of the Appellant explained that the loan was secured to 'finance the acquisition of 60% shareholding in Agip'. It was based on these statement and others that the Respondent determined the tax liability of the Appellant.

For the reasons given in this judgment, this Tribunal holds that the case of the Appellant fails and the reliefs sought by the Appellant in this appeal are hereby dismissed.

This Tribunal orders as follows:

- (a) An order that the Appellant is not discharged of the assessment of tax served on it by the Respondent in respect of interest the Respondent disallowed as deductible for 2003 year of assessment.
- (b) An order that the Respondent is not prohibited from assessing the Appellant to any further tax in 2003 year of assessment in relation to interest and similar charges.
- (c) An order that the Appellant shall pay tax as assessed by the Respondent, which is the sum of N72, 912,838 (Seventy Two Million Nine Hundred And Twelve Thousand Eight Hundred And Thirty Eight Naira).

This case is hereby dismissed with cost assessed and fixed at N100, 000 (One Hundred Thousand Naira)

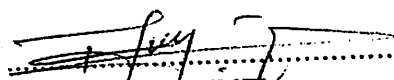
DATED THIS 24<sup>TH</sup> DAY OF OCTOBER, 2012

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Nnamdi Ibegbu, Esq., S.A.N., F.C.I.Arb  
Ag. Chairman Tax Appeal Tribunal, Abuja Zone

I concur



HON. A. M. GUMEL  
Hon. Commissioner

I concur



HON. JUDE REX-OGBUKU  
Hon. Commissioner

