IN THE TAX APPEAL TRIBUNAL
LAGOS ZONE
SITTING AT LAGOS

Appeal Nos: TAT/LZ/026/2013
TAT/LZ/030/2013

BETWEEN:

Sedco Forex International Incorporated — Appellant

AND

Federal Inland Revenue Service — Respondent

Judgment

Transocean provides logistic support services to the Appellant. In return, the Appellant pays recharges to Transocean (recharges are costs plus 5% mark-up). In filing its CIT returns for 2006-2013, the Appellant deducted the recharges it had paid to Transocean. The Respondent rejected the deductions and assessed the Appellant to additional CIT on the recharges. The Appellant objected, claiming the deductions are allowable. When the Respondent refused to discharge the additional assessment, the Appellant sued, seeking the following remedies:

(a) A Declaration that recharges in respect of the Appellant's local logistics support company, Transocean Support Services Nigeria Limited, do not form part of the revenue of the Appellant derived from Nigeria for the purposes of taxation under section 30 (1)(b)(i) of CITA.

(b) A Declaration that inclusion of recharges as part of the taxable revenue/profit of the Appellant derived from Nigeria amounts to double taxation and therefore, unjust, null and void.

(c) An order setting aside the Respondent's Notices of Additional Assessment to tax liabilities on recharges (Numbers PDBA 212, PDBA 211, PDBA 210, PDBA 209, PDBA 208 AND PDBA 207 all dated 2nd July, 2013) and served on the Appellant for the 2006, 2007, 2008, 2009, 2010 and 2011 Years of Assessment; and Numbers

RA 004 and RA 005 both dated 5th November 2013 and served on the Appellant for the 2012 and 2013 years of Assessment.

The additional assessments are:

Year of assessment	Additional tax liability (₦)
2006	113,586,376.96
2007	409,030,958.18
2008	302,162,796.51
2009	319,852,287.93
2010	454,733,719.08
2011	536,866,889.46
2012	4,962,866.65
2013	5,762,567.98
Total	2,146,940,462.75

Eworiste Feseun, Transocean's tax manager, testified for the Appellant. The Appellant tendered 57 documents. The Respondent neither called any witnesses nor tendered any documents.

ISSUES FOR DETERMINATION

The following issues were formulated for determination.

1. Whether on a fair and reasonable construction of section 30[1][b][i] of CITA, recharges ought to be included as part of the turnover of the Appellant, a non-resident company for the purposes of assessment to tax on a deemed profit basis, and taxed as part of the taxable turnover of the Appellant, and tax the same recharges as a taxable income of the Nigeria affiliate of the non-resident company?
2. Whether the Respondent's Information Circular No. 93/02 of 22nd March, 1993 entitles the Appellant to a legitimate expectation that the Respondent will not make additional assessment on the Appellant?

The two issues will be treated together in the review contained in this decision.

Parties Positions

The Appellant argues that section 30[1][b][i] of CITA of the Companies Income Tax Act (CITA) and paragraph 5.2 of FIRS's Information Circular No. 93/02 allow deduction of recharges. The Appellant also maintains that the doctrine of legitimate expectation applies.

The Appellant submits that section 30[1][b][i] of CITA requires the foreign company to be taxed on 'a fair and reasonable percentage of that part of the turnover attributable to the fixed base'. The Appellant says that the recharges never formed part of its turnover; the recharges belonged to Transocean; and thus the Respondent cannot tax the recharges at Sedco's hands. In support of this position, the Appellant cites *Halliburton West Africa Limited v. Federal Board of Inland Revenue* (2013) 11 TLRN 84 and *TSKJ II Construcoes International & Anor v. FIRS* (2014) 13 TLRN 1. The Appellant also points out that Transocean has paid tax on the recharges; therefore any additional assessments on the same recharges amount to double taxation.

The Appellant further argues that paragraph 5.2 (i) of FIRS's Information Circular No 93/02 allows deduction of recharges. The Appellant argues that by issuing the circular, the Respondent had created legitimate expectation on the Appellant's part as a taxpayer that it would not be taxed on the recharges. The Respondent was now obligated to fulfill those legitimate expectations.

The Appellant says that the Supreme Court decision in Mobil Oil (Nig.) Ltd v. FBIR (1977) 1 NCLR 1 invoked by the Respondent cannot control this case as it only dealt with a Nigerian company.

The Appellant referred the Tribunal to the decision of Federal High Court in the case of Halliburton West Africa Limited v. FBIR (2013) 11 TLRN 84; (2006) 7 CLRN 138 where the learned Judge held that: "...The crucial words that call for attention in the section are "fair and reasonable percentage of that part of the turnover of the trade or business attributable to the fixed base of business in Nigeria." "I hold that the Body of Appeal Commissioners was therefore, wrong in holding that Recharges i.e. money paid by the Appellant under the contract to Halliburton Nigeria are not relevant to the implementation of Section 26(1) of CITA and not allowable deductions in the turnover of the Appellant."

The Appellant submits that the facts in Halliburton case are very similar to this matter. The Appellant refers the Tribunal to the Federal High Court decision in the case of TSKJ

Il Construcoes International v. FIRS (2014) 13 TLRN 1, where the Court held that the Tax Appeal Tribunal was duty bound to follow and apply its interpretation of section 26 of CITA in the Halliburton case and that the Tax Appeal Tribunal (Abuja Zone) erred in law by not following that decision.

The Respondent submits that the deductibility of recharges for tax purposes, in so far as it is not stated or even implied in section 30[1][b][i] of CITA, is an extraneous matter which should not be smuggled into that section as the Appellant is attempting to do in this case. The Respondent further submits that in *Shell Petroleum International MattscGappijBiv v. FBIR* (2011) 4 TLRN 97 at 107; and in *Timber Trading Co. Ltd v. FBIR* (1966) NCLR 416 at 422, the court held that tax laws are construed strictly and literally. The Respondent therefore urges the Tribunal to strictly abide by the clear words of section 30[1][b][i] of CITA which the Respondent used to assess the Appellant to tax on deemed profit basis of assessment which does not give room for any specific deductions, nor create preference for any expense or costs.

The Respondent further submits that the principle embedded in turnover assessment as enshrined in section 30 of CITA, is that where the assessable profit of a company could not be ascertained, as it is in the case of the Appellant herein, the Respondent would tax a reasonable percentage of the turnover attributable to the company's fixed base in Nigeria. The Respondent further submits that where the assessable profit of the company could not be ascertained, as in this case of the Appellant herein, the Respondent would subtract 80% of the company's turnover to cover expenses, and tax the remaining 20% at the 30% Companies Income Tax rate. Thus tax would be 6% of the turnover. The Respondent also referred the Tribunal to the case of *Mobil Oil (Nig.) Ltd v. FBIR* (1977) 1 NCLR 1; also reported in (2011) 5 TLRN 166. The Supreme Court considered section 30A of CITA 1961 which is similar to section 30[1][b][i] of CITA "It is axiomatic therefore that in all other cases wherein any of the conditions under section 30A is apparent, the Board may exercise its discretion to disregard the assessable profit shown by the return and make an assessment under section 30A".

The Supreme Court held in the Mobil case (supra) thus: "The literal meaning of section 30A is clear and unambiguous. It empowers the Board to assess a company subject to the conditions prescribed therein on such fair and reasonable percentage of the turnover of the company as the Board may determine..., in construing a section, regard shall be given to the necessity of the Act and then such construction shall be put upon it as would promote its purposes and arrest the mischief which it is intended to deter. As the

manner have been evading tax which they ought to have paid. The purposes of section 30A are to deter such companies from engaging in fraudulent practice."

The Respondent submits that the phrase "that part of the turnover attributable to the fixed base' in section 30[1][b][i] of CITA means that all income the Appellant earns in Nigeria is taxable, no matter how the Appellant chooses to deal with that income or part of it. The Respondent cites section 13(2)(a) of CITA to buttress this point. Section 13(2)(a) provides that the profit of a non-Nigerian company is deemed derived from Nigeria if the company has a Nigerian fixed based and those profits can be attributed to that fixed base.

The Respondent argues that Halliburton and TSKJ ll cases do not apply because of Mobil Oil (Nig.) Ltd v. FBIR, where the Supreme Court interpreted section (1)(b)(i) (then section 30A) to allow FBIR assess Mobil to additional CIT because the profits declared in Mobil's returns were less than reasonably expected. The Respondent contends that the Appellant and Transocean are separate legal entities that bear separate tax liabilities.

The Respondent argues that the Appellant misapprehends the doctrine of legitimate expectations as it cannot apply in this context.

Analysis

The Court of Appeal reasoned that a circular is not a subsidiary legislation and therefore has no force of law. The Court of Appeal also said that even if the circular were a subsidiary legislation, CITA would prevail.

The case has not been made by the Appellant that there was a receipt of a specific amount of tax paid to the Respondent from the Nigerian affiliate with respect to such recharges which should be set off from the tax liability and we shall make no more comment on such speculation in this appeal.

With regard to the doctrine of legitimate expectation, the Court of Appeal also held that the doctrine of legitimate expectation thrives on fairness and openness of dealings. To benefit from the doctrine, a person must have made full disclosure or displayed utmost good faith in the transaction. The doctrine cannot stand when it conflicts with a clear statutory provision.

The Appellant did not declare its profits to the Respondent. The Respondent had to compute the Appellant's tax liability using the deemed profit mode. Section 30(1) is clear and it supersedes any legitimate expectations the Appellant might harbor.

Conclusion

In Halliburton, the Court of Appeal held that all of a foreign company's Nigeria derived income was taxable in Nigeria, irrespective of any make-up contributions to the foreign company's Nigerian subsidiary.

The Appellant is liable to tax for all income derived from its operations in Nigeria through its Nigerian affiliate Transocean. The recharges form part of the Appellant's Nigerian derived income and is thus assessable.

Recharges are thus not allowable deductions when calculating a foreign company's income tax.

We order the Appellant to pay all the additional assessments totaling ₦2,146,940,462.75

Legal Representation:

Festus Onyia Esq. for the Appellant.

Jerome Okoro Esq. for the Respondent.

Dated at Ikeja Lagos this 21st day of January, 2015

Kayode Sofola, SAN
Chairman

Chinua Asuzu
Commissioner

Catherine A. Ajayi (Mrs.)
Commissioner

D. H. Gapsiso
Commissioner

Mustafa Bulu Ibrahim
Commissioner

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DATE 18/12/2018