IN THE TAX APPEAL TRIBUNAL

IN THE LAGOS ZONE

HOLDEN AT LAGOS

APPEAL NO. TAT/LZ/045/2013

BETWEEN

CHEVRON NIGERIA LIMITED APPELLANT

AND

FEDERAL INLAND REVENUE SERVICE RESPONDENT

JUDGMENT

INTRODUCTION

The Appellant filed this appeal challenging the Notices of Additional Assessments numbered PPTBA 59; PPTBA 43 and PPTBA 53 for 2006-2008 Years of Assessments (YOAs), issued by the Respondent on the basis that payments made by the Appellant for gas flaring operations were disallowable expenses.

ISSUE FOR DETERMINATION

Whether the Respondent was right to have disallowed the Appellant's tax treatment of the sums of USD 4,493,245.00, USD 4,231,749.00 and USD 5,235,624.00 paid by the Appellant to the Federal Government to flare gas in the 2006, 2007 and 2008 YOAs on the ground that the expense amounts to gas flaring penalties under the provisions of the Petroleum Profits Tax Act?

POSITIONS OF PARTIES

The Appellant submits that the sums of USD 4,493,245.00, USD 4,231,749.00 and USD 5, 235,624.00 which it paid to the Federal Government to flare gas for the years of assessments are tax deductible under the provisions of the PPTA.

The Appellant submits that it applied to the Minister to flare gas when it was unable to re-inject or utilize same, a fact that was not contradicted by the Respondent. The Appellant submits that the sums it paid to the Federal Government to flare gas for the YOAs were incurred solely and inevitably for petroleum operations in accordance with section 10(1)(i) of the PPTA. The Appellant urged this Tribunal to give section 10(1)(i) of the PPTA, a strict and literal interpretation and hold that any fees paid to the Minister to flare gas by the Appellant is tax deductible. The Appellant cites the Court of Appeal decision in the case of **HALLIBURTON WEST AFRICA V FBIR (2015)17 TLRN 1 at 29** where it was held that "It is obvious and settled that tax laws are constructed narrowly or strictly sticking to the ordinary meaning of the words used therein without adding any gloss on them."

The Appellant submits that the expenses were necessarily incurred because the Appellant was left with no option other than to flare the excess gas with the consent of the Minister. The Appellant submits that the sums it paid were arrived at by strict compliance with section 3(2) of the AGRA with respect to the calculation of the fees payable as contained in paragraphs 26, 27 and 30 of the Appellant's Witness Statement (Mr. Ale). The Appellant further asserts that the testimony of its witness was never contradicted by the Respondent. The Appellant referred this Tribunal to the Supreme Court decision in the case of **MILITARY GOVERNOR, LAGOS STATE V ADEYIGA (2012) 5 NWLR (Pt.1293) 291 at 331,** where it was held that :

> "The position of law where evidence is unchallenged or uncontroverted is that such evidence will be accepted as proof of a fact it seeks to establish. A trial court is entitled to rely and act on the uncontroverted or uncontradicted evidence of a plaintiff or his witness. In such a situation, there is nothing to be put or weighed on the imaginary scale of justice. In the circumstance, the onus of proof is naturally discharged on a minimum proof."

The Appellant submits that it is trite that where an expense is incurred as a result of a duty or obligation imposed by statute, the courts automatically deem such expense to be tax deductible. The Appellant relies on the decision of this Tribunal in the case of **MOBIL PRODUCING UNLIMITED V FIRS(2015)18 TLRN 115.**

The Appellant contends that the penalty for flaring gas in contravention of AGRA is not in the form of monetary payments but clearly contained in section 4 of AGRA;

"1. Where any person commits an offence under section 3 of this Act, the person concerned shall forfeit the concessions granted to him in the particular field or fields in relation to which the offence was committed.

2. In addition to the penalty specified in subsection (1) of this section, the Minister may order the withholding of all or part of any entitlements of any offending person towards the cost of completion or implementation of a desirable re-injection scheme or the repair or restoration of any reservoir in the field in accordance with good oil-field practice."

The Appellant submits that the penalty for an offence must be in accordance with the law prescribing the offence as the Supreme Court held in the case of **OGBOMOR V STATE (1985) NWLR (Pt. 2) 223 at 233.**

The Appellant submits that up until December 2005, the DPR consistently issued certificates to the Appellant evidencing authorization to flare gas, in accordance with which the Appellant flared gas and paid the amounts prescribed by the Minister.

The Appellant submits that section 3(2) of AGRA gives the Minister the discretion to issue a certificate to a company engaged in the production of oil and gas upon having been satisfied that the utilization or re-injection of the gas produced is not appropriate or feasible in any particular field or fields. Section 3(2) of AGRA reads thus:

"Where the Minister is satisfied after 1st 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 Respondent contends that the payments made by the Appellant to the DPR in respect of the gas flared in 2006, 2007 and 2008 YOAs constitute a penalty. The Respondent asserts that though no law prescribes monetary penalty for flaring gas, the Appellant deliberately paid to flare gas which this Tribunal should consider as illegal. The Respondent cites the case of **OLOKO V UBE (2001)13 NWLR (Pt. 729)161 at 168** ratio 13 where the Court of Appeal held that:

> *''Once a Court becomes aware of the illegality of a transaction, it is the duty of that Court to stop the case and dismiss the claim for being void and unenforceable. None of the parties to such transaction is entitled to any remedy or relief from the Court...."*

The Respondent submits that section 3(1) of AGRA disallows flaring of gas except with the Minister's permission in writing, while section 3(2) requires that per adventure, the Minister considers it necessary, after a formal application to that effect, the Minister could issue a certificate. The Respondent referred this Tribunal to Regulation 1 of Cap A25, AGRA (Continued Flaring of Gas Regulation) which provides conditions to be met before a company could be permitted to flare gas, which the Appellant never met. The Respondent further argues that section 10 of PPTA mandates the Respondent to only allow for deduction expenses listed under the section that are wholly, exclusively and necessarily incurred and penalty for gas flaring is not on the list.

The Respondent submits that section 1 of AGRA imposed a duty on the Appellant to submit to the Minister a preliminary programme for utilization and gas reinjection, which the Appellant failed to do. The Respondent urged this Tribunal to uphold the argument of the Respondent and disregard the argument of the Appellant.

ANALYSIS AND CONCLUSION

It is not in dispute that the unrestrained flaring of gas has a negative impact on the host community and constitutes a waste of a depleting resource which the country can ill afford. For this reason AGRA was enacted by the legislative in the following terms:

> "2. Where the Minister is satisfied after 1st January, 1984 that utilization or re-injection of the produced gas is not appropriate or feasible in a particular fields, he may issue a certificate in that respect to a company engaged in the production of oil and 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:"

A close reading of the above provisions reveal that intention of the legislative to prevent gas flaring "without the permission in writing of the Minister"

Sub-section 2 of section 3 allows the Minister to fulfill that discretion in writing by the issuance of a certificate of 2 types.

(a)"specifying terms and conditions" or

(b) "if the company pays such sums as the Minister may from time to time prescribe…"

The consent of the Minister is manifested in a certificate stipulating either of the above terms.

Once the Minister issues his permission for a period such transaction ends at the end of the given period as it is not permission in perpetuity. In strict technical terms it can be argued that the express provisions of AGRA stipulate a written consent before gas flaring. In practical terms the bureaucratic inefficiency may work hardship on the operator due to the less that efficient bureaucracy particularly as the ongoing oil production releases the gas byproduct which will need immediate attention and there may be silence from DPR as in the instant case notwithstanding that an application for such certificate may have been made timeously.

In order to meet the justice of the case, this Tribunal in TAT/LZ/035/2013, TAT/LZ/037/2013 and TAT/LZ/038/2013 between Total Oil Nigeria Limited v. FIRS delivered on 17th March, 2015 held as follows:

> "It is a notorious fact that an intolerable amount of gas flaring has persisted for far too long in the Nigerian territory. This carries along with it health, environmental and financial cost. For this reason the legislature enacted the Associated Gas Re-injection Act (AGRA) which is intended to discourage the practice of gas flaring. The requirement for ministerial permission in writing is not satisfied by the unilateral payment of fees by oil and gas company. Having

said this, the Petroleum Profit 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 proved by Exhibits CEP1, CEP2 and CEP3 (the gas flaring certificates for 2005) that the Minister issued the Appellant gas flaring certificates in 2005. The Appellant applied for gas flaring certificates and made requisite payments for the period 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."

This conclusion was arrived at for the catalogue of reasons stated in the decision was tantamount to substantial compliance in the circumstances of that case. See also Mobil Producing Nigeria Unlimited v. FIRS, TAT/LZ/033/2013 delivered on the same 17th March, 2015 to the same effect.

In those cases, the DPR receipts obtained by the companies for their flaring activities were accepted as evidence in writing under the auspices of the Minister. The additional assessments seek to write back these payments into the books of the taxpayer and derive the additional tax on the sum in question while another agency of the same executive keeps the payment at the same time. Quite a curious and incongruous outcome. Affixing an inscription of "penalty" on the receipt, a label without statutory foundation does not have much impact on the complexity of the issues brought about by the role of the office of the Minister in the circumstance.

In the result, we hold as follows:

(i) that the payments made by the Appellant to DPR in respect of the gas flared by the Appellant in 2006,2007 and 2008 do not constitute a penalty;

(ii) that the Appellant is entitled to make tax deductions of the sums incurred as royalties paid for gas flaring activities for the period 2006 to 2008; and

(iii) that the Respondent was wrong to have issued the additional assessments for the years 2006- 2008.

We hereby grant the reliefs sought by the Appellant in its Notices of Appeal and set aside the additional assessments.

LEGAL REPRESENTATION

M. Ukpebor Esq. with S. Esuga Esq., J. Akhator Esq. and Ms A. Ezegbulam for the Appellant.

Mrs B .H. Oniyangi for the Respondent.

DATED THIS 30TH DAY OF OCTOBER 2015

KAYODE SOFOLA, SAN *(Chairman)*

CATHERINE A. AJAYI (MRS)
Commissioner

D. HABILA GAPSISO
Commissioner

MUSTAFA BULU IBRAHIM
Commissioner

CHINUA ASUZU
Commissioner