

**IN THE TAX APPEAL TRIBUNAL
LAGOS ZONE
SITTING AT LAGOS**

Appeal No: TAT/LZ/EDT/077/2014

Between

1. Shell Nigeria Exploration and Production Company Limited
2. Esso Exploration and Production Nigeria (Deepwater) Limited
3. Nigerian Agip Exploration Limited
4. Total E & P Nigeria Limited

} Appellants

And

Federal Inland Revenue Service (FIRS)

Respondent

Judgment

Issues for Determination

1. The Petroleum Profits Tax Act (PPTA) requires the Respondent to include the names and addresses of assessed companies in its Notices of Assessment and serve the companies personally or by registered post. The Respondent did not comply with these provisions when it assessed the Appellants to education tax for 2006 under the Production Sharing Contract the Appellants entered with the Nigerian National Petroleum Corporation (NNPC).
 - Do the Respondent's omissions invalidate its education-tax assessment under the PPTA?
2. Section 46(1) of the PPTA empowers the Respondent to impose penalties on a company that fails to pay the tax assessed within one month after receiving the Respondent's Demand Note. The Respondent imposed penalty and interest when it issued a Demand Note on the 1st Appellant on the basis of a Notice of Assessment which the Respondent had withdrawn following the 1st Appellant's objection.
 - Are the Appellants liable to penalty and interest?



Facts and Proceedings

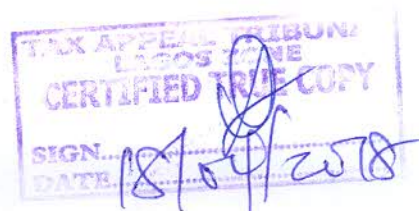
The Appellants are parties in the Oil Mining Lease 118 Production Sharing Contract (OML 118 PSC) with NNPC. The 1st Appellant is the operator of the lease whilst the 2nd-4th Appellants are contractors. NNPC is the concessionaire under the contract. The petroleum-profits tax and education tax due under the contract are imposed on the contract area in line with section 12 of the Deep Offshore and Inland Basin Production Sharing Contracts Act.

On 5 July 2007, the Respondent served the 1st Appellant with a Notice of Assessment for education tax of \$75,381,332 for 2006 (Exhibit OA1). In the Notice of Assessment, the 1st Appellant discovered the following omissions and errors:

- i. It did not include the 2nd-4th Appellants in the Notice of Assessment;
- ii. It did not allocate the tax assessed to the Appellants according to their respective shares in the contract; and
- iii. It calculated the Appellants' education tax from 1st January to 31 December 2005, rather than the statutorily stipulated current year of 1 January to 31 December 2006.

The 1st Appellant objected to the assessment by its letter of 20 July 2007. It pointed out the Respondent's omissions and errors, requesting the Respondent to correct them and issue a revised assessment. The 1st Appellant also pointed out that issuing a revised assessment in NNPC's name would violate section 3 of the Deep Offshore and Inland Basin Production Sharing Contracts Act (Exhibit OA3). By its letter of 14 August 2007, the Respondent withdrew the Notice of Assessment to effect the requested corrections (Exhibit OA2). The Respondent then informed the Appellant that it would reissue the assessment in the concessionaire's name, NNPC.

From August 2007 to June 2008, the 1st Appellant reminded the Respondent about the requested Notice of Assessment on 3 occasions (Exhibits OA4A, OA4B, and OA4C). The 1st Appellant also raised the matter in meetings between the 1st Appellant and the Respondent in November 2007 and March 2008. The



Respondent assured the 1st Appellant that it would serve the revised Notice of Assessment as soon as it completes the revision. When the Respondent finally revised the Notice of Assessment, it served the assessment on NNPC only. The Respondent gave the 1st Appellant a copy of the revised Notice of Assessment in a meeting between the 1st Appellant and the Respondent on 10 June 2009.

The Respondent issued a Demand Note dated 23 June 2009 on the 1st Appellant demanding \$93,281,816.80 (Exhibit OA7). This represents the education tax due, with penalty and interest. The next day, the 1st Appellant paid \$75,381,332, leaving out penalty and interest (Exhibit OA6). This was within 14 days from the day the 1st Appellant obtained the revised Notice of Assessment (Exhibit EOA). The 1st Appellant objected to the Respondent's demand for penalty and interest, requesting that they be set aside since it already paid the principal sum within the statutory period (Exhibit OA8). The Respondent declined this request (Exhibit OA9).

The Appellants appealed against the Respondent's Notice of Assessment and Demand Note. The Appellants filed depositions to support the appeal. The Respondent replied. The Appellants called Ogonna Arizechi, 1st Appellant's tax adviser, as its witness. The Appellants also introduced documentary evidence. The Respondent did not call any witness but tendered its revised Notice of Assessment through the Appellant's witness (Exhibit OA10).

Parties' Positions

The Appellants argue that the Respondent's Demand Note is void since it is based on a defective Notice of Assessment the Respondent had already withdrawn from the 1st Appellant, thus rendering the education-tax assessment void.

The Appellants contend that the Respondent's service of the revised Notice of Assessment on NNPC, excluding the Appellants who are parties to OML 118 PSC, is contrary to section 38(1) of the PPTA. Section 38(1) requires the Respondent to serve companies assessed under the Act personally or by registered post.



The Respondent countered that its Demand Note on the Appellants is in accordance with the PPTA because the Appellants had failed to pay the education-tax due within the statutory period.

The Respondent relies on the provisions of section 43(1) of the PPTA. Section 43(1) provides that where no objection has been raised within the period stipulated under section 38, the tax assessed becomes final and conclusive.

Analysis

1. Do the Respondent's omissions invalidate its education-tax assessment under the PPTA?

The Appellants argue that its Notice of Objection against the Respondent's initial Notice of Assessment has invalidated the assessment since the Respondent withdrew it because of the omissions and errors it contained. But the Respondent counters that no matter the mistake, defect, or omission in an assessment, the assessment remains valid under section 39 of the PPTA.

Section 39 of the PPTA provides that no mistake, defect, or omission could vitiate or invalidate an assessment. But this provision applies if the assessment in question substantially conforms to the PPTA.

Section 37(1) of the PPTA requires the Respondent to include the names and addresses of assessed companies in its Notices of Assessment, whilst section 38(1) requires the Respondent to serve the companies assessed personally or by registered post. The Respondent served the 1st Appellant only. The Respondent's Notice of Assessment of 26 June 2007 (Exhibit OA1) also lumped together the several Appellants' education taxes due under OML 118 PSC. The Respondent's assessment of the Appellants to education tax should have been based on each of the Appellants' petroleum-profits share under OML 118 PSC.

This is why section 12 of the Deep Offshore and Inland Basin Production Sharing Contract Act provides that "chargeable tax on petroleum operations in the contract



area under the production sharing contracts shall be split between the Corporation or the holder and the Contractor in the same ratio as the split of profit as defined in the production sharing contract between them."

The Respondent should have allocated tax amongst the Appellants and NNPC. The Respondent should have applied the equity-based allocation arrangement the 1st Appellant submitted to it by its letter of 17 August 2007 (Exhibit OA3). This is particularly because the Respondent is required to issue separate receipts to the parties according to each parties' share of profit under the contract by section 14 of the Deep Offshore and Inland Basin Production Sharing Contract Act.

Therefore, the Respondent cannot invoke section 39 of the PPTA to save its defective Notice of Assessment having failed to fulfill the required conditions. This effectively invalidates the Respondent's withdrawn education-tax assessment.

2. Are the Appellants liable to penalty and interest?

The Appellants argue that they are not liable to penalty and interest since they had paid the education tax due within the period prescribed by law. The Appellants contend that the Respondent is precluded from demanding the payment of any tax, penalty, or interest premised on the withdrawn Notice of Assessment. The Respondent counters that following the Appellants' objection, it amended the defective Notice of Assessment and issued the Revised Notice of Assessment on 25 September 2007. In the revised assessment, the Respondent issued the assessment in the contract area's name by which the parties to the OML 118 PSC are identified.

The Respondent served the revised Notice of Assessment of 25 September 2007 on NNPC on 28 September 2007. The Respondent did not serve the Appellants with the assessment. On 23 June 2009, the Respondent served a Demand Note on the 1st Appellant. The Respondent demanded payment of \$93,281,816.80, the tax allegedly due after adding penalty at the rate of 10% and 7.5% interest on the \$75,381,332 principal tax.



An examination of the Demand Note reveals that the Respondent issued the Demand Note based on its withdrawn Notice of Assessment of 26 June 2007, not the revised Notice of Assessment.

Under section 43(1) of the PPTA, Demand Notices predicated on a defective Notice of Assessment cannot become final and conclusive against the Appellants. So time could not have started running against the Appellants. Time begins to run from the date the Respondent serves a valid Notice of Assessment in accordance with the relevant law. Therefore, the Respondent cannot apply either section 46(1) to impose penalty or section 32(1) of the Federal Inland Revenue Services (Establishment) Act to demand any interest on the principal sum.

Conclusion

We allow the appeal. We set aside the Respondent's Demand Note dated 23rd June 2009 including penalty and interest. The Appellants' payment of \$75,381,332 completely discharges it from education-tax liability for 2006 accounting year.


Legal Representation:


Mrs Olufunke Adekoya, SAN with T.I. Emuwa Esq. I. Berebibara Esq., Ms A. Adewusi and F. Nwodo for the Appellant.

A. A. Iriogbe for the Respondent.

DATED THIS 29TH DAY OF OCTOBER 2015


KAYODE SOFOLA, SAN (*Chairman*)


CATHERINE A. AJAYI (MRS)
Commissioner


MUSTAFA BULU IBRAHIM
Commissioner

D. HABILA GAPSISO
Commissioner

CHINUA ASUZU
Commissioner

