

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

APPEAL NO: TAT/LZ/004/2011

BETWEEN:

MOBIL PRODUCING NIGERIA UNLIMITED

.....

APPELLANT

AND

FEDERAL INLAND REVENUE SERVICE

.....

RESPONDENT

JUDGMENT

The Appellant commenced this suit by a Notice of Appeal filed on the 5th day of May, 2011 against the Respondent's Notice of Refusal to Amend the Education Tax Notice of Assessment (NOA) PPTBA/ED 53, (Exhibit MBU 5), issued by the Respondent on the Appellant, praying this Honourable Tribunal for an order setting aside Exhibit MBU 6 on the ground that the amount demanded as education tax for 2008 year of assessment is incorrect. The Respondent filed its Reply on the 8th July, 2011.

In support of its case, the Appellant called a witness. The Respondent did not call any witness. The Appellant filed its final written address dated 23rd April, 2012. The Respondent filed its final written address on the 16th May, 2012. The Appellant also filed a reply on points of law dated 1st June, 2012. The Appellant also filed an Additional Witness Statement on 15th June, 2012 and a written submission in Reply to the new issue raised by the Respondent in its Final Address dated 31st July, 2012. The Respondent's Response thereto is dated 15th August, 2012.

The question in this appeal is whether the Appellant still enjoyed, by 2008, the tax deductions allowed it by the Memorandum of Understanding (MOU) which the Appellant had signed with the Federal Government of Nigeria (FGN) and the Nigerian National Petroleum Corporation (NNPC) in 2000.

The answer is No.

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The background is as follows:

The Appellant and the (FGN) had signed a Memorandum of Understanding in 1986 (1986 MOU). A "side letter" dated 23 January 1986 contained more details and formed part of the 1986 MOU. The Appellant and FGN amended the 1986 MOU in December 1986 and again in October 1987. In 1991, they entered another MOU (the 1991 MOU) which superseded the 1986 MOU and its supplemental components and amendments.

The course of dealings between the parties to these MOUs shows that their understanding was never captured in one impregnable document.

The pertinent MOU in this appeal was signed in 2000 between the Appellant, FGN and NNPC (the 2000 MOU). It came into force on 1 January, 2000.

The 2000 MOU allowed the Appellant, in computing its education tax liability, to deduct all amounts it incurred in paying taxes, levies, and other impositions to (FGN), State Governments or any of their agencies including commission to the Central Bank of Nigeria (CBN). But by a letter dated 17 January, 2008 (DPR letter) FGN, through the Department of Petroleum Resources, stated that the 2000 MOU had ended since 1 January 2003, by operation of its clause 7.1. Later, the Appellant filed its Petroleum Profits Tax (PPT) returns for 2008 making deductions as allowed by the 2000 MOU. In this exercise, the Appellant's education tax liability was zero.

Unimpressed, the Respondent issued education tax assessment against the Appellant by 2008 in the sum of US\$83, 414, 793.

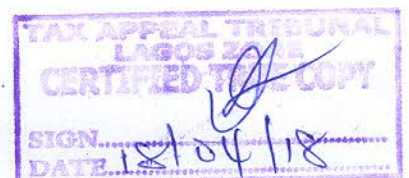
The Appellant reiterated its 2000-MOU-inspired deduction mathematics. The Respondent claimed that the 2000 MOU had expired and been replaced by the Petroleum Profits Tax Act.

Clause 7.1 of the 2000 MOU reads: "This memorandum shall become effective from the 1st day of January 2000 and shall, subject to clause 7.2, be for a minimum term of three years. This Memorandum shall terminate subject to clause 7.3 at the end of three-year term unless otherwise extended by the mutual agreement of the parties"

Clause 7.2 states: "Upon the expiration of the second year, any two parties shall have the right at any time and for whatever reason to terminate this Memorandum by giving not less than two calendar years' notice of termination in writing to the other party and this Memorandum shall terminate subject to clause 7.3 at expiration thereof"

Clause 7.3 provides: "On the termination of this memorandum pursuant to clause 7.1 or 7.2 herein above, the incentives of this Memorandum shall cease to apply and shall be replaced by a fiscal regime which shall continue to encourage investment, determined by Government after due consultations with NNPC and the Company. In the event that

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Government fails to provide the new fiscal regime, this Memorandum will continue to apply notwithstanding the termination thereof until Government comes up with the new fiscal regime in which case this Memorandum shall terminate forthwith"

A community reading of these 3 clauses constrains the following construction:

A. Clause 7.1:-

- a. In the first instance, the 2000 MOU is for a 3-year term (1 January 2000-31 December 2002).
- b. Unless expressly extended by mutual consent, it terminates at the end of the 3-year term.

B. Clause 7.2 is self explanatory and clearly never came into play.

C. Clause 7.3: indeed there is no new fiscal regime yet. The provision of the MOU cannot subsist because the Respondent has, in its assessment, opted to invoke the provisions of the Petroleum Profits Tax (PPTA), a principal legislation. Thus, the PPTA, already in application in the instant case, has overriding force in the absence of the new fiscal regime envisaged under this clause. The PPTA is the legislation in force and cannot be subordinated to the mere contemplation of the MOU

The 2000 MOU thus expired at the end of 2002. The parties never did anything to keep alive for longer, as stated in clause 7.1. In effect, clause 7.1 contains an "option to renew", exercisable at the joint instance of all the parties. This option was never exercised, and thus no renewal or extension was triggered.

The Appellant is no longer entitled to make deductions allowed under it calculating their education tax. This is not saved by Section 11 of the PPTA which did not have 2000 MOU in contemplation.

We uphold the Respondent's assessment of the Appellant to education tax of US\$83, 414, 793. We order the Appellant to pay accordingly.

Legal Representation:

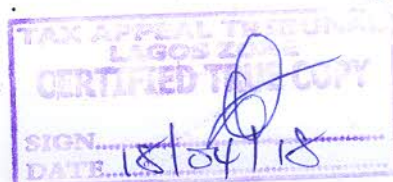
T. Emuwa Esq. with K. Amaefule Esq. for the Appellant.

B. H. Oniyangi (Mrs) with Patience Idakwoji (Mrs) for the Respondent.

DATED AT LAGOS THIS 21st DAY OF JUNE 2013

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