

IN THE TAX APPEAL TRIBUNAL
LAGOS ZONE
HOLDEN AT LAGOS

APPEAL NO: TAT/LZ/032/2013

BETWEEN

MOBIL PRODUCING NIGERIA UNLIMITED

APPELLANT

AND

FEDERAL INLAND REVENUE SERVICE

RESPONDENT

JUDGMENT

INTRODUCTION

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

The Respondent assessed the Appellant to additional Petroleum Profits Tax PPTBA 46, PPTBA 48 for the 2007 and 2008 years of assessment respectively in the sum USD 603,879.64 and USD 794,370.46.

The Appellant being dissatisfied with the Respondent's additional assessments filed a Notice of Appeal on the 19th December, 2013 before this Tribunal seeking for the following Reliefs;

(i) A declaration that the Notices of Additional assessment issued by the Respondent are wrong in law.

(ii) An order setting aside the notices of assessment.

In response to the Appellant's Notice of Appeal, the Respondent filed its Reply seeking for the following Reliefs;



(i) A declaration that the Notices of Additional assessment PPTBA 46 and PPTBA 48 issued by the Respondent are valid.

(ii) An order mandating the Appellant to pay the sum of USD 603, 879.64 and USD 794,370.46 being the additional PPT liability of the Appellant for the Years 2007 and 2008 respectively.

(iii) An order mandating the Appellant to pay 10% of the total tax due by virtue of section 32 of the Federal Inland Revenue Service Act.

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

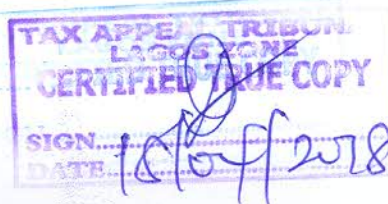
ISSUE FOR DETERMINATION

Whether the mechanism for determining the sale prices for crude oil sold in the 2007 and 2008 accounting periods was Realizable Price or Official Selling Price?

The Appellant submits that it computed its tax based on Realizable Price, being the pricing mechanism agreed upon by it and the FGN as contained in the MOU 2000. The Appellant asserts that itself and the FGN derived the power to agree (execute MOU) on the applicable pricing mechanism from section 23(3) of PPTA which states as follows:

“For the purpose of subsection (2) of this section, the relevant sum per barrel of crude oil exported by a company is the posted pricing applicable to that crude oil reduced by such allowances (if any) as may from time to time be agreed in writing between the Government of Nigeria and the company.”

The Respondent asserts that the Appellant was wrong to calculate its tax liability based on Realizable Price (RP) as the pricing mechanism, instead of the Official Selling Price (OSP). The Respondent derived its ground for assessing the Appellant to additional tax based on the difference in the focalized value of chargeable oil; and on the NEITI report which showed a difference in turnover. The Respondent



also argues that by virtue of clause 2.1 and 2.4 of the MOU, the correct applicable price mechanism for 2007-2008 years of assessment is the OSP.

The Appellant argues that contrary to the position of the Respondent in paragraph 5 of its sole ground in the Respondent's Reply, that "by virtue of clause 2.1 and 2.4 of the MOU, the official selling price is the basis for computing the fiscal value of crude oil export", Appendix A of the MOU specifically refers to Clause 2.4 of the MOU for the purpose of calculating Realizable Price.

The Respondent submits that the MOU relied upon by the Appellant by virtue of clause 7.1 of the MOU, expired at the end of 2002. The Respondent relied on the decision of the TAT in the case of *Mobil Producing Nigeria Unltd V FIRS* (Appeal No. TAT/LZ/004/2011, decided on 21 June 2013), where it was held that the MOU expired at the end of 2002. The Respondent therefore submits that owing to the above decision by the TAT, the application of the RP was irrelevant having been terminated.

The Respondent referred the Tribunal to section 23(3) of the PPTA and submits that section 23(3) of the PPTA stipulates that the posted price shall be by agreement between the Government of Nigeria and the company (Appellant). The Respondent argues that Exhibits MP Add 2- MP Add 5 show that the Federal Government and the Appellant never reached an agreement that the Realizable Price should be the fiscal price to be used for the computation of the fiscal value of crude oil for the period under reference.

The Appellant referred the Tribunal to clause 2.4 of the MOU which states:

"for the purpose of Memorandum, Government Take (Royalty and PPT) relating to the joint venture operations between NNPC and the Company for the fiscal accounting year shall be the lower of Government Take according to the 31/12/1985 Royalty and PPT regulations, as amended, calculated by substitution of Posted Price with Official Selling Price (OSP) and the Revised Government Take according to the 31/12/1985 Royalty and PPT regulations, as amended, calculated by substitution of Posted Price with Tax Reference Price."



he Appellant submits that whilst the MOU made no further reference to OSP, the Realizable Price is shown in the MOU as the yardstick for determining crude oil price. The Appellant referred the Tribunal to Clause 2.4 which states that "Realizable Price calculated in accordance with Clauses 2.11, 2.12 and 2.13 hereof to determine/mirror the crude oil market values of Nigerian Export grades."

The Appellant pointed out that the Respondent contradicted itself by stating in its written address that the MOU terminated in 2002, to which reliance was placed on an excerpt in the case of MOBIL V FIRS (TAT/LZ/004/2011), and in its Reply in particulars 4 to 6 of its sole Ground, asserted that its notices of additional assessments were based on the provisions of Clauses 2.1 and 2.4 of the MOU, which it said make the OSP the basis for computing the fiscal value of crude oil export on which it based its additional assessments for the 2007 and 2008 accounting period.

The Appellant submits that the wording of the MOU is that the MOU should last for a minimum term of three years. The Appellant therefore argues that in view of the condition for termination of the MOU as set out in Clause 7.3 and the Respondent's reliance on it the MOU was not terminated till 2008.

The Respondent asserts that contrary to the Appellant's submission in paragraph 8 of its additional witness statement, that the FGN accepts OSP to be applied only for the period from July 2010 to December 2012, the said letter was not responded to neither were the suggestions made therein followed by the Appellant, as the Appellant still uses the Realizable Price in computing its realized revenues.

The Respondent also submits that section 23(3) of the PPTA require posted price to be agreed upon by the parties. The Respondent argues that Exhibits MP Add 2-MP Add 5 do not constitute agreement by the parties that Realizable Price should be the applicable fiscal price, and therefore urges the tribunal to hold that the Respondent was right for assessing the Appellant to additional tax for 2007 and 2008 years of assessment.

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he Appellant argues that the MOU is the agreement entered into by FGN, NNPC and the Appellant as envisaged by section 23(3) of the PPTA. The Appellant asserts that the MOU has subsisted till it was terminated in 2008 via Exhibit MP Add 2. The Appellant further argues that Exhibit MP Add4 confirms the termination of the MOU in 2008 and clarified that RP should be used as fiscal price from January, 2008 to June 2010.

The Appellant asserts that it is not liable to additional assessment for 2007 and 2008 because the MOU was still in force up to 2008, and by mutual agreement RP was adopted as applicable pricing mechanism by Exhibit MP Add 4.

After going through the submissions of counsel and the statutory references, we hold that section 23(3) of the PPTA enabled the FGN, NNPC and the Appellant to come up with an agreement, which the parties did with the MOU. The MOU clearly contains the pricing methodology and states Realizable Price (RP) as the applicable pricing mechanism. The words used in the MOU and section 23(3) of the PPTA are very clear and unambiguous.

As we have earlier held both in terms of the agreement by conduct and the judgment of the Federal High Court, Saidu J. in suit no FHC/C/10A/13 *MPNU V FIRS*, the MOU was terminated on 1st January 2008, Realizable price is therefore the applicable pricing mechanism only for 2007 YOA. The PPTBA 46 based on OSP is untenable and is hereby set aside.

The YOA 2008 is a different situation. The Appellant has not established any satisfactory evidence, outside the 2000 MOU, to persuade the tribunal to discharge the assessment PPTBA 48. The appeal in respect of that year fails.

LEGAL REPRESENTATION


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

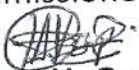
Mrs. B. D. Akintola for the Respondent.




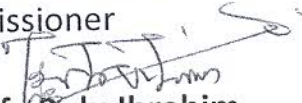
Dated this 23rd day of January, 2015


Kayode Sofola SAN
Chairman


Catherine A. Ajayi (Mrs)
Commissioner


Dennis H. Gapsiso Esq.
Commissioner


Chinua Asuzu Esq.
Commissioner


Mustafa Bulu Ibrahim
Commissioner.

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