

IN THE TAX APPEAL TRIBUNAL

LAGOS ZONE

HOLDEN AT LAGOS

APPEAL NO: TAT/LZ/PPT/033/2014

BETWEEN

MOBIL PRODUCING NIGERIA UNLIMITED

APPELLANT

AND

FEDERAL INLAND REVENUE SERVICE

RESPONDENT

JUDGMENT

The Appellant dissatisfied with the Notice of Refusal to Amend by the Respondent, filed a Notice of Appeal dated 7th March, 2014 for wrongful assessment to additional petroleum profits tax.

BACKGROUND FACTS

The Appellant is a crude oil producing company in Nigeria while the Respondent is charged with the responsibility of assessing, collecting and accounting for revenue accruing to the Federal Government.

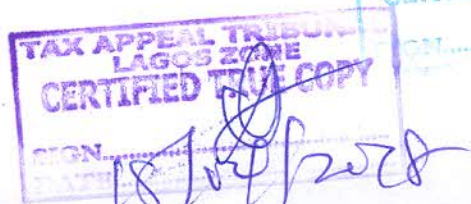
The Respondent assessed the Appellant to additional Petroleum Profits Tax PPTBA126 for the 2005 year of assessment in the total sum of USD 19, 641, 094.50.

The Appellant being dissatisfied with the Respondent's additional assessment filed a Notice of Appeal before this Tribunal seeking for the following reliefs:

- (i) A declaration that the Notice of Assessment NO: PPTBA 126 is wrong in law.
- (ii) An Order setting aside the Notice of Assessment NO: PPTBA 126.

In response to the Appellant's Notice of Appeal, the Respondent filed its reply seeking for the following reliefs:

- (i) A declaration that the Notice of Assessment, PPTBA 126 issued by the Respondent as additional assessment is valid.



(ii) An Order directing the Appellant to pay the amount stated on the notice of Additional Assessment. (iii) An order directing the Appellant to pay 10% of the total tax due by virtue of section 32 of the FIRS (Establishment) Act.

(iv) Interest at the prevailing commercial rate on the judgment sum until it is liquidated.

THE CASE OF THE APPELLANT

The Appellant is a crude oil producing company operating in Nigeria. The Appellant prepared and filed its Petroleum Profits Tax (PPT) returns with the Respondent for the 2005 accounting period in accordance with the provisions of the PPTA.

The Appellant computed its gross revenues for the 2005 accounting period and year of assessment based on Realizable Price, being the fiscal pricing mechanism last agreed between the Federal Government and the Appellant. The PPT returns for 2005 accounting period forwarded to the Respondent contained the gross revenues.

The Appellant was surprised to receive a letter from the Respondent dated 20th December, 2013 to the effect that an additional assessment was due on the Appellant for 2005 accounting period amounting to USD 19,641,094.50 based on official selling price.

The Appellant consequently served on the Respondent its notice of objection dated 9th January 2014 in respect of the Notice of Additional Assessment. The Respondent by a letter dated 7th February, 2014 informed the Appellant that the Appellant's objection was not acceptable. The Respondent in its Respondent's Reply indicated that the additional assessment was based on the difference in focalized value of chargeable oil shown in the Nigerian Extractive Industries Transparency Initiative (NEITI) report, without tendering the NEITI report in evidence.

The Appellant states that by section 23(3) of the PPTA, the applicable pricing mechanism per barrel of crude is to be agreed between the Appellant and the FGN. The Appellant further states that as at 2005 year of assessment, the agreed pricing mechanism per barrel of crude oil exported by the Appellant, was the Realizable Price as evidenced by the pricing mechanism for RP which has been explicitly described in Appendix A to the 2000 MOU. The Appellant adds that there was no existing agreement or documentation that describes any OSP pricing mechanism and consequently, the issue of OSP could not arise with respect to the 2005 year of assessment.

THE CASE OF THE RESPONDENT

The Respondent's case is that the additional notice of assessment was based on differences in the fiscal value of chargeable oil, made pursuant to NEITI's report in 2010 after an audit and review of Appellant's 2005 PPT returns.



The Respondent also states that the additional assessment is in tandem with the MOU entered into by the Appellant and the FGN and NNPC (Exhibit RAS3). The Respondent further states that by clauses 2.1 and 2.4 of the MOU, the application of realizable price and/or posted price was substituted with the Official Selling Price (OSP) which the Respondent rightly used to arrive at the Appellant's gross revenue. The Respondent submits that based on the MOU, the realizable price (RP) was substituted with the official selling price.

ISSUES FOR DETERMINATION

Two issues are formulated for determination.

(i) Whether the Additional Assessment Is statute barred?

(ii) Whether realizable price is the correct mechanism for determining the fiscal value of crude oil sold in the 2005 accounting year?

ARGUMENT ON ISSUES

ISSUE ONE

Whether the additional assessment is statute barred?

In view of our decision on issue 2, we will not need to pronounce on this issue.

ISSUE TWO

Whether realizable price is the correct mechanism for determining the fiscal value of crude oil sold in the 2005 accounting year?

The Appellant argues that the MOU governed PPT computation for 2006 and 2007. It says the MOU sprang from sections 9(2)(a) and 23(5) of PPTA.

The Appellant maintains that clauses 2.1 and 2.4 of the MoU provide for the method for computation of Royalty and PPT, and OSP is not that method. But clause 2.4.1 defines RP. Besides, the mathematical formulas strewn across clauses 2.4 to 2.7 incorporate RP. The Appellant further submits that clause 2.6 states 'oil prices (RP)' and this denotes that oil prices refer to RP. Finally, the Appellant adds that clauses 2.11, 2.12, and 2.13 of the MOU, as well as its Appendix A, show that RP is the agreed fiscal-price formula under PPTA.

The Respondent argues that there is no agreement between FGN, NNPC, and the Appellant on the pricing methodology for computing PPT for 2006 and 2007.



It contends that the MOU is no such agreement, having been terminated under its clause 7. The Respondent argues that even if the MOU was valid for those years, PPTA overrides it. The Respondent submits that PPTA is the relevant tax law for computing PPT and it specifies official selling price as the standard practice.

Analysis

The Respondent submits that the MOU was invalid during 2006 and 2007. It argues the MOU had been terminated. Relying on *Mobil Producing (Nig.) Unlimited v FIRS*, the Respondent submits that the PPTA is the regime for computing PPT.

The Appellant argues that the MOU is the applicable regime for calculating its PPT returns. The Appellant submits that the MOU represents the financial agreement contemplated in sections 9(2)(a) and 23(5) of PPTA.

Section 9(2)(a) of PPTA provides that the value of chargeable oil is determined according to the "provisions of any applicable enactment thereto and any financial agreement or arrangement between [FGN] and the company" to be assessed. Section 23(5) of PPTA defines "posted price" in relation to crude oil exports as "the price F.O.B. which is from time to time established by the company after agreement with the Government of Nigeria as to the procedure to be followed for the purpose."

The parties' agreement is thus a prerequisite for setting the price-determination formula.

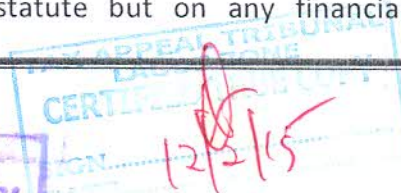
The Appellant counters that the MOU remained valid during 2006 and 2007, because it had not been terminated.

Clauses 7.1 and 7.2 provide for termination of the MOU. Clause 7.3 of the MOU subjects termination of the MOU to the prior establishment of a replacement fiscal regime.

7.3 ...In the event that Government fails to provide the new fiscal regime, this Memorandum will continue to apply notwithstanding the termination thereof until the Government comes up with the new regime in which case this Memorandum shall terminate forthwith.

In *Mobil Producing (Nig.) Unlimited v FIRS* (FHC/C/10A/13), the Federal High Court held that the Department of Petroleum Resources' (DPR) 17-January-2008 letter introduced a new fiscal regime, and that this new regime terminated the MOU.

The issue is certainly interesting and not free from difficulty. What is not in dispute are the provisions of S.9(2)(a) and particularly 23(5) of the PPTA which predicate pricing not on a complete specific formula provided by the statute but on any financial agreement or



arrangement between (FGN) and the company and S.23(5). An agreement is therefore a prerequisite for the determination of the price. The appellant in its address, arguing the RP, based its case in its written address as follows: "... Realisable Price, being the fiscal pricing mechanism last agreed between FGN and the Appellant" inter alia. The Respondent contends that there was no agreement on the pricing methodology, contending that the MOU has become defunct since 2002. It contends that in the absence of such agreement does not mean absence of tax, but the imposition of "standard practice".

What then is the agreement between the parties that fits into the statutory requirements set out in S.9(2) and 23(5) of the PPTA for the year under review.

The position that an agreement cannot be substituted for legislative authority is settled law. Thus Saidu J. FHC/C/10A/13 in *Mobil Producing Nigeria Unlimited v. FIRS* correctly stated the law when he held as follows:

"No matter how strong and well worked an MOU is, it cannot be used to overrule clear provision of law. Parties cannot by consent waive provision of law as held in MEMAKAYA v. MEMAKAYA (2001) 9 -10 SC1. "But this in the context of S.9(2) and 23(5) of PPTA merely begs the question since the statute itself makes agreement between the parties that is, NNPC and Mobil Nigeria Producing Unlimited is this case, a part of the pricing mechanism. Saidu J did hold that PPTA is a new fiscal regime after the end of the MOU 2000. He predicates this on the letter of 17th January, 2008 on the facts of the particular case argued before him. The letter to which judicial endorsement has been given makes certain pertinent points which should guide the determination of this appeal.

"RE: Memorandum of Understanding on Incentives for Encouraging Investments in Exploration and Development Activities and Enhancing Crude Oil Exports (2000 MOU)

Please refer to the deliberations of the joint Government/Industry Negotiating Team on the 2000 MOU.

Government has noted that:-

- 1) ***The 2000 MOU lapsed as at 1st January, 2003***
- 2) ***The 2000 MOU has become redundant and in principle no longer in use by any of the industry operators since mid-2005.***
- 3) ***The Government Inter-ministerial Team and Industry (OPTS) Negotiating Team deliberated extensively to seek any possible options for extension of the 2000 MOU under the chairmanship of the Director DPR.***



In the light of the above, Government has directed as follows:-

- i) To terminate the 2000 MOU forthwith in line with Clause 7.3 pursuant to Clause 7.1 of the 2000 MOU.*
- ii) Henceforth the 2000 MOU shall be replaced by the fiscal regime as contained in the petroleum Profit Tax (PPT) Act of 1959 as mended, including deductions (Technical Costs) as provided in Section 10 of the PPT Act.*
- iii) The Official Selling Price (OSP) as defined in the above Act shall be provided by NNPC (COMD).*

You are please advised to abide by the above directive.

A.O. Chukwueke

Chairman MOU Inter-ministerial Committee and Director of Petroleum Resources"

Despite the termination of the 2000 MOU by effluxion of time, there was a need for agreement to activate parts of the PPTA. Tacit and informal agreement albeit by conduct continued in the industry until 2005. The informal consent by conduct was put to an end by the letter of 17th January, 2008 by inter- ministerial committee which reasserted its replacement with the PPTA fiscal regime. Exhibit "AS 10" and "AS 4" are consistent with this conclusion.

In the result, although the life of the MOU 2000 came to an end by effluxion of time on 10th January, 2003 as it was not extended, there was consent manifested by the conduct of the parties sufficient to be an "agreement" under the provisions of S.9(2)(a), and 23(5) of the PPTA. It was brought to an end on 17th January, 2008 which is the finding of Saidu J. in FHC/L/10A/13.

Accordingly, we find that until the letter of 17th January 2008 the appropriate pricing is the Realizable Price. The additional assessment PPTBA 26 is therefore untenable for the 2005 year of assessment. It is hereby set aside.

LEGAL REPRESENTATION:

I. Berenibara Esq. with Ms Folake Adewusi for the Appellant.

Mrs. B. D. Akintola for the Respondent.



DATED THIS 23RD DAY OF JANUARY, 2015.



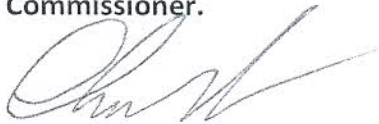
Kayode Sofola, SAN
Chairman.



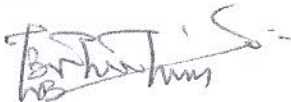
Catherine A. Ajayi (Mrs)
Commissioner.



Dennis H. Gapsiso Esq.
Commissioner.



Chinua Asuzu Esq.
Commissioner.



Mustafa Bulu Ibrahim
Commissioner.

