

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

APPEAL No. TAT/LZ/011/2013

BETWEEN:

Total E & P Nigeria Ltd
Chevron Petroleum Nigeria Ltd.
Esso Exploration & Production Nig. (Offshore East) Ltd.
Nexen Petroleum Nigeria Ltd.

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

And

Federal Inland Revenue Service

Respondent

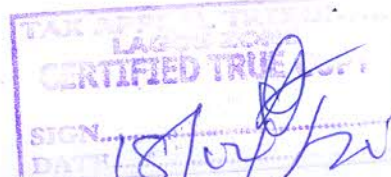
Judgment

Introduction:

The Appellants and NNPC are bound by Production Sharing Contract (PSC) on OML 138 Contract Area. OML 138 is chargeable to tax under the Deep Offshore and Inland Basin Production Sharing Contract (DOIBPSCA). The Appellants and NNPC share the tax assessment of the Contract Area in the ratio of their profit oil split.

The Respondent assessed the Appellants to Education Tax of \$35,468,129.89 on OML 138 PSC Contract Area vide notice of assessment PPTBA/ED 42, for 2012 year of assessment. The Respondent relied on the tax returns for the Contract Area, filed by NNPC. The Appellants disagreed with the basis of computation and maintain that both the gross proceeds of chargeable oil and deductible expenses were understated. The Appellants' returns show education tax due of \$29,021,196.60.

The Appellants were also not listed in the Notice of Assessment in dispute. And the Notice of Assessment dated June 5, 2013 was served on NNPC and NNPC delivered it to the Appellants on July 23, 2013. The Appellants filed their Notice of Objection to the assessment with the Respondent on July 30, 2013.



ISSUES FOR DETERMINATION:

The Appellants submit 4 issues for determination:

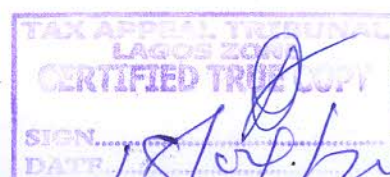
1. Whether in the absence of any contrary evidence as to the fiscal value of crude oil sold, the Respondent was correct to have assessed tertiary education tax on amounts other than the Appellants' actual receipts, revenue, and sales?
2. Whether the Appellants are taxpayers and entitled to challenge the assessment issued by the Respondent?
3. Whether the Respondent applied the law correctly in its treatment of expenses incurred by the Appellant?
4. Whether failure to list the names of each of the taxpayers under the PSC on the assessment and serve the Notice of Assessment (NOA) PPTBA/ED 42 on each of them nullifies the assessment and the Notice?

Facts and Proceedings:

The Appellants are operators of OML 138 under the Production Sharing Contract (PSC). The Appellants' filed their 2012 Petroleum Profit Tax (PPT) returns in respect of OML 138, Exhibit TNL2(b), with NNPC on May 16, 2013. The computations show fiscal value of chargeable oil – \$3,097,595,300.82; operating expenses – \$1,646,535,470.65; and Education Tax – \$29,021,196.60.

NNPC filed PPT returns on OML 138 with the Respondent on May 28, 2013 – Exhibit JO1. The returns show fiscal value of chargeable oil of \$3,091,323.064.97; operating expenses of \$1,317,916,570.44; and Education Tax of \$35,468,129.89.

The Respondent computed the Education Tax of \$35,468,129.89 on OML 138 based on NNPC returns. The Respondent raised NOA PPTBA/ED42 of June 5, 2013 on "OML 138 PSC – Operated by Total Exploration & Production Limited" Exhibit TNL3(b) Exhibit JO3. The Notice of Assessment was served on NNPC and NNPC forwarded the notice to the Appellants vide a letter dated July 15, 2013 – Exhibit TNL3(a) The Appellants received the NOA on July 23, 2013 and raised their



objection on July 30, 2013 – Exhibit TNL4 The Respondent received the Appellants' letter of objection on August 2, 2013 and issued Notice of Refusal to Amend (NORA) on August 15, 2013 – Exhibit TNL5.

Parties' Positions:

The Appellants submit that the gross proceed from the sale of chargeable oil in 2012 was \$3,097,595,300.82. And \$1,646,535,470.65 was incurred as operational expenses – wholly, exclusively, and necessarily – on petroleum operations on the contract area. The Appellants' computed assessable profit is \$1,451,059,830.17 and Education Tax is \$29,021,196.60. Exhibit TNL2(b) supports the Appellants' argument. The Appellants assert that the Respondent did not dispute or challenge these submissions. Thus, the Appellants contend that the unchallenged figure of \$29,021,196.60 for Education Tax remains the valid assessment for the relevant tax year.

The Respondent submits 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/ED 42 on OML 138 – Exhibit JO3 based on NNPC returns – Exhibit JO1. 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. Thus, 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, contends the Respondent.

The Respondent maintains that its assessment of the Appellant to education tax of \$35,468,129.89 is based on NNPC returns and in accordance with PSC. The Respondent believes that it has complied with the law by relying on NNPC returns to determine the expenses incurred on OML 138.



The Appellants submit 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 S13(1) of the 5th Schedule to the FIRS Establishment Act, 2007 and the case of Esso Exploration & Production Nig. Ltd. & Anor v FIRS (2012) 8 TLRN 45.

The Appellants argue that OML 138 Contract Area relates to more than one company. But the Respondent's notice of assessment was addressed to NNPC and merely mentioned that the OML 138 PSC is operated by the 1st Appellant. The Appellants reason that by virtue of sections 2(2) & 20 of the Tertiary Education Trust Fund (Establishment, Etc) Act each of the companies liable to pay tax under the PSC is entitled to be served with the notice of assessment. Thus, the Appellants submit that the Respondent's failure to serve the notice of assessment on each of the parties renders the assessment a nullity.

The Respondent submits that the recognised tax payer under the PSC is OML 138 contract area. But the Respondent states 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.

The Appellants contend that the combined effect of section 37(1) of the PPTA and section 2(1)(b) of the Tertiary Education Trust Fund (Establishment, Etc) Act entitles each company participating in OML 138 to separate assessment to education tax. The Appellants argue that by virtue of section 12 of the Deep Offshore Act, the Respondent is bound to consider the ratio of equity held by the parties to the PSC and split the chargeable tax in the notice of assessment accordingly.

The Appellants argue that section 11(2) entitles each company in the PSC to separate receipt for the share of education tax paid on OML 138.

18/12/2028

Taxpayer's
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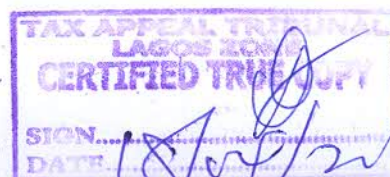
Analysis and Decision:

The Deep Offshore and Inland Basin Production Sharing Contract Act (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 maintain 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 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. 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 consultation.¹ But the Respondent appears to say 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/ED 42 meets neither. Thus, we nullify the Respondent's NOA PPTBA/ED 42. We direct the Respondent to accept the Appellants' PPT returns for 2012 and along with the NNPC returns 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.

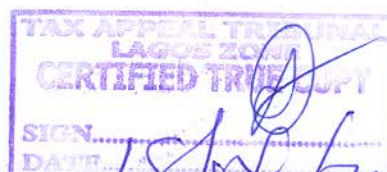
OML 138 Contract Area is the "tax base" of the contracting parties for the licenced operations under the PSC or merely a "taxable entity" assessable in the names of the contracting parties. The parties to the contract are the tax payers.

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

² ibid

³ ibid

⁴ Ibid



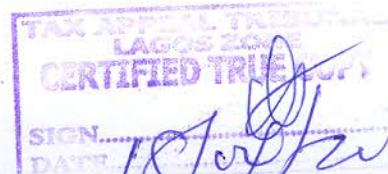
Section 37(1) of PPTA provides that "assessment ... shall contain the names and addresses of the companies assessed to tax or of the persons in whose names any companies (with the names of such companies) have been assessed to tax

..." 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 circumstances, we hold that the Respondent did not apply the law correctly 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/ED 42 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/ED 42 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:

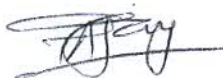
We nullify the Respondent's NOA PPTBA/ED 42. We direct the Respondent to accept the Appellants' PPT returns for 2012 and along with NNPC returns use its inherent powers under the PPTA to assess the Appellants to Education Tax.

Legal Representation:

DATED AT LAGOS THIS 20TH DAY OF MARCH 2015



KAYODE SOFOLA, SAN
Chairman



CATHERINE A. AJAYI (MRS)
Commissioner



CHINUA ASUZU
Commissioner




D. H. GAPSISO
Commissioner


MUSTAFA BULU IBRAHIM
Commissioner

TAX APPEAL TRIBUNAL
LAGOS ZONE
CERTIFIED TRUE COPY
SIGN.....
DATE 18/07/2018