IN THE TAX APPEAL TRIBUNAL
LAGOS ZONE
SITTING AT LAGOS

Appeal No: TAT/LZ/009/2013

Between
Mobil Producing Nigeria Unlimited (Mobil) Appellant
And
Federal Inland Revenue Service (FIRS) Respondent

Judgment

Issues for Determination

The Federal Government of Nigeria (FGN), the Nigerian National Petroleum Corporation (NNPC), and the Appellant entered a Memorandum of Understanding (MoU) with a tax-incentive clause. The Appellant applied the incentive in its tax returns for 2009-2012. The Respondent did not take account of the incentive when it assessed the Appellant.

1. Does the Respondent's failure to issue Notice of Refusal to Amend to a taxpayer render its subsequent assessments invalid?
2. Does the Respondent's failure to issue a Notice of Assessment before serving a Demand Note on a taxpayer render the Demand Note null and void?
3. Is the Appellant entitled to the MoU incentives?

Introduction

The Respondent assessed the Appellant to education tax for 2009, 2010, 2011, and 2012. The Appellant paid the education tax assessed for 2012, but objected to the Notices of Assessment for 2009, 2010, and 2011. It requested a review. The Respondent did not issue the Appellant any Notice of Refusal to Amend for those years, but served Demand Notes on the Appellant in June 2013. In the Demand Notes, the Respondent charged the Appellant to education tax for all the years, including 2012. The Appellant appealed the assessments, including the Demand Note for 2012.

Facts and Proceedings

FGN, NNPC, and the Appellant entered an MoU in 2000 (Exhibit MPU1). The MoU entitles the Appellant to certain reliefs, including a tax incentive clause.

The Respondent, an agency of the FGN, assessed the Appellant to education tax for the years 2009 to 2012 without applying the tax offsets in the MoU especially as clause 2.9 provides.

For the 2009 year of assessment, the Respondent assessed the Appellant's education tax at US$68,621,350 (Exhibit MPU10). The Appellant objected, claiming nil liability for 2009 based on the tax incentive contained in the MoU. The Appellant requested a review of the assessment (Exhibit MPU11). The Respondent declined to review it. It stated that the MoU was contrary to the provisions of the PPTA. The Respondent then issued a Demand Note on the Appellant (Exhibit MPU12). It did not issue any Notice of Refusal to Amend the assessments.

For 2010, the Respondent assessed the Appellant's education tax at US$100,866,136 (Exhibit MPU10). The Appellant objected to the assessment. It claimed it had already paid its education tax of US$13,820,364 for 2010 after taking account of the tax incentive the MoU provided (Exhibit MPU11). The Respondent did not reply. Without issuing a Notice of Refusal to Amend the assessment, the Respondent served a Demand Notice on the Appellant. The education tax due for 2010 was US$87,045,772 (Exhibit MPU10).

For 2011, the Respondent computed the Appellant's education tax to be US$123,512,515.10 (Exhibit MPU10). The Appellant objected to the assessment as it did for 2010. The Appellant said its education-tax liability ought to have been US$85,609,026, which it had already paid, not the assessment the Respondent had served on it (Exhibit MPU11). The Respondent did not accept the Appellant's MoU incentive-based computation but did not issue any Notice of Refusal to Amend. The Respondent eventually replied with a Demand Note (Exhibit MPU12).

For 2012, the Respondent earlier assessed the Appellant to US$81,802,973. The Appellant paid. But in June 2013, the Respondent served a Demand Note on the Appellant. It included the education tax due for 2012. This was put at US$111,265,301. Since the Appellant had paid US$81,802,973 based on the initial assessment, the Respondent demanded the outstanding education tax of US$29,462,328.

The Appellant filed a Notice of Appeal to contest the Respondent's assessments and demand notes. It also filed depositions. The Respondent replied. The Appellant called Adegbola Salako, its Manager, Upstream Nigeria Tax, as its witness. It also introduced documentary evidence. The Respondent did not call any witness or introduce evidence.

Parties' Positions

The Appellant argues that the Respondent's education-tax assessments must be discharged because:

1. the Respondent failed to issue to the Appellant any Notice of Refusal to Amend as required under sections 38(6) and 44 of the PPTA;

2. the Respondent issued a Demand Note for 2012 assessment year without a corresponding Notice of Additional Assessment, thus rendering the demand note a nullity; and

3. the Respondent failed to take into account the provisions of the MoU which was still binding between the parties before a new fiscal regime commenced on 1 January 2013.

The Respondent disagrees with the Appellant's position because:

1. the Federal Inland Revenue Service (Establishment) Act 2007 {FIRS Act} which governs appeals to the Tribunal does not require the Respondent to serve the Appellant with a Notice of Refusal to Amend before an assessment can be validly made or issued;

2. the Respondent was empowered and entitled to reassess the Appellant's education tax for 2012 because the Appellant was previously underassessed; and

3. this Tribunal must follow *Mobil Producing Nigeria Unlimited v Federal Inland Revenue Service*[1], which decided that the MoU relied on by the Appellant has been terminated since January 2008.

Analysis

1. **Does the Respondent's failure to issue Notice of Refusal to Amend to a taxpayer render its subsequent assessments for 2009, 2010 & 2011 accounting periods invalid?**

The Appellant argues that the Respondent failed to issue any Notice of Refusal to Amend for its 2009-2011 Notices of Assessment, rendering the demand notes for those years premature and invalid. The Respondent counters that sections 38(6) and 44 of the PPTA do not apply to appeals before the Tribunal. The Respondent relies on paragraph 13 of the First Schedule to the FIRS Act which governs appeals against the Respondent's decisions.

The appeal before this Tribunal is for education tax. Section 1(3) of the Tertiary Education Trust Fund (Establishment, etc) Act provides that the *assessable profit of a company shall be ascertained* in the manner specified in the Companies Income Tax Act (CITA) or the PPTA. Section 2(1) empowers the Respondent to assess and collect the tax imposed by the PPTA from petroleum companies. Under section 2(1)(b), the Respondent is required to apply the provisions of the PPTA *relating to the collection* of petroleum profits tax due under the Tertiary Education Trust Fund (Establishment, etc) Act. These provisions relate to collection, not appeals against the Respondent's decisions.

The PPTA is not silent on appeals. Section 38(6) requires the Respondent to serve taxpayers who dispute the Respondent's assessments a Notice of Refusal to Amend. This is a mandatory requirement under the PPTA. That is why section 44 of the Act puts any disputed assessments in

[1]FHC/10A/13

abeyance pending the determination of the taxpayer's objection or appeal. So under the PPTA, the Respondent's service of Demand Notes on a taxpayer without a prior Notice of Refusal to Amend the assessment would appear premature and invalid.

On the other hand, the FIRS Act does not say that the Respondent must serve a taxpayer with a Notice of Refusal to Amend if it declines the taxpayer's request for review of an assessment. Paragraph 13(1)-(3) of the Fifth Schedule to the FIRS Act, which the Respondent relies on, governs appeals by a taxpayer who is aggrieved by the Respondent's *assessment or demand notice* or aggrieved by *any action or decision* of the Respondent. Any *action or decision* includes inaction and indecision. So the Respondent's omission to issue a Notice of Refusal to Amend within a reasonable time or at all can be treated as the Respondent's decision, subject to appeal to this Tribunal.

And by virtue of the provisions of section 68 of the FIRS Act, sections 38(6) and 44 of the PPTA cannot operate to make issuance of a Notice of Refusal to Amend a condition precedent since they conflict with paragraph 13 of the Fifth Schedule to the FIRS Act. Section 68 of the FIRS Act states that:

> *(1) Notwithstanding the provisions of this Act, the relevant provisions of all existing enactments including, but not limited to, the laws in the First Schedule shall be read with such modifications as to bring them in conformity with the provisions of this Act.*
>
> *(2) If the provisions of any other law, including the enactments in the First Schedule are inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the provisions of that other law shall to the extent of the inconsistency be void.*

Paragraph 2 of the First Schedule lists the PPTA as one of the Acts administered by the Respondent. The FIRS Act is the superior Act. It governs appeals.

By virtue of paragraph 13(1) and (2) of the Fifth Schedule to the FIRS Act, we deem the Respondent's failure to issue a Notice of Refusal to Amend to the Appellant as a Respondent's decision against which an appeal lies right away. This is also consistent with our Rules especially Order 3 Rules 1 and 2.

2. **Does the Respondent's failure to issue a Notice of Assessment before serving a Demand Note on a taxpayer render the Demand Note null and void?**

The Appellant argues that the Respondent acted arbitrarily by issuing Demand Note for 2012 which does not correspond with the Notice of Assessment for the same period. The Appellant contends that the Respondent's action has denied the Appellant the opportunity of being heard since it could not reply with a Notice of Objection. But the Respondent counters that section 36(1) of the PPTA allows it to further assess a taxpayer if it discovers that the taxpayer has been underassessed.

Section 36(1) does not excuse the Respondent from serving a Notice of Assessment (or Notice of Additional Assessment) on a taxpayer. If the Respondent discovers or is of the opinion that a taxpayer has been under-assessed, the Respondent may assess the taxpayer to additional tax. This must be by a Notice of Additional Assessment, not a Demand Note. As stated in the Notices of Assessment the Respondent served on the Appellant for years 2009, 2010, and 2011 (Exhibit MPU10), a Notice of Assessment or Notice of Additional Assessment entitles a taxpayer who disputes an assessment to reply with a Notice of Objection within 30 days for a review of the assessment. But a Demand Note does not entitle a taxpayer who disputes the tax payable to raise any objection.

The Respondent's issuance of a Demand Note on the Appellant without a prior Notice of Additional Assessment for 2012 is invalid.

3. Is the Appellant entitled to the MoU incentives?

The Appellant argues that the Respondent was wrong for basing its Demand Notes on the Tribunal's decision in *Mobil Producing Nigeria Unlimited v Federal Inland Revenue Service*[2] which was in respect of the Appellant's education-tax assessment for 2008.

The Appellant contends that the facts and circumstances of the present case are distinguishable from the facts and circumstances in the earlier appeal because the Appellant has introduced exhibits MPU14 and MPU15 in this case. Exhibit MPU14 is a letter dated 19 June 2013 and written by the Department of Petroleum Resources (DPR). Titled 'Re: TERMINATION OF 2000 MOU AND ESTABLISHMENT OF NEW PRICING MECHANISM', the DPR proposed that Realizable Price should be used as the fiscal price for crude-oil sales from January 2008 to June 2010, and Official Selling Price (OSP) for July 2010 to December 2012. Exhibit MPU15 is a letter written by the Oil Producers Trade Section (OPTS) of the Lagos Chamber of Commerce and Industry (which includes the Appellant). The letter is dated 6 September 2013 and titled 'Re: Pricing Methodology'. In that letter, the OPTS agreed to apply Realizable Price from January 2008 to June 2010. But from July 2010 to December 2012, the DPR and the OPTS could not agree on whether Official Selling Price or Realizable Prize should apply. To address the differences, the OPTS proposed a meeting.

When this Tribunal concluded trial in the earlier *Mobil case*, the letters (Exhibits MPU14 and MPU15) were not in existence. The Exhibits were not also contained in the records of the Federal High Court when the question of the life of the MoU went before that court. But in the Federal High Court's decision, upholding the judgment of this Tribunal in TAT/LZ/004/2011, Seidu J laid the matter to rest. His Lordship held as follows:

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[2]TAT/LZ/004/2011

> It is clear from the letter dated 17th January 2008, that a new Fiscal Regime has been introduced. The clear intention of the Ministry of Petroleum Resources is not to be bound again by the MOU of the year 2000. This is well stated in their letter, referring to the power to so do as allowed by Clause 7.3 of the MOU Exhibit MBU1 [Exhibit MPU1].
>
> No matter how strong and well worded an MOU is, it cannot be used to overrule clear provision of law. Parties cannot by consent waive provision of law as held in *MENAKAYA v. MENAKAYA* (2001) 9 – 10 S.C. 1.
>
> I am satisfied that the appropriate parties are in the court considering the cause of appeal in this case. It is clear from Exhibit A the letter dated 17th/01/2008 that all the right [sic] and privileges enjoyed under the MoU have been taken away. The Petroleum Profit Tax Act is the effective law that is applicable to the Appellant in this case.

We are bound by the decision of the Federal High Court. The letter of 17 January 2008 before the Federal High Court in Mobil's appeal is similar to the contents of Exhibits MPU14 and MPU15. They both terminate the life of the MoU in question. In the absence of the MoU, the Federal High Court has held that the new fiscal regime is the PPTA. This was also the Tribunal's decision in *Philips Oil Company Nigeria Limited v Federal Inland Revenue Service*[3].

Conclusion

We hold that the Respondent's failure to issue Notice of Refusal to Amend to the Appellant does not render its assessments invalid.

But the Respondent's failure to issue a Notice of Assessment before serving Demand Note on the Appellant for 2012 renders the Demand Note null and void. We discharge the Demand Note for 2012.

The 2000 MoU is dead. Exhibits MPU14 and MPU15 cannot effectively introduce a new fiscal regime. It is the PPTA that governs.

We order the Appellant to pay the education tax due for 2009, 2010, and 2011.

We order the Respondent to serve a proper Notice of Additional Assessment on the Appellant for 2012.

[3]TAT/LZ/O21, O22, O23, and O24/ 2013

Legal Representation:

Olufunke Adekoya, SAN with Theophilus Emuwa Esq., Godwin Etim Esq., I. Berenibara Esq. and Ms Adefolake Adewusi for the Appellant.

Mrs B. D. Akintola 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