IN THE TAX APPEAL TRIBUNAL
LAGOS ZONE
HOLDEN AT LAGOS

APPEAL NO: TAT/LZ/033/2013

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 assesses, collects, and accounts for revenue accruing to the Federal Government.

The Respondent assessed the Appellant to additional Petroleum Profit Tax for the 2006-2008 years of assessment in the total sum of US$7,633,850.

The Appellant, being dissatisfied with the Respondent's additional assessments, filed a Notice of Appeal before this Honourable Tribunal on 19 December 2013 seeking the following reliefs:

i. A declaration that the sums of US$3,126,000; US$3,129,000; and US$2,726,000 paid by the Appellant in 2006, 2007 and 2008 years of assessment respectively for flaring gas are wholly, exclusively and necessarily incurred for the purposes of petroleum operations carried on by the Appellant.

ii. A declaration that the sums of US$3,126,000; US$3,129,000; and US$2,726,000 paid by the Appellant in 2006, 2007 and 2008 years of assessment respectively for flaring gas are deductible expenses under section 10 (1) of PPTA in calculating the Appellant's petroleum profits tax liability.

iii. An order setting aside the notices of additional assessment for the 2006, 2007, and 2008 years 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 45, PPTBA 47, and PPTBA 49 issued by the Respondent are valid.

ii. An order mandating the Appellant to pay the total sum of US$7,633,850 being the additional Petroleum Profits Tax liability of the Appellant for the 2006, 2007, and 2008 years of assessment.

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.

The Appellant also filed a Rejoinder to the Respondent's reply.

ISSUE FOR DETERMINATION

Whether the payment made by the Appellant is tax deductible under section 10(1) of the Petroleum Profits Tax Act

PARTIES' POSITIONS

The Appellant submits that the payments made in respect of 2006-2008 years of assessment for gas flaring are tax deductible because they were expenses incurred wholly, exclusively and necessarily in the course of producing crude oil at a time when utilization and re-injection of the gas were not feasible. The Respondent submits that section 3 of Associated Gas Re-injection Act (AGRA) is meant to discourage flaring of gas, hence the requirement of certification to restrict gas flaring. On this point, the Respondent adds that gas flaring without ministerial certification violates section 3(1) of Associated Gas Re-injection Act, and thus cannot enjoy tax deduction under section 10(1) of PPTA.

The Respondent argues that the sums allegedly incurred by the Appellant were not wholly, exclusively, and necessarily incurred in the course of petroleum operations so as to be deductible under section 10(1) of PPTA. The Respondent further submits that the Appellant could have carried on with its petroleum operations by utilizing and re-injecting it.

The Appellant adduced in evidence Exhibit MP1, issued by the Federal Government of Nigeria, being payments made by the Appellant for gas flared for the 2006-2008 accounting periods to support its position. The Appellant referred the Tribunal to the Supreme Court decision in *Shell Petroleum Development Company v FBIR* (1996) 8 NWLR (Part 466) 256, where Uwais CJN held:

> "Once there is a statutory or contractual obligation, and in this case it is the former, for a company engaged in petroleum operations to perform, such obligation is wholly, exclusively and necessarily for the purpose of the operations of the company."

The Appellant argues that the fees it paid for flaring gas is an obligation imposed on the Appellant by law (AGRA). The Appellant cites *Shell*, supra, where Belgore JSC held at page 296:

> "The agreement between the Appellant and the Government has no air of illegality and was perfectly legal, because even though they vary the obligations of the parties under the Petroleum Profits Tax Act, they retain the very spirit of the law i.e. to pay specific amount of tax assessed. The mode of payment may vary but nonetheless the tax must be paid. The expatriation of payment has not rendered the payment illegal. The Respondent is an agent of the Federal Government and when its principal harvested the windfall in 1972, it never protested even though the Appellant gained that year Exchange rate and Central Bank Commission which it declared and was accordingly taxed upon then as Petroleum Profits Tax. It falls to reason that when the Appellant incurred loss on these heads

in any given tax year that must be deductible too. To now raise illegality is unconscionable of the Respondent."

The Appellant therefore in line with the Supreme Court decision in the *Shell* case submits that the payments made to the Federal Government of Nigeria for gas flaring as provided under AGRA are deductible under section 10(1) of PPTA, for being wholly, exclusively and necessarily incurred for purpose of petroleum operations.

The Appellant in paragraph 4 of its witness statement asserts that it commercialized (utilized) the associated gas and re-injected it as well, but flared gas when re-injection and utilization were not feasible.

The Appellant submits that section 11(1) of PPTA is subject to section 11(2)(b) of PPTA. Section 11(2) provides that:

> "The incentives specified under subsection (1) of this section shall be subject to the following conditions, that is – the company shall pay the minimum amount charged by the Minister of Petroleum Resources for any gas flared by the company."

The Appellant therefore submits that in line with section 3 of AGRA as well as section 11(2)(b) of PPTA, it made the payments to the Federal Government of Nigeria to flare gas during the 2006-2008 accounting periods. The Appellant further submits that section 10(1)(i) of PPTA provides that such outgoings and expenses should be deducted in computing the adjusted profit of the company. Accordingly, the sums paid shall be deducted as outgoings and expenses wholly, exclusively and necessarily incurred by the company for the purpose of petroleum operations, and the Respondent was wrong to have disallowed them and issued the Notices of Additional Assessments Nos. PPTBA 45; PPTBA 47;and PPTBA 49 (Exhibits MP3B, MP3C & MP3D).

The Appellant referred the Tribunal to section 13 of PPTA which sets out deductions that are not allowed for the purpose of ascertaining the adjusted profit of any company. The Appellant adds that section 13 does not treat payments made for gas flaring for which no certificate has been issued or received as non-deductible expenses.

The Appellant submits that it has been making payments to the Federal Government of Nigeria as prescribed by the Minister of Petroleum Resources through the Department of Petroleum Resources to flare gas. The payment receipts were admitted in evidence and marked as Exhibit MP1, which the Respondent acknowledged but contends that the gas flared was illegal and therefore not tax deductible because no certificates were issued by the Minister for 2006-2008 accounting periods.

The Appellant submits that going by section 3 of AGRA, it paid the money required to flare gas in furtherance of its petroleum operations. The Appellant further submits that payment for flaring of gas fees precedes issuance of certificate by the Minister of Petroleum Resources. The Appellant referred the Tribunal to section 3 of AGRA which provides:

> "(1) Subject to subsection (2) of this section, no company engaged in the production of oil or gas shall after 1 January 1984 flare gas produced in association with oil without the permission in writing of the Minister.
>
> (2)Where the Minister is satisfied after 1 January 1984 that utilization or re-injection of the produced gas is not appropriate or feasible in a particular field or fields, he may issue a certificate in that respect to a company engaged in the production of oil or gas-
>
> (a) specifying such terms and conditions, as he 'may' at his discretion choose to impose, for the continued flaring of gas in the particular field or fields; or
>
> (b) permitting the company to continue to flare gas in the particular field or fields if the company pays such sum as the Minister may from time to time prescribe for every 28.317 standard cubic meters (SCM) of gas flared:
>
> Provided that, any payment due under this paragraph shall be made in the same manner and be subject to the same procedure as for the payment of

royalties to the Federal Government by companies engaged in the production of oil".

The Appellant submits that section 3(1) of AGRA is subordinate to section 3(2) of AGRA, with the operating term "subject to." The Appellant referred the Tribunal to the case of *Oloruntoba-Oju v Abdul-Raheem*(2009) LPELR- 2596 (SC), where the Supreme Court held that:

> "Whenever the phrase "subject to" is used in a statute, the intention, purpose and legal effect is to make the provisions of the section inferior, dependent on, or limited and restricted in application to the section to which they are made subject to. In other words, the provision of the latter section shall govern, control and prevail over the provision of the section made subject to it. It renders the provisions of the subject subservient, liable, subordinate and inferior to the provisions of the other enactment."

The Appellant therefore submits that consequent on the Supreme Court's decision, section 3(1) is inferior to, dependent, limited and restricted in application to section 3(2) of AGRA. The Appellant further submits that where there is evidence that section 3(2) has been complied with, then section 3(1) will be of no effect if contradicted or made inferior by section 3(2) of the same Act.

The Respondent argues that by section 3(1) of AGRA, the Appellant flared gas without first obtaining the Minister's certificate in writing and therefore the Appellant acted contrary to the Act. The Respondent emphasized that section 3(1) of AGRA by using the word "shall" connotes a mandatory compliance." The Appellant submits that section 3(2) of AGRA use of the word "may" shows that the Minister is not compelled to issue a certificate if he is satisfied that utilization or re-injection is not appropriate or feasible. The Appellant referred the Tribunal to *Busari v Oseni (1992) LPELR* -14981 (CA), where the Court of Appeal held that the word "may" is generally permissive and not mandatory.

The Respondent further submits that section 3(2) of AGRA does not support issuance of certificate by the Minister retroactively. The Appellant submits that issuance of certificate is not a condition precedent to flaring gas, but rather payment of the prescribed fee is for a company engaged in petroleum operations to flare gas. The Appellant emphasized that the Minister may permit the company to flare gas without issuing a certificate.

The Appellant further submits that the clause "if the company pays such sum as the Minister may from time to time prescribe for every 28.317 Standard cubic meters (SCM) of gas flared" in the context of section 3(2) of AGRA, presupposes that payment of money by the company is only due after the gas has been flared. The Appellant therefore submits that section 3(2) of AGRA is clear and unambiguous and thus should be given its ordinary meaning as the Supreme Court held in *IBWA v IMANO* (1988) 3 NWLR (Part 85) 633 at 660.

The Respondent referred the Tribunal to section 4 of AGRA which provides penalty for non-compliance with section 3 of AGRA, and submits that by section 4, flaring of gas by the Appellant without the Minister's permission in writing is illegal. The Appellant submits that section 4 of AGRA only vests the power to act in the Minister of Petroleum, therefore, a unilateral determination of breach of section 3 of AGRA by the Respondent amounts to a usurpation of the powers of the Minister of Petroleum by the Respondent.

The Appellant submits that the Minister has not adjudged the Appellant as having defaulted in meeting with its obligations under section 3 of AGRA. The Appellant asserts that having paid the prescribed fees, it is not in breach of section 3 of AGRA. The Appellant further argues that section 4 of AGRA does not state that a company that fails to comply with section 3 of AGRA will have the sums paid for gas flaring disallowed by Appellant.

ANALYSIS

It is a fact that has attained notoriety that an intolerable amount of gas flaring has persisted in the Nigerian territory for too long a period. This carries along with it health and environmental hazards from the attendant unwholesome emission quite apart from the wastage of depleting non-renewable resources. For this reason the legislature enacted AGRA which by its section 3 has the intention to discourage gas flaring. The appropriate approach to the interpretation of this enactment would embrace its purpose to wit a purposive interpretation to give effect to the intendment of the draughtsman. This forecloses the deductibility provided under S. 10(1) of PPTA except it is with ministerial sanction.The Appellant would also need to demonstrate satisfactorily that the expenditure was wholly, exclusively and necessarily incurred bearing in mind the option of re-injection of gas. It is important to note that payment per se without the minister's permission will not suffice for the purpose of compliance with the requirements of AGRA.

The Petroleum Profits Tax Act (PPTA) and the Associated Gas Re-injection Act (AGRA) do not expressly require that a company must obtain gas flare certificate before expenses incurred can be tax deductible. The NEITI report which states that gas flare fee paid by the Appellant for the said years of assessment is not deductible is not based on any provision of the law. NEITI report which the Respondent relied on cannot overrule either the PPTA or the AGRA.

Section 3(2) of AGRA which the Appellant relies on, means that a company which applies for permission to continue to flare gas is not bound by the provisions of section 3(1), provided the Minister is satisfied that the utilization or re-injection of the produced gas is not appropriate or feasible, the Minister may if he so likes, issue a certificate to the company engaged in petroleum operations.

By this subsection 2, the Minister has a discretion to issue a certificate to a company to continue to flare gas. Section 4 of AGRA contains provisions for penalty whenever gas is flared illegally.

The Appellant applied for gas flaring certificates and made requisite payments for the period from 2006, 2007 and 2008, to continue to flare gas. The Minister did not issue certificate nor sanction the Appellant for illegal gas flaring. The Respondent has not provided proof of sanction on the Appellant for illegal flaring of gas from 2006 to 2008. In the circumstances, we believe that the Minister did not consider the gas flared by the Appellant illegal. If the Minister had sanctioned the Appellant, then, the gas flare fee paid by the Appellant would be considered an illegal payment which would disqualify the Appellant from benefiting under section 10(1)(l) of the PPTA.

CONCLUSION

In the light of the above, we hold that the Respondent was wrong for disallowing the gas flare fee incurred by the Appellant in the course of its petroleum operations. We hereby grant the reliefs sought by the Appellant and set aside/discharge the Respondent's Notices of Assessment and allow the Appeal.

LEGAL REPRESENTATION:

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

Mrs B. D. Akintola for the Respondent.

DATED AT LAGOS THIS 17TH DAY OF MARCH, 2015

KAYODE SOFOLA, SAN (Chairman)

CATHERINE A. AJAYI (MRS)
Commissioner

D. HABILA GAPSISO
Commissioner

MUSTAFA BULU IBRAHIM
Commissioner

CHINUA ASUZU
Commissioner

Commissioner

TAX APPEAL TRIBUNAL LAGOS ZONE
CERTIFIED TRUE COPY
SIGN.......
DATE 18/04/2018