

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

TAT/LZ/010/2013

Between

**Total Exploration & Production Nigeria Limited
Chevron Petroleum Nigeria Limited
Esso Exploration & Production Nig (Offshore East) Ltd
Nexen Petroleum Nigeria Limited**

**1st Appellant
2nd Appellant
3rd Appellant
4th Appellant**

And

Federal Inland Revenue Service

Respondent

Judgment

Introduction

The Appellants commenced this appeal by a Notice of Appeal dated 16 September 2013 on the following grounds of appeal:

- a. The petroleum profits tax as contained in Notice of Assessment (NOA) PPTBA 40 is incorrect because the gross proceeds of chargeable oil stated in NOA PPTBA 40 are wrongly stated as USD3,091,323,064.97 instead of USD3,097,595,300.82.
- b. In NOA PPTBA 40, the Respondent wrongly calculated the deductible expenses in respect of the OML 138 contract area to be USD1,317,916,570.44 instead of USD1,646,535,479.65 and thereby wrongly assessed the contract area to tax.
- c. The Respondent wrongly calculated the capital allowance in respect of the OML 138 contract area to be in the sum of USD639,483,801.58 in NOA PPTBA 40 instead of USD1,877,741,478.03.
- d. The Respondent wrongly calculated Investment Tax Credit in respect of OML 138 contract area to be the sum of USD566,961,346.48 in NOA PPTBA 40 instead of USD4,694,353,695.07.
- e. By failing to list the Appellants on NOA PPTBA 40 and by not serving NOA PPBTA 40 on the Appellants, the Respondent improperly issued and served NOA PPTBA 40.



Issues for determination

The issues for determination are:

- a) Whether the Respondent was correct to have assessed tax on amounts other than on the basis of the Appellants' actual receipts, revenue and sales.
- b) Whether the Respondent's calculation of deductible expenses, capital allowance and Investment Tax Credit were correct in law.
- c) Whether the Appellants are taxpayers and entitled to challenge the assessment issued by the respondents.
- d) Whether failure to list the names of each of the taxpayers under the PSC on the assessment and serve the NOA PPBTA 40 on each of them nullifies the assessment and the Notice.

Facts and Proceedings

The Appellants were asked to pay tax based on an assessment that the Respondent forwarded to the Nigerian National Petroleum Corporation (NNPC) in respect of OML 138 PSC Contract Area in which the Appellants are the Contractor parties and the 1st Appellant is the Operator. NNPC had amended the actual 2012 PPT returns forwarded to it by the Operator before filing same with the Respondent. The Operator received NOA PPTA 40 dated 5 June 2013 from NNPC on 23 July 2013. The Operator swiftly objected to the assessment on 30 July 2013. However, the Respondent responded on 15 August 2013 that the Operator's Notice of Objection was invalid.

The Appellants filed the following:

1. The Notice of Appeal dated 16 September 2013;
2. A Written Statement on Oath and an Additional Written Statement on Oath dated 16 September 2013 and 4 June 2014 respectively by Ms. Modeleola Jegede;
3. Documentary exhibits; and
4. Rejoinder dated 17 February 2014.

The Respondent filed a Reply dated 6 December 2013.

Parties' Positions

The Appellants submit that the fiscal value or gross proceeds of chargeable oil sold in the 2012 accounting period was USD3,097,595,300.82 arising from 28,942,683 barrels of chargeable oil sold by parties to the PSC and that the deductible expenses incurred



wholly, exclusively and necessarily for petroleum operations in respect of the OML 138 contract area during the 2012 accounting year was USD1,646,535,479.65.

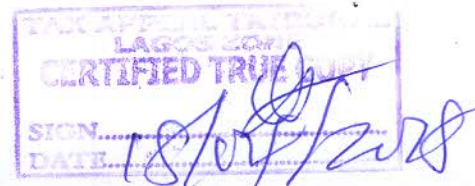
The Respondent asserts that "the contract area was assessed for the 2007 and 2008 in the same manner and in accordance with the same procedure without any objection from the Appellants." But the Appellants countered that the assessment of a contract area to PPT should be in respect of an accounting period being assessed and not on the basis of a previous assessment. And the Appellants say there were no assessments for the 2007 and 2008 accounting periods because the contract area in question had not started production of crude oil so as to be liable to PPT in those years.

The Appellants assert that in respect of the OML 138 contract area and for the 2012 accounting year, the capital allowance should be USD1,877,741,478.03 {relying on Sections 20(2) and Paragraph 6(1) of the 2nd Schedule of the PPTA} while the Investment Tax Credit ought to be USD4,694,353,695.07 {relying on Section 4(1) of the Deep Offshore and Inland Basin Production Sharing Contracts Act (DOIBPSCA)}. The calculations of these amounts were explicitly laid out in **Exhibit TNL**.

The Appellants argue further that they are the persons liable to pay the tax, and having been aggrieved by the Respondent's assessment, are entitled to seek redress. The Appellants relied on section 13(1) of the 5th Schedule to the Federal Inland Revenue Service (Establishment) Act, 2007 and on the decision of the Tax Appeal Tribunal in the case of Esso Exploration & Production Nig. Ltd. & Anor. v. FIRS (2012) 8 TLRN 45. They affirm that the Respondent has not shown that the Appellants' appeal is not in compliance with section 13(2) of the 5th Schedule to the Federal Inland Revenue Service (Establishment) Act, 2007 that provides the timeline for the commencement of an appeal.

The Appellants assert that the Respondent did not serve on them the notice of assessment in relation to the OML 138 for the 2012 accounting year. They submit that in spite of the fact that OML 138 Contract Area relates to more than one company that is liable to be assessed to petroleum profits tax, the Respondent served NOA PPTBA 40 (Exhibit TNL3) only on the NNPC, stating on it that the OML 138 is operated by the 1st Appellant. The Appellants therefore submit that the Respondent's failure to serve the notice of assessment on each of the parties to the PSC renders the assessment a nullity, relying on section 37(1) of the PPTA and section 12 of the DOIBPSCA.

The Respondent counters that parties are not in dispute that NNPC filed the 2012 PPT returns with the Respondent. NNPC is the party empowered by Paragraph 2(e) of Article III of the PSC (Exhibit TNL 1) to file returns with the Respondent. The Respondent issued the NOA PPTBA 40 on OML 138 ((Exhibit TNL3) based on NNPC returns (Exhibit TNL 2). Clause 9 of the PSC places the right and duty of determining



the fiscal price of crude oil in the contract area on NNPC. The Respondent asserts that NNPC is in a better position to provide it with the correct fiscal value of crude oil in respect of the contract area. The Respondent argues that its pleadings and evidence constitute challenge to the Appellants evidence.

The Respondent also argues that the Appellants failed to adduce justification as to why their returns should be accepted instead of NNPC's. The Respondent maintains that the Appellants have failed the burden of proof required by Paragraph 15(6) of the 5th Schedule to the FIRS (Establishment) Act 2007 and sections 131(1) & 132 of the Evidence Act, 2011.

The Respondent submits that its NOA PPBTA 40 is based on NNPC returns and in accordance with PSC. The Respondent also submits that it has complied with the law by relying on NNPC returns to determine the expenses incurred on OML 138.

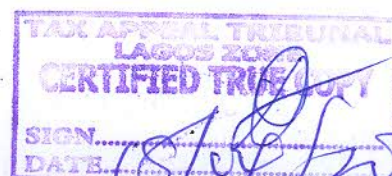
The Respondent submits that the recognised tax payer under the PSC is OML 138 contract area itself, stating further that the name and address of the operating entity i.e. the 1st Appellant are clearly reflected on the NOA. The Respondent asserts that by virtue of section 39 of the PPTA, failure to list the names of the parties to the contract area on the NOA will not render the assessment invalid.

Analysis and Decision.

The Deep Offshore and Inland Basin Production Sharing Contract(DOIBPSCA) is a fiscal incentive legislation that governs petroleum and gas operation activities under the PSC subject to the PPTA. Section 3(1) of (DOIBPSCA) says PPT on the Contract Area shall be determined in accordance with PPTA and prescribes 50 per cent tax rate. The PSC vests the Appellants with the right to prepare PPT returns for the contract area while NNPC reserves the right of delivery of the PPT returns to the Respondent.

The Appellants submitted PPT returns to NNPC in accordance with Clause 7.1(h) and Paragraph 2(a)&(e) of Article III of the PSC. But NNPC filed a different version of PPT returns with the Respondent. Clause 7.1(h) says the Contractor shall submit estimated and final PPT returns to the Corporation in accordance with the PPT Act. Paragraph 2(a) of Article III says *"The Contractor shall compute the PPT payable by Corporation pursuant to Clause 8.1 of this contract in accordance with the provisions of the PPTA ..."* Paragraph 2(e) says *"The Contractor shall prepare all returns required under the PPT Act and timely submit them to the Corporation for onward filing with the Federal Board of Inland Revenue ..."*

Clause 13.1 empowers the Contractor to keep complete books of accounts consistent with modern petroleum industry and accounting practices and procedures. Officials of the Corporation shall have access to such books and accounts. The Corporation



officials attached to the Contractor, pursuant to Clause 12.4 shall participate in the preparation of same. And Clause 12.4 provides that the Corporation shall attach competent professionals to work with the Contractor.

The Appellants' PPT returns were jettisoned by NNPC. The Respondent relied on the PPT returns prepared and filed by NNPC to assess the Appellants to Petroleum Profits Tax (PPT) for 2012 year of assessment. The PSC has accorded NNPC the right to attach competent staff to the Contractor (Appellants) to give effect to Clause 13.1. And by virtue of Clauses 12.4 and 13.1, NNPC is deemed to have participated in the preparation of the PPT returns generated by the Appellants. NNPC only has right of participation in the preparation of the PPT returns while still in the domain of the Appellants. The Appellants' PPT returns are the foundation for the determination of their tax affairs by the Respondent. NNPC is incompetent to interfere with the Appellants' tax documents. We find no provision in the PSC that empowers NNPC to amend or vary the PPT returns filed with it by the Appellants. The PPT returns filed by the Appellants with NNPC are meant to be delivered to the Respondent and must be so delivered. If NNPC has cause to file returns other than the one submitted to it by the contractors of OML 138, it owes the contractors explanation or consultation¹. But the Respondent says it does not care whether the figures are wrong or not - it cares only that they were filed by NNPC who has the duty of filing it under the PSC.

Cooperative Compliance is the current global trend at stimulating voluntary compliance and enhancing the integrity of the tax authorities. The Respondent must make conscious efforts at building cooperative relationships with taxpayers. The Respondent must 'view the taxpayer's claims and objection within the overriding objective of its responsibilities for the entire tax regime'². The Respondent can 'direct NNPC to review the areas of the Appellants' objection and confirm the genuineness of their claims'³. It could also 'invite all parties to OML [138] Contract Area for round table discussion on the tax affairs where conflicting returns are presented to it'⁴.

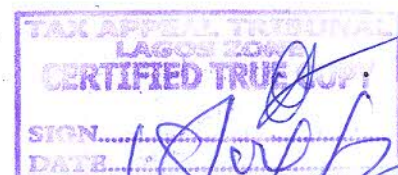
PPT returns are triggered by section 30 of PPTA to originate from the taxpayers (Appellants) and be sent to the Respondent. The power to tinker with PPT returns is the realm of the Respondent under section 35 of PPTA. Taxation is about law and not contract or agreement. The Respondent has not established that the Appellants' PPT returns have failed to meet the requirements of section 30 of PPTA. A valid assessment in default of section 30 is the purview of section 35. The Respondent's assessment NOA PPTBA 40 meets neither. Thus, we nullify the Respondent's NOA PPTBA 40. We

¹ Judgment delivered in *Esso v FIRS* TAT/LZ/001/2013, on 20 November 2014

² *ibid*

³ *ibid*

⁴ *ibid*



direct the Respondent to accept the Appellants' PPT returns for 2012 and use its inherent powers under the PPTA to assess the Appellants to PPT.

The Appellants believe that they are taxpayers under OML 138 Contract Area. But the Respondent considers that the OML 138 Contract Area is the taxpayer.

OML 138 Contract Area is the "tax base" of the contracting parties for the licenced operations under the PSC or merely a "taxable entity" assessable in the names of the contracting parties. The parties to the contract are the tax payers.

Section 37(1) PPTA provides that the names and addresses of the companies assessed to tax should be on the assessment notice. Sections 11(2) and 12 of DOIBPSCA also support the case of the Appellants as taxpayers.

On whether the Appellants are tax payers and entitled to challenge the assessment issued by the Respondent, we hold that by virtue of section 13(1) of the 5th Schedule of the FIRS Act, the Appellants were aggrieved by the Respondent's issuance of notice of assessment. The Appellants are impacted by the assessment which they are liable to pay. The Appellants are tax payers and have legal right to challenge the assessment.

On whether or not the Respondent applied the law correctly in the treatment of expenses incurred by the Appellants, we are of the view that the Respondent failed to present any evidence that the Appellants failed the WEN test, i.e. that the expenses were not wholly exclusively and necessity from its petroleum operations. The Respondent also failed to back its position with any provision of the PPTA, any tax law or the PSC agreement that disallows expenses incurred by non-operators, that constitute the contractor in the PSC to the contract area. Section 13 of the PPTA which contains list of non-allowable deductions, does not include expenses incurred by non-operators under the PSC for the purposes of petroleum operations in the contract area. The Respondent should have been guided by sections 10 and 13 of the PPTA, section 11 of DOIBPSCA in treating the expenses incurred by the Appellants. In the treatment of the expenses incurred by the Appellants. We direct the Respondent to accept the Appellants returns and along with the NNPC returns use its inherent statutory powers to assess the appropriate tax liability guided by the facts and the law applicable in the matter.

On whether the failure to list the names of each of the tax payers under the PSC on the assessment and serve the NOA PPTBA 40 on each of them nullifies the Assessment, section 37(1) of the PPTA offers the answer as it makes it mandatory, by using the word "shall" on the part of the Respondent to list all the names and addresses of each of the tax payers assessed to tax on the assessment. It is noted that the Respondent asserts



that it listed the parties to the PSC in the Notice of Assessment and the agreement executed by the parties stipulated a mode of service through NNPC which was sufficient/substantial compliance with S. 37(1) PPTA. The Respondent also alluded to the provisions of S. 39 of PPTA to buttress the validity of the notice of assessment. In view of our findings on issue 2 above, it is not necessary to decide the point. It would however be more expedient to serve the notice of assessment on each relevant party to leave this issue out of contention. We hereby allow the Appeal and set aside the NOA PPTBA 40 subject to our earlier directive that the Respondent should accept the Appellants returns and use its inherent statutory powers to assess the appropriate tax liability guided by the facts and the law applicable in the matter.

Conclusion:

We nullify the Respondent's Notice of Assessment PPBTA 40 and direct the Respondent to accept the Appellants' PPT returns for 2012 and use its inherent powers under the PPTA to assess the Appellants to Petroleum Profits Tax.

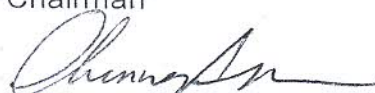
Legal Representation:

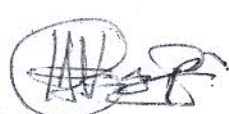
T.I. Emuwa with Ibifubara Berenibara and Adefolake Adewusi for the Appellants

Jerome Okoro for the Respondent


DATED AT LAGOS THIS 20TH DAY OF MARCH 2015


Kayode Sofola, SAN
Chairman


Chinua Asuzu
Commissioner


D. H. Gapsiso
Commissioner


Mustafa Bubu Ibrahim
Commissioner


Catherine A. Ajayi (Mrs)
Commissioner

