IN THE TAX APPEAL TRIBUNAL
LAGOS ZONE
SITTING AT LAGOS

Appeal Nos: TAT/LZ/025/2013
TAT/LZ/031/2013
[CONSOLIDATED APPEALS]

BETWEEN:

TRANSOCEAN DRILLING UK LTD — APPELLANT

AND

FEDERAL INLAND REVENUE SERVICE — RESPONDENT

JUDGMENT

The Appellant filed its Appeals on the 12th and 13th December, 2013, asking the Tribunal for the following reliefs:

a. A DECLARATION that Recharges in respect of the Appellant's local logistics support company (Global Offshore Drilling 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 206, PDBA 205, PDBA 204 and PDBA 203 all dated 26th June, 2013 which were served on the Appellant for the 2008, 2009, 2010 and 2011 Years of Assessment; and PDBA 323, PDBA 324 AND PD04 all dated 17th September 2013 for the 2011, 2012 and 2013 years of assessment.

Introduction

Global Offshore provides logistic support services to the Appellant. In return, the Appellant pays recharges to Global Offshore (the recharges are costs plus 10% mark-up). In filing its CIT returns for 2008-2013, the Appellant deducted the recharges it had paid to Global Offshore. 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 assessments, the Appellant sued.

The additional assessments are as follows:

Notice of Assessment	Year of Assessment	Total Tax Liability ($)
PDBA 206	2008	458,251.00
PDBA 205	2009	598,807.00
PDBA 204	2010	1,023,888.00
PDBA 323	2011	1,287,816.39
PDBA 324	2012	1,305,833.42
PD 04	2013	1,13`,344.19
	Total	5,805,940.00

Eworitse Faseun, the tax manager of Transocean Support Services' Limited (an affiliate of the Appellant), testified for the Appellant. The Appellant tendered 22 documents. The Respondent neither called any witnesses nor tendered any documents.

ISSUES 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, while at the same time taxing the same recharges as a taxable income of the Nigerian affiliate of the non-resident company?

2. Whether the Respondent's information Circular No. 9302 of 22nd March, 1993 entitles the Appellant to a legitimate expectation that the Respondent will not make additional assessments on the Appellant?

The 2 issues will be treated together in the review contained in this decision.

Parties' Positions

The Appellant argues that section 30[l][b][i] of the Companies Income Tax Act (CITA) and paragraph 5.2 of the Respondent'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[l][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 the recharges never formed part of its turnover; these charges belonged to Global Offshore, and thus the Respondent cannot tax the recharges at the Appellant's hand. In support of this position, the Appellant cited Halliburton West Africa Limited v. Federal Board of Inland Revenue (2013) 11 TRLN 84 and TSKJ ll Construcoes International & Anor v. FIRS (2014) 13 TRLN 1. The Appellant points out that Global Offshore 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 the Respondent'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 argues that the Respondent wrongfully assessed it to tax twice in 2011. Invoking Order 22[1] of the Tribunal rules, The Appellant says the Tribunal can decide all issues arising from or relevant to the appeal, hence, the Tribunal should determine the validity of issuing additional assessments twice for one year.

The Appellant contends that the Supreme Court decision in Mobil Oil (Nig.) Ltd v FBIR (1977) 3 S.C. 1 invoked by the Respondent cannot control this case as it dealt with a Nigerian company only.

The Respondent, counters that neither section 30[l][b][i] of CITA nor paragraph 5.2 of the Information Circular No. 93/02 allows recharges.

The Respondent submits that the phrase 'that part of the turnover attributable to the fixed base' in section 30[l][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 base and those profits can be attributed to that fixed base.

The Respondent argues that the Halliburton West Africa Limited v. Federal Board of Inland Revenue (2013) 11 TRLN 84 and TSKJ II Construcoes International & Anor v. FIRS (2014) 13 TRLN 1 cases do not apply because of Mobil Oil (Nig.) Ltd v. FBIR (1977) 3 S.C. 1, where the Supreme Court interpreted section 30[l][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 Global Offshore are separate legal entities that bear separate tax liabilities.

The Respondent 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 present rate applied as tax is 20% of such turnover. The Respondent further submits that the remaining 80% of the turnover serves to cover expenses and all costs (including the recharges) though the recharges must have been included to make up the total Nigerian turnover before the 80% is removed. Taxing the 20% at the 30% Companies Income Tax rate results in an effective tax rate of 6% of the turnover. The Respondent referred the Tribunal to the Supreme Court decision in 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] of CITA and held as follows:

"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 Respondent relied on the Supreme Court decision in Mobil Oil (Nig.) Ltd case (supra) in respect of the law on section 30[l][b][i] of CITA. The Supreme Court held:

"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 our view, there is no injustice in assessing a company on a percentage of its turnover. Such legislation has received the approval of democratic societies, for example, Section 28 of the Australian Income Assessment Act, 1992 and section 80 of the English Taxes Management Act, 1970. Furthermore, the literal meaning of the section is compatible with the social policy rule of interpretation of a statute, conservatively known as the mischief rule, which may be epitomized thus: 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 Appeal Commissioners pointed out in their judgment, some companies have been manipulating their account with intent to hide their true assessable profits and in that manner have been evading tax which they ought to have paid. The purposes of section 30[A] is to deter such Companies from engaging in fraudulent practice".

With regard to the doctrine of legitimate expectation, the Respondent argues that the Appellant misapprehends the doctrine of legitimate expectation as it cannot apply in this context.

The Respondent submits that the correct 2011 CIT additional assessment is as contained in the 5th November 2013 Notice of Refusal to Amend Assessment No. R/A 002 (as originally assessed on 17th September 2013) because it includes penalties and interests.

Analysis

The case has not been made by the Appellant that there was a receipt of tax by 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 the instant appeal.

In FBIR v Halliburton (WA) Limited (Appeal Number CA/L/320/2009, decided on 2 December 2014), the Court of Appeal reasoned that a circular is not a subsidiary legislation and therefore has no force of law. The Court of Appeal added that even if the circular were a subsidiary legislation, CITA would prevail.

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] of CITA is clear and it supersedes any legitimate expectations the Appellant might entertain.

Furthermore, in Halliburton, the Court of Appeal held and this is binding on the tribunal that all of a foreign company's Nigerian-derived income was taxable in Nigeria, irrespective of any make-up contributions to the foreign company's Nigerian subsidiary.

Conclusion

The Appellant is liable to tax for all income derived from its operations in Nigeria through its Nigerian affiliate Global Offshore. 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.

The 17 September 2013 additional assessment notice Number PDBA 323 stands. We strike out FIRS's 26th June 2013 additional assessment notice for 2011.

We order the Appellant to pay the additional assessments totaling US$5,805,940.00. (Five million eight hundred and five thousand, nine hundred and forty US dollars only).

Legal Representation:

Festus Onyia Esq. for the Appellant

Jerome Okoro Esq. for the Respondent.

TAX APPEAL TRIBUNAL
LAGOS ZONE
CERTIFIED TRUE COPY
SIGN.....
DATE 31/07/2018

Dated at Ikeja Lagos this 20th day of March, 2015

KAYODE SOFOLA, SAN
Chairman

CATHERINE A. AJAYI (MRS.)
Commissioner

D. H. GAPSISO
Commissioner

MUSTAFA BULU IBRAHIM
Commissioner

CHINUA ASUZU
Commissioner

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SIGN.....
DATE 18/04/2018