IN THE TAX APPEAL TRIBUNAL
IN THE LAGOS ZONE
HOLDEN AT LAGOS

APPEAL NO.TAT/LZ/CIT/006/2015

Between

NIGERDOCK NIGERIA PLC -FZE — APPELLANT

AND

FEDERAL INLAND REVENUE SERVICE — RESPONDENT

JUDGMENT

Upon receiving the Respondent's notice of assessment dated 9th December, 2014, for 2008 - 2013 years of assessment, the Appellant raised an objection through its tax consultant and the Respondent refused to amend the notice of assessment by its notice of refusal to amend dated 2nd February, 2015. By an amended Notice of Appeal dated 5th May, 2015, the Appellant appealed to this Tribunal on the following grounds:

a. The Respondent wrongly relied on Sections 23, 52, 53 and 55 of the Companies Income Tax Act (CITA) in charging the Appellant as liable to pay companies income tax. The Appellant is a free zone entity registered with the Nigeria Export Processing Zones Authority (NEPZA), and carries out its business exclusively within the Snake Island Integrated Free Zone (SIIFZ).

b. As a free zone enterprise, the Appellant is by virtue of Section 8 NEPZA Act exempted from all Federal, states and governmental taxes, levies and rates in so far as the Appellant conducts it activities exclusively within the SIIFZ.

c. By virtue of section 18(1)(a) of NEPZA Act, CITA, Withholding Tax (WHT) Regulation and Value Added Tax Act (VATA) are not applicable to activities carried out within SIIFZ.

d. The Respondent wrongly and unlawfully based its purported Assessment on Audit whereas no such Audit was carried out. In the circumstances, the Assessment Notices issued by the Respondent and dated 9th December, 2014 were based on non-existent Audit are therefore speculative, lacking in any verifiable basis and are invalid.

The Appellant therefore sought from this Tribunal the following orders:

a. A Declaration that the R[illegible]ondent's charge of the Appellant as liable to pay companies income tax, WI[illegible] and VAT are wrongful and unlawful.

b. A declaration that the Ap[illegible]llant is exempted from all federal, states and local government taxes, levies [illegible]d rates on its activities carried on within the Snake Island Integrated Fee Zon[illegible] (SIIFZ).

c. An Order setting aside t[illegible] Respondent's Companies Income Tax Assessment Notice as attached to the Respondent's Demand Notes and Letters dated 9th December, 2014, in particu[illegible]r, Notices of Assessment Numbers PDBA 436, PDBA 437, PDBA 438, PDBA 43[illegible] PDBA 440, PDBA 441, PDBA 442, PDBA 443, PDBA 444, PDBA 445, LD/OS/VAT/14/87, LD/OS/VAT/14/88,LD/OS/WHT/14/77, LD/OS/WHT/14/78 and the Respondent's Notice of Refusal to Amend dated 2nd February, 2015.

The Respondent in its Reply dated 27th March, 2015, denied the averment of the Appellant and stated in response that the Appellant though a free zone enterprise earned incomes on activities carried outside the free zone for Total Exploration & Production Limited (TEPL) and Mobil Nigeria Unlimited (MNUL), and therefore liable to pay relevant taxes on the incomes derived on those activities. In proof of its assertion, the Respondent tendered in evidence agreement executed between the Appellant and TEPL, agreement between the Appellant and MNUL, list of payment made by the MNUL and TEPL to the Appellant in respect of the services rendered to them.

From the pleadings and arguments of the parties, the following issues are not in dispute:

a. The Appellant is an approved enterprise under the Nigeria Export Processing Zones Authority Act and the Snake Island Integrated Free Zone Regulations.

b. By virtue of sections 8 and 18(1) of NEPZA Act, an approved enterprise is exempted from all government taxes provided the approved enterprise's operations are within the free zone.

The parties however do not agree on whether the operations of the Appellant, in respect of which the Respondent raised notices of assessment, are within the free zone. While the Appellant contended that its operations to the TEPL and MNUL are within the Snake Island Fee Zone, the Respondent on the other hand argued that the operations are outside the free zone in customs territory.

Issue for determination

The only issue that can be distilled from the position of the parties is as follows: **Whether the incomes derived by the Appellant on the services rendered to Total**

Exploration & Production Limited and Mobil Nigeria Unlimited are subject to tax under the relevant tax laws.

The resolution of the above issues is premised on evaluation of the documents before this Tribunal with a view to determining the scope and location of works carried out by the Appellant to TEPL and MNUL. The determination of scope and location of the works will be helpful in ascertaining the tax liability of the Appellant on the incomes derived on the works.

Exhibit FIRS 3, which is a copy of an agreement between TEPL and the Appellant and exhibit A2 attached to Exhibits FIRS 3, admitted in evidence as Exhibit FIRS 3A(Scope of Work and Services to Company) clearly establishes that the some of the works of the Appellant under this agreement would be carried out by the Appellant itself while some of the work would be subcontracted. Relevant provisions of the Agreement state that some works would be carried out at the Site, which is Ofon, an area in the South-eastern coast of Nigeria, while some would be carried out at other locations different from the Site.

Article 1.3 of Exhibit FIRS 3A sets out works that must be subcontracted by the Appellant to potential subcontractors in exhibit J attached to Exhibit FIRS 3A. The works to be subcontracted are pre-commissioning and commissioning work, and management and inspection engineering zone.

Relevant clauses in the Exhibit FIRS 3 suggest the presence of the Appellant at the Site or Worksite. For example Article 24.8 states as follows:

> 'Unless otherwise stated, each of CONTRACTOR 1 and CONTRACTOR 2 shall be responsible for providing medical services and first aid facilities for all his personnel employed on WORKSITES and/or SITE for the performance of his part of the WORK and his SUBCONTRACTOR. When required by COMPANY each of CONTRACTOR 1 and CONTRACTOR 2 shall also provide such services and facilities for company personnel'.

The definition of Worksite in Article 2.1 of Exhibit FIRS 3 shows that works may be carried out under this Agreement at other locations listed in exhibit K attached to the Exhibit FIRS 3, other than the Site, and this may include the work yard of the Appellant in the free zone. Exhibit K was not attached to the Exhibit FIRS 3 to enable the Tribunal determine the actual place the Appellant carried out its work under the Agreement.

The Tribunal has also considered Article 27.1 of the Exhibit FIRS 3 which states as follows:

'Each of CONTRACTOR 1 and CONTRACTOR 2 undertakes to perform the different phases of his part of the WORK only at such locations as set out in EXHIBIT F and K'.

Neither the Appellant nor the Respondent tendered exhibits F and K attached to the Exhibit FIRS 3 before this Tribunal. These two exhibits are very important to the determination of location of work of the Appellant and its tax liability.

The Respondent places heavy reliance on Articles 1, 14.9, 24.8, 25.5 and 47.6 in Exhibit FIRS 3A which all refer to execution of the contract at the Site outside the zone to justify the liability of the Appellant to pay tax. The Respondent does not however consider Article 27.1 which provides that the Appellant must carry out its work at locations set out in exhibits F and K attached to Exhibit FIRS 3. The Respondent acknowledges in its letter dated 21st November, 2014, admitted as Exhibit M7 in this matter that some parts of the work were done at the Appellant dockyard while some were either done outside the zone or subcontracted to other companies. But the Respondent does not consider this distinction in its assessment notices.

S. 8 of the NEPZA Act states as follows:

> Approved enterprises operating within a Zone shall be exempted from all Federal, State and Government taxes, levies and rates

S. 18(1)of the NEPZA Act further states as follows:

> Approved enterprises within the zones shall be entitled to the following:
>
> a. legislative provisions pertaining to taxes, levies, duties and foreign exchange regulation shall not apply within the zone.

We agree with the Respondent that the tax exemption status enjoyed by the Appellant under Sections 8 and 18(1) is qualified. The Appellant will continue to enjoy the tax exemption in so far as its operation is within the zone. But where the Appellant's operation is outside the zone, it shall be liable to relevant taxes.

The learned counsel for the Appellant rightly submitted that the Appellant is not only exempted from payment of tax but also from compliance with any legislation relating to taxes, levies, duties and foreign exchange regulation. It is therefore the position of this Tribunal that the Appellant does not have an obligation to comply with tax legislation such as collection of Value Added Tax and withholding taxes of other parties provided that the operation is within the zone.

The position will however be different where an approved enterprises supplies goods and services to customers outside the zone but in the customs territory. The 'supply' is

an operation and is a taxable activity because it is not within the zone. The income received on the supply shall be taxable pursuant to section 11 of the NEPZA Act and Part 2 Section 15(a) of NEPZ Authority Regulations and Operational Guidelines for Free Trade Zone in Nigeria.The installation service at the Site amounts to supply of service outside the zone. Again, there is no evidence before this Tribunal to determine whether the Appellant carried out the installation service at the service as exhibits F and K were not tendered by the parties.

The contention of the Respondent that the Content Development Levy was deducted from the Appellant's source is not and cannot justify the liability of the Appellant to tax on operations within the zone. In any event, the issue of Content Development Levy is not before this Tribunal, and it will amount academic exercise to pronounce on its applicability to the Appellant's operation.

In the final analysis, there is no sufficient evidence before this Tribunal to determine the actual work carried out by the Appellant within and outside the zone under the contracts with the TEPL and MNUL. The Tribunal therefore cannot in this circumstance of insufficiency of evidence grant the reliefs of the Appellant to set aside the Respondent's assessment notices. In the same vein, the Tribunal cannot also grant the Respondent's relief to uphold the assessment notices. This case is hereby non-suited.

Legal Representation:

Kayode Ogunjobi Esq. with Bolaji Ramos Esq. for the Appellant.
Jerome Okoro Esq. for the Respondent.

DATED AT LAGOS THIS 3RD DAY OF JUNE 2016

KAYODE SOFOLA SAN (Chairman)

CATHERINE A. AJAYI
Commissioner

D. HABILA GAPSISO
Commissioner

MUSTAFA BULU IBRAHIM
Commissioner

CHINUA ASUZU
Commissioner

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DATE 18/5/2018